



STATE OF ARKANSAS
ASA HUTCHINSON
GOVERNOR

June 11, 2015

Scott C. Meneely
Acting Regional Director
Bureau of Indian Affairs
Eastern Regional Office
Attention: Division of Real Estate Services
545 Marriott Drive, Suite 700
Nashville, TN 37214

Dear Director Meneely:

As Governor of the State of Arkansas, I would like to extend my respect and appreciation to the Quapaw Tribe's culture and heritage within Arkansas. My staff and I have had the opportunity to meet Chairman John Berrey and applaud his interest in insuring a legacy for his Tribe.

I am writing in response to the Eastern Region Acting Regional Director, Scott C. Meneely's, invitation to comment on the proposed acquisition of 160 acres of land in Pulaski County, Arkansas, to be held in trust by the United States for the use and benefit of the Quapaw Tribe of Oklahoma (Tribe). The Tribe proposes to use the property to facilitate tribal self-determination through the protection and preservation of the archeological sites located thereon of cultural significance to the Tribe. The interests of the State of Arkansas must be balanced with the honor due the Quapaw Nation.

The letter requested information regarding taxes, assessments, services and zoning. On May 11, 2015, Pulaski County Judge Barry Hyde provided a thorough response containing data and figures which detail the current state of taxes, assessments, services and zoning on the property to date. I ask that you consider the response provided by Judge Hyde regarding these questions.

The Office of Attorney General of the State of Arkansas has prepared a legal analysis on behalf of the state, and I ask to you consider this information as a part of my comments and information provided along with this letter. General Rutledge has set forth the jurisdictional challenges and other issues that would affect my role in governing the State of Arkansas as well as identifying the effect this request has on the state.

I would like to highlight several points which are addressed in more detail in the brief. First, the land in consideration is more than 300 miles away from the Quapaw Headquarters. I

am concerned as to what extent the Tribal law would be administered on the land in question considering the distance to the Tribal government. Further, the state's respective bodies of government will be limited in their jurisdictional capacity on the Arkansas land, causing inability to carry out the laws of the state and limiting its ability to protect the citizens of the State of Arkansas.

Second, the land in consideration has historical significance as containing burial grounds. The State of Arkansas is charged by statute to protect burial grounds. Act 1533 of 1999, the Grave Protection Act, prohibits tampering of Native American, Civil War, or slave burial grounds and places strict criminal penalties on anyone convicted of trading, collecting, or displaying subsequent remains. The protection of our state's history and heritage has been and will continue to be a priority of our state and of mine as governor. Placing the land into federal trust would remove the state's ability to protect the interest of its citizens.

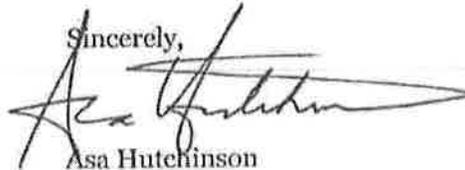
The Tribe's application asserts the burial remains are that of the Quapaw. However, the report provided by the Tribe does not offer definitive proof identifying the remains as that of the Quapaw people. Further, the Tribe asserts that there are also burial remains of African American slaves on the land in question. I am assured that the Tribe is interested in protecting the burial remains and that the Tribe has conferred with the Preservation of African American Cemeteries Inc. regarding protection of the African American slave remains. I have no doubt Chairman Berrey has a genuine desire to protect Quapaw remains. However, this desire alone is not sufficient to allay my concerns.

The non-Quapaw burial remains and historical presence which deserve state protection on the land at issue, coupled with the question of whether the earlier remains discovered on the land are Quapaw or that of an earlier people, gives me great pause. If the land were placed into trust, the state would lose the ability to protect the interests of the decedents of the original inhabitants and any other historical presence or artifacts discovered on the land. I am concerned about whether there is a rational basis to place the land into trust given these unrequited issues.

My final point of concern involves the requirements of the National Environmental Policy Act. The Tribe has not provided an environmental assessment and impact statement in support of its application. The fact that the land in question contains burial grounds and is located in a flood plain necessitates a thorough review and consideration of the environmental impact of placing this land into trust.

I appreciate your careful consideration of this application and of the state's concerns. For the reservations stated herein and more fully set forth in the brief provided by the Attorney General, the state cannot support the application. Regardless of the decision, the Quapaw will remain an essential part of Arkansas heritage and the Office of Governor will continue to do its best to administer the rule of law and protect the interests of the State of Arkansas.

Sincerely,

A handwritten signature in black ink, appearing to read "Asa Hutchinson", written over a horizontal line. The signature is fluid and cursive.

Asa Hutchinson

Cc: Secretary Jewell

**Legal Memorandum Regarding
The Quapaw Tribe of Oklahoma's Fee-to-Trust Application**

June 10, 2015

The Quapaw Tribe of Oklahoma ("the Quapaw" or "the Tribe") has applied to the United States Department of the Interior's Bureau of Indian Affairs to place 160 acres of privately owned Arkansas farmland into federal trust pursuant to 25 C.F.R. § 151.10. In response to the Tribe's application, the Attorney General's Office provides the following legal analysis and discussion on behalf of the State of Arkansas ("the State") regarding the Tribe's application and its impacts upon the State as well as a request that the Secretary of the Interior deny the application.

I. Summary and Legal Background

The placement into federal trust of 160 acres of Pulaski County, Arkansas, farmland is at issue in this application, and the State requests that the Secretary consider the State's three primary concerns regarding the Oklahoma Tribe's application. First, whether the "on-reservation application" is proper when the Oklahoma Tribe's privately owned Arkansas land lies more than 300 miles away, and is in fact not on its reservation and does not fall within the definition for "Indian reservation" contained within 25 C.F.R. § 151.2(f). Second, whether a review of the factors applicable to "on-reservation" fee-to-trust applications militate against approval of the present application by the Quapaw. And third, even if the Quapaw had submitted an "off-reservation" application, whether the application should still fail as there are a multitude of additional considerations which demonstrate that granting the application would have no benefit on the State of Arkansas but would actually harm the State

Title 25 C.F.R. §§ 151.1 – 151.15 contain the federal regulations applicable to land acquisitions by the United States Department of Interior's Bureau of Indian Affairs. Pursuant to these regulations, the Secretary of the Interior or her designee ("the Secretary") is authorized to consider applications from Native American Indian tribes to place privately-owned land into federal trust for the benefit of the tribe or individual Indian. In making the determination whether to allow the placement of lands into federal trust, the Secretary must engage in an examination

of several issues: (1) the Secretary must determine whether the land is appropriate for acquisition, and specifically whether the land is located within a tribe's exterior boundaries, whether the tribe already owns an interest in the land, or whether the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing[]" (25 C.F.R. § 151.3); (2) the Secretary must determine whether the land in question is part of an "Indian reservation" as defined by 25 C.F.R. § 151.2(f); (3) if the land is part of an Indian reservation, then the Secretary must determine whether the tribe's request to place "on-reservation" land in trust meets a series of requirements (25 C.F.R. § 151.10) (discussed *infra*); and (4) if the land is not part of an Indian reservation, then the Secretary must determine whether the tribe's request to place the "off-reservation" land in trust meets an additional series of requirements (25 C.F.R. § 151.11) (discussed *infra*).

The process by which the Secretary must reach her decision to place privately held lands into federal trust is governed by the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 701-706. While deference is accorded the Secretary in making such determinations, it is not absolute. The decision violates the APA when the Secretary's "interpretation is 'plainly erroneous or inconsistent with the regulation [at issue].'" *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005). Accordingly, in reviewing the Tribe's application and in making a determination, the Secretary must "articulate a rational connection between the facts found and the choice made," *id.* at 799-800 (quoting *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1031 (8th Cir. 2003)), and must employ a "reasonable interpretation of the regulation and the statute in reaching [her] conclusion." *Id.* at 799-800 (quoting *Harrod v. Glickman*, 206 F.3d 783, 788 (8th Cir. 2000) (internal citations omitted)). Based on these requirements, the application should be denied.

II. The Quapaw's fee-to-trust application is improperly submitted as an "on-reservation" application because the land in question was not "disestablished" by act of Congress as is required by federal law in order to constitute an "on-reservation" acquisition.

The Quapaw reservation is currently located in the State of Oklahoma. The Tribe has asserted in its fee-to-trust application that the Pulaski County land

should be considered "on-reservation" land.¹ "On-reservation" fee-to-trust applications are only appropriate for "land [that] is located within or contiguous to an Indian reservation." 25 C.F.R. § 151.10. The term "Indian reservation" refers to:

...that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, . . . where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2.

Accordingly, for the Oklahoma Tribe's application to be considered "on-reservation," the Arkansas land must have once been part of its former reservation and that land must have been judicially determined to have been either disestablished or diminished. Although the Quapaw rightly assert that the Pulaski County land was part of its original reservation, they err by contending that their original reservation in Arkansas was disestablished or diminished as those terms are used in 25 C.F.R. § 151.2.

The history of the land at issue reflects that, by Treaty dated August 24, 1818, the Quapaw ceded by agreement a large portion of their land to the United States and reserved a portion in Arkansas ("1818 Treaty"). Subsequently, by Treaty dated November 15, 1824, the Quapaw ceded by agreement the remainder of the Arkansas reservation land to the United States ("1824 Treaty"). While the Quapaw assert that the 1824 Treaty agreement constituted disestablishment of the original reservation, this contention is simply without any merit.

Disestablishment and diminishment only occur when Congress acts to dismantle a reservation. *Solem v. Bartlett*, 465 U.S. 463 (1984) (stating "only Congress can divest a reservation of its land and diminish its boundaries"). Treaties, by contrast, are agreements entered into by the President with the advice

¹ This tactic attempts to avoid the more onerous requirements applicable to "off-reservation" applications (discussed *infra*), which accord greater weight to the concerns of state and local governments.

and consent of the United States Senate. Treaties cannot be construed to disestablish or diminish reservation lands. U.S. Const. art. 2, § 2; *see also N.Y. Indians v. U.S.*, 170 U.S. 1, 23 (1898) (stating “[t]he power to make treaties is vested by the Constitution in the President and Senate.”). Accordingly, any non-contiguous, former Indian reservation land that was previously ceded to the United States by agreement is not subject to “on-reservation” fee-to-trust review by the Secretary.

In an attempt to buttress their argument for “on-reservation” review, the Quapaw cite several cases to suggest that a court has previously determined that the historic Arkansas reservation was disestablished in 1824. These precedents cited in the Tribe’s application do not support disestablishment. In *Quapaw Tribe of Indians v. U.S.*, 1 Indian Cl. Comm’n 469, *aff’d* 120 F. Supp. 283 (Ct. Cl. 1954), for example, the Indian Claims Commission observed in its review of the facts that the United States acquired “through negotiation” (not by act of Congress) the lands claimed by the Quapaw west of the Mississippi River. In deciding against the Tribe, the Indian Claims Commission also recounted the fact that the President had commissioned Robert Crittenden to “negotiate a treaty with the Quapaw.” Accordingly, the controlling case precedents indicate that the consensual nature of the land treaty and the lack of any congressional enactment merely reflect the Tribe’s voluntary cession of the land and not disestablishment. *See also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (declining to decide disestablishment issue but noting that a serious question existed as to whether the Oneida’s Treaty of Buffalo Creek of 1838 represented an abandonment of their reservation rather than a disestablishment).

In the absence of any act of Congress concerning the Quapaw’s historic reservation in Arkansas, the Arkansas reservation was not disestablished or diminished. Therefore it is clear that the Arkansas land at issue is not “located within or contiguous to an Indian reservation,” and the “on-reservation” fee-to-trust application is improper and should be denied.

III. The Tribe’s fee-to-trust application fails to meet the criteria for “on-reservation” and “off-reservation” applications and should therefore be denied.

A rational connection between the decision to grant the application and the underlying facts must be articulated in granting the application. This decision must be the product of a careful consideration of the criteria contained in 25 C.F.R.

§§ 151.10 and 151.11. While the State of Arkansas maintains, for reasons discussed above, that only the "off-reservation" criteria are applicable (25 C.F.R. § 151.11), the Quapaw fail to meet the less onerous burdens of supporting an "on-reservation" fee-to-trust application.

A. Even assuming that the Tribe's "on-reservation" fee-to-trust application is the correct application (which it is not), the Tribe has failed to submit a fee-to-trust application that satisfies the "on-reservation" criteria found in 25 C.F.R. § 151.10.

In order to approve an "on-reservation" fee-to-trust application, the Secretary must find rational support for all of the eight factors set forth in 25 C.F.R. § 151.10(a)-(h). These criteria include:

- (1) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (2) The need of the individual Indian or the tribe for additional land;
- (3) The purposes for which the land will be used;
- (4) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (5) 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;
- (6) Jurisdictional problems and potential conflicts of land use which may arise; and
- (7) 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.
- (8) 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. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

25 C.F.R. §§ 151-.10(a)-(h).

The Oklahoma Tribe's application should be denied as they have failed to articulate facts that can in any way rationally support a finding in favor of granting the application.

- 1. The Quapaw appear to have satisfied the requirement for them to demonstrate the existence of statutory authority for the acquisition and any limitations contained in such authority.**

Title 25 C.F.R. § 151.3 establishes the Land Acquisition Policy of the Department of the Interior. It provides that land may be acquired by the United States for a tribe in trust status when the land is located within the boundaries of an Indian reservation or adjacent thereto, when the tribe owns an interest in land, or when the Secretary determines the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. §§ 151.3(a)(1)-(3).

While the land is not within or adjacent to the Tribe's Oklahoma reservation, the Tribe's recent purchase of the 160 acres in Pulaski County, Arkansas, appear to satisfy this requirement. *See* 25 C.F.R. § 151.3(a)(2).

- 2. The Quapaw have failed to show a need for the land acquisition for the individual Indian or the Tribe.**

In their "on-reservation" fee-to-trust application, the Oklahoma Tribe has asserted that it has a need for the property, *which it already owns*, to be placed in trust with the federal government in order to protect burial sites that are located on the property. Specifically, the Quapaw state that the property includes "culturally significant sites that have been identified and documented" and that it needs to "ensure the protection and maintenance of these sites for the Tribe and its members for generations to come." *See* Application at 12.

The Oklahoma Tribe's stated need for property in Pulaski County, Arkansas, is incapable of supporting their application. At present, the resources of the State of Arkansas are devoted to the preservation of the Native American artifacts and burial grounds located on the land. In fact, in a Memorandum dated April 23, 2015 (attached hereto as Exhibit A), the Department of Arkansas Heritage, which oversees such preservation efforts, explained how the Department has worked tirelessly with the Quapaw Tribe in order to preserve the burial sites, and the Quapaw have assented to the State's rescue efforts.

In stating the above need for the acquisition, however, the Quapaw have failed to articulate or even mention why the current status of the land as privately held is problematic, which is an implicit consideration within this criterion to prove why a need exists. At present, the State of Arkansas has empowered the Arkansas Historic Preservation Program to require permits before unmarked graves can be disturbed or their contents disturbed. Once the land is placed in federal trust, however, current legal and regulatory protections would dissolve, and therefore, the placement of the land into federal trust would have the opposite effect of the stated need for protecting the land as articulated by the Oklahoma Tribe.

Moreover, the existing state regulatory scheme provides greater protection than federal laws governing lands held in trust for Indian tribes in several ways. First, Arkansas law protects all human remains rather than only Native American remains. *Compare* Ark. Code Ann. § 13-6-401(a) *with* 25 U.S.C. § 3002. Second, Arkansas's sentencing laws allow for six years of imprisonment for trafficking Native American remains and artifacts whereas the federal law maximum is five years. *Compare* Ark. Code Ann. §§ 5-4-401(a) and 13-6-406(a) *with* 18 U.S.C. § 1170(a). Arkansas law also prohibits the display of human remains, but the federal law does not. *Id.* And third, Arkansas laws protecting Native American remains and artifacts extends to both public and private lands whereas the relevant federal law only applies to federal and tribal lands. *Compare* Ark. Code Ann. § 13-6-401(b) *with* 25 U.S.C. § 3002. If the application is approved, the Arkansas protections outlined above would cease to apply to the land, and the burial sites in question would be rendered vulnerable. Federal law is inadequate in preventing harm to Native American burial sites as compared to Arkansas law and, therefore, it is not possible that the Tribe's stated need of protecting and maintaining burial sites located on the land rationally supports a need for placing the land in federal trust. Thus, the application should be denied.

One additional consideration is the existence of an African-American cemetery on the Pulaski County, Arkansas land. The State protections discussed above provide even better protections for these non-tribal human remains than would be afforded under the federal laws. The Tribe has publicly stated that it will work with the Preservation of African-American Cemeteries, Inc. ("PAAC") to protect and preserve the non-tribal human remains. Such a promise, while appropriate, has no enforceability should the Quapaw fail to fulfill that commitment. Further, the PAAC is an organization claiming to work toward the preservation, restoration, and documentation of African-American cemeteries, but it has no legal authority to preserve or protect these human remains. While its purpose is laudable, its ability to unilaterally engage in enforcement of laws protecting the remains is nonexistent. The State firmly asserts that the gentleman's agreement between the Oklahoma Tribe and the non-governmental PAAC organization is insufficient to protect the non-tribal human remains. At the very least, the Tribe's fee-to-trust application should be denied so that various groups having potential, ancestral connection to those Native Americans and African-Americans buried on the Pulaski County land may have an opportunity to determine the best treatment for those interred there.

As previously noted, the Secretary must "articulate a rational connection between the facts found and the choice made." *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005). In view of the Tribe's stated need, it is not possible for a rational connection to be drawn to a federal decision in favor of taking the land into trust. Arkansas resources are dedicated to this exact purpose, and Arkansas law protects the Native American Arkansas burial sites more effectively than federal law. Accordingly, the application should be denied.

3. The Quapaw have failed to express a purpose for the land that supports the stated need for the acquisition.

In their "on-reservation" fee-to-trust application, the Oklahoma Tribe explains that the purpose of the acquisition is agricultural production and that there are "no plans *at this time* for a change in such use or for the further development of this property." See Application at 12.

There is no basis to conclude that the stated agricultural purpose of the land sought for trust acquisition will support the Tribe's need to protect the culturally significant sites located on the property at issue. To further complicate this analysis, the Tribe has suggested in its application that it can and will change at

any time the existing agricultural purpose of the land into another purpose. On page 12 (titled "Section 3") of the fee-to-trust application, the Tribe states, "[t]he current and ongoing use of the property is for agricultural production (crops). There are no plans *at this time* for a change in such use or for the further development of this property." (emphasis added). Similarly, on page 13, the Tribe states that it "has no *present* plans to change the use of the property." (emphasis added.) These statements anticipate a future change in use even if it is not imminently planned in detail. The inability of the Tribe to be more transparent on the intended purpose for the land in question is striking and should militate against approval of the present application.

As such, a decision in favor of the trust acquisition cannot be rationally supported by the Tribe's stated agricultural purpose when its claimed need for the land is to preserve cultural antiquities. Accordingly, the application should be denied.

4. The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, while small in comparison, is not insignificant.

While the Tribe maintains in their fee-to-trust application that the state and local taxes on the 160 acres of Pulaski County property is slight (approximately \$1,000 annually) compared to the overall tax revenue for the county in which it resides, the actual tax revenue that would later be diverted from collection would be astronomical if the land's use is converted to another use. Currently, the Pulaski County land is being utilized for agricultural production, and its tax liability is small. Notably, the Tribe has been known to convert its lands and those acquired through the fee-to-trust process into business ventures, whose profitability is entirely dependent upon the Tribe's semi-sovereign status.

A cursory review of the Quapaw Tribe's website² indicates that its business ventures include golf courses, convenience stores casinos, casino entertainment facilities, golf courses, and convenience stores. These convenience stores list for sale deli sandwiches, soda, beer, cigarettes, and fuel. The State of Arkansas charges an excise tax on all of these products, with the exception of the sandwiches, that is typically collected from the consumer at point of purchase. Collection of such taxes

² See <https://www.quapawtribe.com/> (last visited June 9, 2015).

on sales made to non-tribal members on reservation land has proved challenging in other states.

The State of Arkansas has a significant interest in ensuring that its individual and corporate citizens are accountable to the tax system in order to provide the fundamental services that government provides. If the land is placed into federal trust and the Quapaw change their current agricultural purpose to a commercial one, the tribal business will be immune from state tax and thus present a significant loss to the State. According to the Department of Finance and Administration (DFA), the State could suffer a loss of significant revenues if the Pulaski County land is placed into federal trust. Whereas the current state tax revenues for the agricultural use of the land are relatively minimal, the potential tax revenues on the land would be high if the Tribe converted the land into an entertainment venue.

The problems with removing the land from the tax rolls, however, do not end with the loss of the tax revenues. The land in question sits in a medium industrial area including the Little Rock Port Authority and scrap metal companies that heap scrap metal in tall piles for processing. These enterprises require heavy equipment access by road. It is plain that the entry of an entertainment facility similar to those erected by the Tribe in other states would lead to interferences with the nature of the commercial community in the area. Disputes would potentially be raised in the Arkansas state and federal courts over the legitimate activities (*e.g.*, road use and maintenance) of tax-paying businesses that are making positive contributions to commerce in our State. Additionally, the placement of the land into trust would interfere with the Little Rock Port Authority's statutorily authorized right to exercise eminent domain and condemnation proceedings in order to construct railroads and other structures in support of the Port Authority's functions and needs. Ark. Code Ann. § 14-186-210.

The removal of this land from the tax rolls of the State creates a path toward tax-free profitable ventures such as entertainment facilities and convenience stores. The conferral of tax-free status is culturally, developmentally, and financially detrimental to the State of Arkansas, and no rational connection can be drawn between these negative effects and approval of the application. After all, the State would still be required to perform its typical infrastructural role as to the land and neighboring properties (*i.e.*, building and maintaining roads, bridges, communication networks, and etc.) but without any tax revenue from the Tribe to support those services. While the State and the Tribe could engage in an agreement

or compact to provide such services, the interests of the State cannot be fully addressed by those agreements. Accordingly, in view of the State's significant financial concern of lost revenues, the Tribe's application should be denied.

Further, while the State recognizes that the application is a non-gaming approval application, approval of the application is the first step in the process for the Quapaw to eventually receive approval for gaming. Gambling facilities will likely attract a number of customers if erected in an area with the highest population density. If subject to taxation, the gambling facility would generate a large amount of tax revenue for the state and county where the land sits. However, the trust status of the land, if granted, would make the land immune to state and local taxes regardless of the use of the land. The State of Arkansas expects accountability from its private and corporate citizens. To release a gambling enterprise from tax liability entirely would be to undermine a significant element of corporate citizenship and accountability in our State. Additionally, because such an entertainment venue would take patrons away from other venues that are in fact providing state tax revenues (*e.g.*, Oaklawn Park and Southland Park), the effect would be to diminish state revenues overall. (See Correspondence from Ron Oliver dated Apr. 21, 2015, Exhibit B.)

In short, the approval of the Tribe's fee-to-trust application would significantly impact the State and its political subdivisions as it would free the land from any tax liability while still requiring the services and infrastructural support of the State. Accordingly, the application should be denied.

5. The placement of the privately-held land into trust would create jurisdictional problems and conflicts for Arkansas citizens.

Currently, the Pulaski County land at issue is governed by state and federal laws applicable to administrative and executive branch agencies as well as the courts. Accordingly, civil and criminal laws that are implicated or violated on the privately-held land are enforced in the state and federal courts located within the State of Arkansas. If the trust application is granted, Arkansas will face jurisdictional challenges which will inevitably arise in courts of law.

Once the land is put into federal trust, the controlling law of the land takes on a new character. *See, e.g.*, 25 U.S.C. §§ 1321 and 1322 (granting states the opportunity to enforce criminal and civil laws so long as the tribe assents). The

applicability of the state and federal laws in Arkansas to the lands placed in federal trust would be subject to legal challenges and interpretations. If it is later determined that Quapaw tribal law applies to the Pulaski County land held in trust (and not Arkansas state law), then the typical state law claims and defenses known to citizens and their counsel would be unfamiliar and may be unavailable to citizens of Arkansas who work and pay taxes here. One can imagine the various types of legal claims that may arise on the land in question. Should the land be developed for commercial purposes, for example, local Arkansas vendors would have multiple contractual relationships with the Tribe, and any legal actions that ensue would require a court's intervention. If the tribal law were to apply, it would create uncertainty and present potential hardship on Arkansas businesses.

Other states have experienced significant jurisdictional turmoil under similar circumstances. In Oklahoma, for example, the Oklahoma Supreme Court has struggled with the applicability of Oklahoma tort law on Indian lands. *See, e.g., Sheffer v. Buffalo Run Casino*, 315 P.3d 359 (Ok. Sup. Ct. 2013) (finding that Oklahoma's dram shop liability did not apply to plaintiff's injuries caused by casino employees because Oklahoma state courts were not "courts of competent jurisdiction" under the Indian Gaming Regulatory Act); *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013) (stating that the gaming regulatory act "does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim arising from the allegedly negligent serving of alcohol on Indian land . . ." and further denying the jurisdiction of the state court). The Arkansas state and federal courts would likely experience upheaval and uncertainty in determining the law that governs the 160 acre tract in Pulaski County. And local individuals, visitors, and businesses, not knowing what the state of the jurisdictional law is, would patronize the business or engage in business transactions with the Quapaw-owned enterprise without any knowledge or counsel concerning the legal consequences of any harm experienced as a result.

In short, the rights of Arkansans and Arkansas businesses to access the courts and seek redress for wrongs and other injuries would be hampered by tribal jurisdiction as it interferes with basic, time-honored notions of citizenship. This effect is fundamentally unfair to those who may be harmed while present on the 160 acre tract of Arkansas land or doing business with the tribe. Accordingly, there is no reason to uphold the Tribe's application that can rationally be supported by the jurisdictional problems that would result, and the application should be denied.

6. The existing structure of the Bureau of Indian Affairs is not equipped to discharge the additional responsibilities needed if the fee-to-trust application is granted and the Pulaski County, Arkansas land becomes part of the Oklahoma Tribe's lands.

The Bureau of Indian Affairs currently provides education systems, social services, natural resources management, economic development programs, law enforcement and detention services, tribal court administration, implementation of land and water claim settlements, housing improvement, disaster relief, school repair and replacement, road and bridge maintenance, and dam repair. However, none of these offices are in or near Pulaski County, Arkansas. If the 160 acres of Pulaski County land were placed in federal trust for the Quapaw, then the Bureau would be extending services into the State of Arkansas.³

The Bureau's nearest offices reside in eastern Oklahoma (Eastern Oklahoma Regional Office in Muskogee, Oklahoma and the Miami, Oklahoma Office, which is nearest the Quapaw) and in central Tennessee (Eastern Regional Office in Nashville, Tennessee). Neither of these offices is located within the State of Arkansas, and both are located at significant distances from the Pulaski County, Arkansas property at issue. Accordingly, none of the above-mentioned services could be directly provided if the Secretary were to approve the fee-to-trust application.

Currently, Arkansas residents are accustomed to having access to their government and to the services that it provides by traveling a short distance. The location of the Bureau's offices in neighboring states would impose a hardship upon those individuals working on the 160 acre tract of land and could hinder the land from being effectively managed or overseen by the Bureau from such a great distance. Because of the Bureau's complete lack of resources at or near the property, the Secretary's decision to grant the fee-to-trust application would lack any rational support. Therefore, the application should be denied.

7. The Quapaw have provided no information reflecting compliance with the National Environmental Policy

³ See <http://www.bia.gov/WhatWeDo/index.htm> (last visited May 19, 2015).

Act as required by law, and the application should therefore be denied.

The Tribe has not included in its fee-to-trust application packet any information about National Environmental Policy Act ("NEPA") compliance as required by regulations applicable to "on-reservation" fee-to-trust applications pursuant to 42 U.S.C. § 4331, *et seq.* The Tribe has also neglected to include any statement reflecting an environmental "finding of no significant impact" to the land in question. 43 C.F.R. § 46.325. It therefore does not appear that the Quapaw have conducted the procedures necessary in order for environmental assessments or environmental impact statements to be prepared.

The NEPA authorizes the Department of the Interior to promulgate administrative regulations in order to execute the federal environmental policy. These regulations provide that a proposed action is subject to the NEPA "if it would cause effects on the human environment . . . and is subject to bureau control and responsibility." 43 C.F.R. § 46.100.

The NEPA requires, under varying circumstances, the preparation of environmental assessments and environmental impact statements in support of the fee-to-trust application. Environmental assessments and environmental impact statements must be prepared in support of an application unless a "categorical exclusion applies." 516 DM 6, App'x 4 (1996); 516 DM 10 at § 10.5 (2004). Environmental assessments require a more cursory review of environmental impact. 43 C.F.R. § 46.300. Environmental impact statements, however, are more detailed in content and in procedure as they require analysis of environmental alternatives and require public comment. 43 C.F.R. §§ 46.415 and 46.435. An environmental impact statement must be prepared if the action involved is a "major Federal action significantly affecting the quality of the human environment." 43 C.F.R. § 46.400. Yet, even if a "categorical exclusion" prevents any need for either an environmental assessment or an environmental impact statement, there are so-called "extraordinary circumstances" that still require environmental impact review. 45 C.F.R. §§ 46.205(c) and 46.215. These extraordinary circumstances include actions that "[h]ave significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources . . . floodplains . . . and other ecologically significant or critical areas." 43 C.F.R. § 46.215.

The Quapaw Tribe's omission of the NEPA materials with its application reflects their assertion that the transaction meets a "categorical exclusion" to the

general NEPA rule. Even assuming that this is the case, the fact that the land lies in a floodplain along the Arkansas River and that it contains historically significant resources (*i.e.*, an African-American cemetery and Native American burial grounds) means that "extraordinary circumstances" exist that necessitate the filing of NEPA materials.

The Quapaw have failed to comply with the fee-to-trust application requirement that environmental impacts be explained for review by the Secretary. Accordingly, the Secretary cannot make a rational decision to grant the application where no facts on this issue exist, and the Secretary should deny the application.

B. Even if the Tribe had submitted the correct type of application, which is the "off-reservation" application, the Tribe could not satisfy the criteria applicable to an "off-reservation" fee-to-trust application.

As noted above, the Oklahoma Tribe has erroneously submitted an "on-reservation" application even though the Arkansas lands do not qualify as reservation land. Nonetheless, even if the Tribe had submitted the appropriate "off-reservation" fee-to-trust application, the application should still be denied. In order to approve an "off-reservation" fee-to-trust application, the Secretary must find rational support for all of seven of the factors discussed above regarding "on-reservation" applications (25 C.F.R. §§ 151.10(a)-(c) and 151.10(e)-(h)) as well as three additional criteria. These three additional criteria include:

(1) The location of the land relative to state boundaries and its distance from the boundaries of the tribe's reservation shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(2) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(3) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

25 C.F.R. § 151.11 (1995).⁴

The Oklahoma Tribe's application should be denied as they have failed to articulate facts that can in any way rationally support a finding in favor of granting the application.

- 1. The three hundred miles separating the Arkansas land from the Oklahoma reservation is so great that the Tribe's stated justifications and benefits of granting the application should be met with the Secretary's highest scrutiny.**

Federal law establishes a sliding scale that is applicable to the Secretary's scrutiny of "off-reservation" fee-to-trust applications. According to this sliding scale, the Secretary's scrutiny level of the tribe's justifications and stated benefits for the application must increase as the distance grows between the subject land and tribal reservation. While a short distance of a few miles is likely not sufficient to invoke heightened scrutiny, a distance of three hundred miles requires a much higher level of scrutiny of the Tribe's assertions concerning the property. *See, e.g., South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (2005) (determining that the seven to eight mile distance between the land and the reservation was "not so great as to make the

⁴ A brief review of subsections (b) and (d) raise the level of scrutiny that an "off-reservation" fee-to-trust application must endure over an "on-reservation" application. Additionally, these subsections grant express deference on a sliding scale to the state and local governments that currently have regulatory jurisdiction over the land at issue.

land's connection to the reservation illogical or to require more exacting scrutiny of the Tribe's intent.").

The Tribe's only stated justification and benefit supporting its application is the need to protect and maintain the burial sites located on the Pulaski County land. In view of the State's discussion above concerning the manner in which Arkansas law protects such sites more broadly than federal law, the Tribe's stated justification, which is already small, should be minimized even farther according to the above sliding scale. Based upon this review, the Tribe's justifications in support of the application are so slight, that there is no rational conclusion to support the Secretary's finding in favor of granting the application.

Therefore, the application should be denied even if it is considered under the "off-reservation" criteria.

2. The Quapaw's stated business purpose, which does not include a business plan, does not satisfy the level of scrutiny that is required, given the distance between the land the Tribe's reservation in Oklahoma.

Title 25 C.F.R. § 151.11(c) requires an "off-reservation" fee-to-trust application to include a business plan if the property is intended to be used for business purposes. The Tribe has included no such plan. Although the Tribe's application does not make it precisely clear what the purpose of the land will be in the future, the Tribe explains that "[t]here are no plans at this time for a change in such use or for the further development of the property." See Application at § 3, p. 1. Based upon these assertions, the rule does not presently require that a detailed business plan be presented with the application. However, should the Tribe change its designs on the Pulaski County land, then a business plan should be required for review by the Secretary.

To the extent that the Quapaw ever intend to reveal a business purpose for the Pulaski County land, the State would object to that belated revelation in that it has been prevented from commenting upon the business plan in this forum. Other jurisdictions have recently experienced the Quapaw's apparent mercurial tendencies regarding land use. See Complaint, *Kansas v. Nat'l Indian Gaming Comm'n*, Case No. 5:15-cv-04857-RDR-KGS (D. Kan., Mar. 9, 2015). In Kansas, for example, the Quapaw assured the local jurisdictions that they would not use the property for gaming purposes. *Id.* at 6. Less than one year after the land was

placed into trust, the Quapaw began pursuing plans to allow gaming on the property. *Id.* at 7. These recent occurrences raise alarm considering the Quapaw's claim in this matter of "no plans *at this time* for a change in such use or for the further development of this property." See Application, p. 12. Should the Quapaw desire to implement a business purpose for the land, regardless of whether that purpose includes gaming, the State feels strongly that the Tribe should have developed and presented its plans in this forum.

Accordingly, the application should be denied because, in its "on-reservation" application, the Tribe omitted a detailed business plan, and the State has not had an opportunity to comment upon such a plan.

3. In view of the three hundred mile distance separating the Arkansas land from the Oklahoma reservation, great deference should be accorded to the State's assertion that granting the fee-to-trust application would not benefit the State.

The sliding scale applicable to the Secretary's scrutiny level of the justifications and benefits of granting the fee-to-trust application also affects the level of deference to accord to the State's objections to the application. Based upon the vast distance between the Oklahoma reservation and the Pulaski County land, the Secretary must give great weight to the State of Arkansas's objections to the placement of the land into trust.

In the preceding sections, the State has already expressed a series of significant concerns, including:

(1) that the State and its agencies are better-suited legally and physically in order to protect the burial grounds currently present on the property and to continue its working relationship with the Tribe for continued maintenance of the site;

(2) that if an entertainment venue or gambling facility were created, the State would lose significant tax revenues as the facility would be free of state tax obligations;

(3) that if a commercial purpose were added to the land, the potential is high for conflict with surrounding businesses, which are subject to state and local laws;

(4) that the removal of the property from state court jurisdiction would cause citizens to use foreign tribal courts in another jurisdiction in order to redress grievances and wrongs;

(5) that the lack of state and local law enforcement jurisdiction would lead to lawlessness and crime on the Pulaski County, Arkansas land, and if created into a gambling enterprise, the lack of local law enforcement jurisdiction would lead to confusion and other law enforcement difficulties that offend notions of peace and order; and

(6) that there is no office of the Bureau of Indian Affairs near the Arkansas property that could provide information and services to residents and consumers residing in Arkansas.

Based upon these concerns alone, and taking into account the higher level of scrutiny that should be applied to the Tribe's application, the application should be denied.

There are, however, a series of additional issues from various state agencies and departments that greatly concern the State should the Pulaski County land be placed into federal trust. The following sections discuss each of these state initiatives and issues that would be negatively affected by the placement of the land into federal trust.

a. Tobacco Master Settlement and Tobacco Taxation

The State of Arkansas's efforts in smoking prevention would be hindered by placement of the Pulaski County land into federal trust. In an attempt to promote the health and well-being of its citizens, the State of Arkansas has placed specific taxes upon tobacco products and has entered into a master settlement agreement with major tobacco manufacturers that requires that Arkansas account for the

collection of these taxes according to each cigarette purchased. Tribal jurisdiction, however, would interfere with the State's tax collection efforts. Even though tribes are authorized to collect state cigarette taxes on tribal lands, the tribes are immune from suit and therefore cannot be compelled to collect the state taxes. Moreover, for those state taxes that are collected, tribes in some states withhold a significant portion of the taxes for their own use. As a result, the State would incur a significant loss of tax revenues and the Tribe would be enriched at the expense of the health and safety of the people of Arkansas. (See Memorandum from Steve Goode dated Apr. 16, 2015, Exhibit C.)

The State's responsibility to diligently enforce the tobacco master settlement agreement would also be hindered by the entry of the Pulaski County land into trust. As it stands, the State is required to collect payments into an escrow account on every cigarette sold in the state (both on and off tribal lands) by manufacturers who have elected not to make voluntary payments to the State. Thus, some states have experienced problems with these manufacturers producing cigarettes on tribal lands and failing to place a tribal stamp on the cigarette pack. As such, these products are not counted in the system. Because Arkansas is obligated to diligently collect these escrow payments, any cigarette packs that go uncounted would lead to the potential that Arkansas would breach the master settlement agreement. The consequences of such a breach would be disastrous as it would hinder the State's current budgetary priorities in funding Medicaid and many other important items.

b. Payday Lending

The State's significant achievements in eradicating payday lending would be jeopardized by the placement of the Pulaski County land into federal trust. Since 2008, there have been no payday lending stores located in the State of Arkansas. Payday lending has been eradicated from Arkansas because Arkansas state law prevents the application of any interest rate above 17%. Indian tribes, however, enjoy sovereign immunity, which makes them exempt from state usury laws, and they have therefore become increasingly involved in payday lending. If the Quapaw were to begin engaging in payday lending on the Pulaski County land, it would inhibit the State's ability to police and prohibit the practice.

c. Public Health and Disease Control

The Arkansas Department of Health's efforts in controlling disease and promoting a safe and healthy environment for Arkansas citizens would be hindered

by placing the Pulaski County land into federal trust. (See Correspondence from Dr. Nathaniel Smith dated Apr. 20, 2015, Exhibit D.) Presently, the Arkansas Department of Health oversees inspections of food establishments, plumbers, public drinking water systems, sewer water systems, enforcement of the State's Clean Indoor Air Act, which prohibits indoor smoking with only a few exceptions, drug inspections, and monitoring incidents of disease. These efforts in support of the public health are vital to the prosperity of all Arkansans.

The placement of the Pulaski county land into federal trust would remove the above-mentioned protections that the Department of Health supplies. Importantly, if the land's use should ever convert to a commercial purpose, then the State's interests in protecting the health of its citizens who visit the Tribe's commercial establishment could not be enforced. Those areas that would be most negatively affected by granting the application include: (1) infectious disease and contact tracing; quarantine, isolation and exclusion laws; (2) involuntary testing and treatment laws; (3) environmental health; (4) tobacco prevention and cessation; (5) the Women, Infants and Children Program (WIC); (6) injury prevention and control; (7) oral health; (8) preparedness and emergency response; and (9) vital records and statistics. While agreements and compacts between the State and the Tribe might later provide some of these protections, the interests of the State in protecting its citizens could not be guaranteed as is currently the case. Accordingly, the Tribe's petition should be denied.

d. Environmental Protection

The Arkansas Department of Environmental Quality's (ADEQ) work in protecting the Pulaski County land and its inhabitants would be diminished if the land were placed into federal trust. Distinct from the federal Environmental Protection Agency's (EPA) role, ADEQ administers and implements a number of programs and initiatives under Arkansas state law that would dissolve if the land were placed into federal trust. (See Correspondence from Ryan Benefield, Exhibit E.) The following important functions of ADEQ would be inapplicable: (1) enforcement of the Arkansas Remedial Action Trust Fund Act, Ark. Code Ann. § 8-7-501, *et seq.*, and the Arkansas Brownfields Program (*i.e.*, remediation of contaminated sites that are not large enough to constitute federal superfund sites); (2) enforcement of the Controlled Substance Contaminated Property Cleanup Program, which regulates and insures cleanup of properties contaminated by manufacture of controlled substances; (3) enforcement of the Arkansas Open-Cut Land Reclamation Act, Ark. Code Ann. § 15-57-301, *et seq.*, which regulates removal

of clay, bauxite, sand, gravel, soil, shale, or other materials for commercial purposes and reclamation of those sites; (4) enforcement of the Arkansas Quarry Operation, Reclamation and Safe Closure Act, Ark. Code Ann. § 15-57-401, *et seq.*, which regulates removal and reclamation of stone quarries; (5) enforcement of the Arkansas Solid Waste Program, which regulates the management of waste tires and industrial solid waste disposal; and (6) permitting of any confined animal feeding operation pursuant to the Arkansas Animal Liquid Waste Management System Rules. Moreover, for those environmental programs that are federally delegated to the states, the State of Arkansas has in certain circumstances employed greater protections than the federal government. Accordingly, if the Pulaski County land is placed into federal trust, the stringent state environmental protections of the land will be rolled back, and the lower level of federal protection will apply. This development could have disastrous effects on the environmental health of our State. In view of the significant lack of environmental enforcement that would ensue if the land is placed into federal trust, the Tribe's petition should be denied.

In considering the concerns of the State of Arkansas about the Quapaw Tribe's application, the Secretary should accord great weight to the State's position.

IV. Conclusion

Based upon the above analysis, the Secretary should deny the Quapaw Tribe of Oklahoma's "on-reservation" fee-to-trust application in all respects. Its stated benefits are limited while the harms to the State are vast. In short, there is no basis upon which to grant the application that is rationally supported by the reasons for granting the application, and the Secretary should deny the application.

Memorandum

To: Phyllis Bell, Liaison

From: Stacy Hurst

Date: April 23, 2015

Re: Quapaw Land Acquisition

I asked each of the divisions within the Department of Arkansas Heritage to provide input on the Quapaw land acquisition in Pulaski County. Their feedback is below.

Arkansas Natural Heritage Commission

Agency Director Chris Colclasure reports that the site appears to be primarily farmland with several wooded tracts. It's likely that the wooded areas are forested wetlands so clearing and converting these areas would typically require a Corps of Engineers 404 permit and mitigation. If the land is placed in trust, these requirements may disappear. We have no occurrences of elements of special concern mapped on the property, but there are some within a 5-mile radius. Overall, the acquisition and use of this property by the Quapaw will have little to no impact on the work of ANHC.

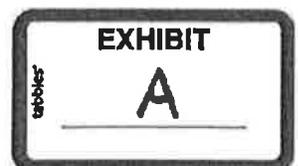
Arkansas Historic Preservation Program

You have already received the input solicited of the Arkansas Archeological Survey by AHPP. Their perspective mirrors that expressed by the Survey. Additionally, if the land in question is disturbed for development, certain characteristics could trigger a Section 106 review. This would be performed under the direction of the Tribal Historic Preservation Officer, Mr. Everett Bandy of the Quapaw Tribe of Oklahoma. Under typical circumstances, disturbance of the existing burial site would trigger requirements of state burial laws and review by AHPP. If the land goes into trust, this review would probably not be required, but Chairman Berrey has publicly indicated his desire to still adhere to those requirements.

Historic Arkansas Museum

Director Bill Worthen has a longstanding personal relationship with the Quapaw and a robust knowledge of their history. Similar to the position of the Arkansas Archeological Survey, Bill believes that it is likely that the Quapaw carry within them a remnant of previous inhabitants and are, therefore, the rightful arbiters of issues related to graves and tribal artifacts found at the site. The Historic Arkansas Museum has been engaged with the Quapaw for decades and partnered with them on exhibits. The promise of cultural and heritage tourism could be better realized with the active participation of the Quapaw.

The Arts Council had nothing extraordinary to add to the conversation, nor did Mosaic Templars, Old State House or the Delta Cultural Center.



A review of information about the Thibault and Welspun properties and the Quapaw Tribe

Ann M. Early, Ph. D.
Arkansas State Archeologist

21 April 2015

1. The Thibault Site and the Thibault Artifact Collection

J.K. Thibault owned a large percentage of Arkansas River bottomland, known locally as Fourche Island, lying east and south of Fourche Creek and Fourche Bayou and southeast of Little Rock. The Thibault and the Fletcher families together owned almost the entire Island and farmed it both before and after the Civil War. Mr Thibault built a large home on the property. The house was a well-known landmark. It no longer stands but we have found the ruins and know their exact location.

Between 1881 and 1894, Edward Palmer travelled in Arkansas on behalf of the Smithsonian Institution in Washington, DC. Palmer was a professional botanical and historical field collector, and he was collecting artifacts from Indian sites for the Smithsonian's Bureau of Ethnology. While in Arkansas, Palmer met J.K. Thibault who had been digging up Indian graves and collecting artifacts on his plantation. Palmer visited the property and looked at the mounds there. Thibault loaned his artifact collection, mostly pottery vessels, to Palmer and the Smithsonian for study, and he donated at least one human skull to the Smithsonian. The artifacts included a small number of metal and glass objects, like beads and wire bracelets that are known by archeologists to identify historic period Indian graves and settlements. At least some of the things that Mr. Thibault dug up were buried sometime after AD 1600 and perhaps as late as AD 1700. There were no trained archeologists residing in Arkansas in the 19th century.

The Thibault family plantation home site is now located on Quapaw Tribe lands and some Thibault plantation property is now part of Welspun Corporation property, passing through Isgrig ownership along the way.

Mr. Thibault's site and artifacts were discussed in several Smithsonian Institution publications. The most important of these was "Report on the Mound Explorations of the Bureau of Ethnology", written by Cyrus Thomas and published in the Twelfth Annual Report of the Bureau of Ethnology, a branch of the Smithsonian, in 1894. This is one of the most famous classic archeological reports ever published because it proved to all rational people that the mounds and pottery vessels found all over the eastern United States were made by the ancestors of the American Indians, not by Phoenicians, Egyptians, or other fanciful civilizations. This report is currently in print and is available from the Smithsonian Institution Press for a nominal price.

This makes the Thibault Site, as we refer to it, and the artifact collection, one of the first archeological discoveries in Arkansas to be described in print.

Eventually, the Smithsonian returned the artifacts to the Thibault family. J.K. Thibault's descendants sold the collection to the MacArthur Park Museum of Science and Natural History in the 1960s. After the MacArthur Park Museum moved downtown and became the Museum of Discovery, the Museum board de-accessioned nearly all of its artifact collections. The Thibault Collection, among others, was transferred to the Arkansas Archeological Survey custody in 2011, at our request. After accessioning the collection into its holdings, the Survey has subsequently loaned some of the items to the Downstream Casino for an exhibit of artifacts in the casino foyer. Others are in the Survey's collections in Fayetteville, and loaned to other institutions.

In 1990, Dr. Marvin D. Jeter, then an archeologist with the Arkansas Archeological Survey, edited a book about Edward Palmer's work in Arkansas. "Arkansaw Mounds" was published by the University of Arkansas Press. It contains more information about Mr Thibault and his property that was taken from Palmer's unpublished notes and other sources. The book is out of print at the U of Arkansas Press, but the University of Alabama press has issued a low cost paperback reprint that may still be available.

During the 20th century, a small number of citizen archeologists have picked up artifacts on Fourche Island and turned the information over to the University of Arkansas Museum and the Arkansas Archeological Survey. We now know where several locations exist on the island that have yielded pottery and human bones. None of these locations was studied in detail before the Welspun land purchase. The entire island has never been thoroughly searched for archeological sites. The Archeological Survey database contained only those sites reported to us over the years or discovered in early publications.

In 1987, the Arkansas Archeological Survey excavated a historic period (that is, dating to sometime after AD 1600) Indian cemetery on Adams Field (Now Bill and Hillary Clinton National Airport) that was going to be destroyed by some airport construction. This cemetery, named the Goldsmith Oliver 2 (second site on the old Goldsmith Oliver property) site, is contemporary with the graves and pots that Mr. Thibault dug up. There were 20 graves in the portion of the site that was excavated at that time. Other graves may still be present at the site. Beads and metal wire jewelry found at the site show that it is a historic settlement.

These discoveries and others reported to the Survey, show that the landscape between the Airport and the David D Terry Lock and Dam is made up of numerous natural levees, ridges and swales, and low areas that were once creeks or old river channels. Indians lived along these slightly higher locations in scattered groups, most likely in family farmsteads, for thousands of years. Some were living in this area as late as the 1600s, according to the archeological evidence.

There are also archeological sites on this property that come from early 19th century occupation, but we do not know if these are Quapaw farmsteads or not.

2. The Welspun and Quapaw tract site research.

When the Welspun development was announced, the accompanying map in the newspaper indicated that the tract included more than one of the archeological sites known to contain human remains and late prehistoric or early historic artifacts. It appeared that there would be no 106 review carried out, and no opportunity for AHPP to comment on the project, because there were no Federal permits or loans involved in the early stage of the development. With assistance, I approached the on-site manager, and informed him that we had certain knowledge that there were unmarked graves on the property. By law, it is illegal to knowingly disturb or destroy unmarked graves. I asked the manager if the locations of the grave sites could be preserved and protected since they were in the far corner of the site, well away from factory construction. In addition to the Indian graves, we had information that there were two graves marked with commercial gravestones at the location, but that the stones were no longer in evidence. At the time we also did not know whether the African American cemetery was situated on Welspun land, or on adjoining private land.

The manager declined to preserve the sites, but instead asked us to remove the graves, entirely at our own expense. The Archeological Survey does not have the financial resources to undertake an extensive salvage project, and we were not authorized to search for yet-to-be discovered grave sites, but we were allowed to work in the location where we already had definite evidence that human remains existed. Dr. John House, the Arkansas Archeological Survey Archeologist based at UAPB in Pine Bluff, works in Pulaski County and has over 30 years' experience working on archeological sites in the Arkansas River Valley. He spearheaded all of the excavations and surveys on the Welspun, private, and Quapaw properties that have been carried out to date. He is also the 'UAPB historian' referred to in an Arkansas Democrat newspaper article published in the Arkansas Democrat-Gazette on April 20, 2015.

We used our remote sensing equipment to search for indications of graves and other features, and then we began small excavations with the assistance of citizen volunteers. Over the period of two years intermittent work-some times with only one or two people on the site-on weekends or during short week long field excursions, the Arkansas Archeological Survey located 9 graves of pre-territorial period Indians and removed the remains. It is worth noting that this fieldwork could have been accomplished in a matter of weeks if trained staff personnel could have remained on the project for a sustained period.

The Archeological Survey was also contacted by private citizens who owned land adjoining the Welspun tract who wanted to know what cemeteries and other historic sites were on their property. We informed the landowners about one Indian cemetery, the African American slave cemetery, and the historic Thibault plantation home site, along with several other archeological features that we already knew about. We asked the landowners to consider preserving these locations if they developed the property, and they declined. The private citizens also asked us, at our own expense, to remove all of these archeological sites and all graves from their property. With their permission, we undertook some small scale targeted excavations to remove graves from one tract that was intended for development in the near future, and to assess the status and extent of the slave cemetery. We were financially unable to undertake large scale excavations, and hoped to discuss preservation possibilities with the land

owners as we learned more about the sites. During the salvage excavations we located 11 Indian graves and other features that were associated with a 17th century occupation at that locality.

We also confirmed the existence of the African American cemetery, documented that it was used up through the early 20th century, and estimate that there may be as many as 100 graves in that location. The cemetery is situated in part on a group of Indian mounds, in an area where we could not use remote sensing to look for graves, so the estimated number of interments is based on limited testing.

According to Arkansas State Law, before unmarked graves can be disturbed or their contents disinterred, a permit must be obtained from the Arkansas Historic Preservation Program and potential descendent or cultural interest groups are given an opportunity to have input on the planned action. In accordance with this law, the Arkansas Archeological Survey consulted with the Quapaw Tribe about the at-risk status of the cemeteries and the opportunity to disinter the remains so that they could be removed from immediate danger. The Quapaw Tribal authorities gave their assent to the rescue efforts and expressed interest in the historic nature of the sites in the area.

It is important to understand that these historic period Indian graves are only the third group of confirmed historic Indian burials to be investigated by legitimate means in Arkansas in nearly a century.

The Quapaw Tribe is the preferred consultant for situations such as this in central Arkansas because of the historically documented ties with the general Little Rock area in the Colonial and Territorial periods.

There is historic evidence that Quapaw-French families were living in the same general location as the Little Rock airport and the Clinton Presidential Library as late as the time of the Louisiana Purchase in 1804. Margaret Smith Ross published an article, "Squatters Rights Part I:" in Volume IV of the Pulaski County Historical Review, in 1956, that discusses the documentary evidence for several Quapaw French families living on the south side of the Arkansas River roughly between downtown Little Rock and the mouth of Fourche Creek-or beyond- around the time of the Louisiana Purchase. The article was reprinted in 1999.

In the years leading up to the Louisiana Purchase, the Spanish Colonial government issued land grants to a small number of individuals purportedly living in what became Arkansas. These land grants were typically for about 640 arpents, about 640 acres, and were meant to give legal ownership to people already settled in the area. The grants were often described with relation to a cabin site, or a location associated with a person, then the tract was drawn around that spot.

After the Louisiana Purchase, beginning shortly after 1804, Spanish land grant holders were required to submit their grants to an American Board of Commissioners that considered whether the grants were legal or not. These reviews, and later petitions for legitimacy, often dragged on for years. While these issues were still under consideration, General Land Surveyors passed through the countryside and drew the boundaries of the grants into the maps of townships, and sections, which were established by the US Government in order to sell land to settlers.

The General Land Office maps for the north and east bank of the Arkansas River in the general area of Little Rock show the location of numerous Spanish land grants that were issued to French-Quapaw Individuals. Some of these are directly across the river from the Welspun/Thibault/Quapaw tracts. The survey was done in 1818. The original field notes of the surveyors that were written while they were surveying this township typically give information about unusual events, and may have information about these grants.

It is worth noting that one of the names on grants in this location is the surname Imbeau. This is a well known French-Quapaw family whose descendants include advisors to current Quapaw Chairman John Berrey. The Imbeau family is also mentioned in books about colonial Arkansas written by Morris Arnold.

The Thibault/Welspun property was not subject to this early survey because the land was in Quapaw hands at the time, and was not eligible for sale because it did not belong to the Federal Government. It was part of the last Quapaw reservation in Arkansas.

If someone wished to do more research on the grants, there will be additional information in the American State Papers, Public Lands volumes, in the Territorial Papers of the United States, and in other papers. The former volumes are compilations of congressional documents up to 1837 that cover all kinds of government activities. The 9 volumes in the Public Lands series, a subset of the total library, includes information about land claims, sales, congressional hearings, and other activities relating to Arkansas and a group of other states. Disposition of Spanish Land grants would be one of the subjects at issue. The Territorial Papers of the United States compile original documents from various government offices and agencies relating to the territories acquired by the infant country in the 18th and 19th centuries. Louisiana, Missouri, and Arkansas volumes are part of the collection, and all have information about modern day Arkansas. Indian affairs and land claims are major topics of concern in the volumes because the topics obsessed Federal and Territorial authorities.

The Commissioner of State Lands holds the original General Land Office fieldnotes, original Township plat maps, and a volume recording the ultimate disposition of Spanish Land Grants in the State Capitol office. American settlers quite commonly bought the grants from their original owners before legal disputes were resolved, and this seems to be the common fate of Spanish grant holders in Arkansas.

Quapaw Treaties

You can find and print out the complete text and signatures for any Indian treaty, transcribed, at the Oklahoma State Digital Library. Quickest way there is just google 'Indian treaties' and look for the OSU digital library link. It will take you directly to the tribal list.

In August of 1818, the Quapaws ceded their claims to most of the center part of Arkansas (at that time not yet a territory of its own) but retained a wedge shaped tract of land south and west of the Arkansas River. The boundary of the land is described in the treaty. The treaty was proclaimed, or accepted, in 1819.

That wedge shaped piece of land has a northern point at Little Rock. The east boundary of the tract was to run down the Arkansas River to Arkansas Post. From there it was to run southwest to the Ouachita River, then up the Ouachita and Saline east banks, then back in a northeastern direction to Little Rock.

It is important to note that the boundaries of treaty lands were first described in the treaties, then government agents had to go out and stake out the actual line after the treaty was accepted. Often the line that was finally surveyed was not exactly what was written on paper, bringing about endless disagreements between Indian Tribes and the US Government.

The western boundary of this tract is memorialized on US Geological Survey maps, however, and can be found on the 7.5 minute USGS map for Little Rock, ARK. The map version dated 1986, in hand here, shows the red treaty boundary labelled 'Old Indian Treaty Boundary'. It runs directly north/south along the west side of the MacArthur Park property, crosses the intersection of Commerce and 9th St, and ends up almost exactly at the foot of the railroad bridge on the south side of the Arkansas River.

It seems evident, although not confirmed at this moment, that the surveyors started at this point and walked straight south rather than trying the impossible task of finding an imaginary point on the Saline River southwest of Little Rock deep in the forest and trying to survey in the opposite direction.

The boundary lines are re-affirmed in the 1824 treaty between the Quapaws and the US Government that severed the Quapaw claims for this wedge shaped piece of land and quit all their official claims for Arkansas territory.

Therefore, the current Quapaw Tribe property, and the Welspun property, lie within the last Quapaw land in Arkansas. Although there are no records of known specific Quapaw families living on the property in the 1800s, it seems certain that Quapaws used this area and may have resided on it before removal in 1824. Further historic research may well turn up information about such residence.



STATE OF ARKANSAS
Department of Finance
and Administration

ARKANSAS RACING COMMISSION
1515 West Seventh Street, Suite 505
Post Office Box 3076
Little Rock, Arkansas 72203-3076
Phone: (501) 682-1467
Fax: (501) 682-5273
www.state.ar.us/dfa

April 21, 2015

The Honorable Governor Asa Hutchinson
State of Arkansas
State Capital
500 Woodlane Street
Suite 250
Little Rock, AR 72201

Dear Governor Hutchinson:

The mission of the Arkansas Racing Commission is to regulate thoroughbred and greyhound racing in the state.

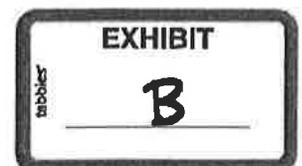
Since 2005, the Racing Commission has also had the authority over the rules and regulations, as well as approval of Electronic Games of Skill, also known as EGS games.

The EGS Games have been a tremendous success. The activity level of the Racing Commission is much higher due to the constant intake of new games, updates and revisions to current games, and an increasing amount of vendor interaction with each expansion that takes place at each track the Racing Commission regulates, Oaklawn and Southland.

In my view, the effect and impact of a tribal gaming casino would be significant and damaging to the Racing Commission and Department of Finance and Administration.

As a regulatory agency, the actions and decisions of the Arkansas Racing Commission play an integral role in the Live Racing, Simulcast Racing, Instant Racing Machines, and Electronic Games of Skill.

During the 1990's and Early 2000's, racing of all types suffered near devastation from the competition of Casino Gambling in neighboring states. Consequently, revenue paid to the state and local government was drastically reduced. Like all agencies funded by general revenue, the Racing Commission was impacted.



Since then the Electronic games of Skill have more than leveled the playing field. Not only has the gaming been exceptionally successful, it has also lifted all boats. Since a small percentage of the EGS games net income goes to purses for horse and dog racing, both gaming and racing are producing larger amounts of revenue than in previous years. For example, in Fiscal Year 2014 alone, the revenue from all sources combined resulted in over \$42 Million to the State. With the current forecast, Fiscal Year 2015 is predicted to bring in over \$50 Million to the State. That does not include over 3,000 jobs and the taxes paid by those employees, or the sales tax on food and beverage.

The question, of course, is how the agency, the Department of Finance and Administration, and the State of Arkansas will be affected by the introduction of Tribal Gambling Casino into the state's largest metropolitan area?

The entities that the Commission regulates are required to pay a privilege tax based on gross racing wagers, and net gaming wagers. The introduction of a tribal casino that pays no taxes and is exempt from the racing commissions rules and regulations, make for an unlevelled playing field that could be detrimental to the Arkansas Racing Commission and the State of Arkansas.

I suppose that some role for the Racing Commission could be established in the required compact between the State of Arkansas and the Tribe, but I don't know that. Because the effect on our two existing racetracks would obviously be negative, I believe the effect on the Arkansas Racing Commission would be detrimental.

Sincerely,



Ron Oliver, Manager
Arkansas Racing Commission



ARKANSAS TOBACCO CONTROL

101 E. Capitol Ave., Suite 401
Little Rock, AR 72201
Phone: 501-682-9756
Fax: 501-682-9760
<http://www.atc.ar.gov>



Asa Hutchinson
Governor

Steve Goode
Director

WORKING PAPER MEMORANDUM

To: Governor Asa Hutchinson
From: Steve Goode, Director, Arkansas Tobacco Control
Re: Possible effects of Quapaw Nation Reservation on Arkansas Tobacco Control
Date: April 16, 2015

Background Premise:

Assuming a Quapaw Nation Reservation is created in central Arkansas, a typical source of revenue for a reservation is Native American smoke shops.

Question Presented:

What effect would one or more Native American smoke shops in central Arkansas have on Arkansas Tobacco Control (ATC) and the State of Arkansas as a whole?

Probable Consequences:

In the event that the Quapaw Nation is granted sovereign status and opens Native American smoke shops on designated reservation property in central Arkansas, our agency believes that it would have the following effects:

1. Tax revenue on cigarettes and tobacco products would undergo a substantial decline in central Arkansas given that in Pulaski County alone there are over 600 retail cigarette and tobacco permits, none of which could match the price at which the untaxed cigarettes and tobacco products could be sold at in reservation smoke shops.
2. Smuggling, which is currently a significant problem for Other Tobacco Products (OTP), would undergo a dramatic upward spike; cigarette smuggling would rise significantly as well. ATC is currently working multiple cases where OTP has been smuggled into the state to avoid state tobacco excise taxes. Reservation smoke shops would most likely create an illicit cigarette and OTP point of purchase in the Little Rock area in a physical location where state and local law enforcement has no jurisdiction.
3. Smoking rates would likely begin to rise due to the availability of cheap cigarettes and the inability of ATC to conduct sales to minor checks on any reservation smoke shop.
4. State minimum pricing on cigarettes, which is currently 7.5% above wholesale, would also not be able to be enforced on the reservation, thereby contributing to below state minimum sales.
5. We are currently consulting with Asst. A. G. Charles Saunders to see what effects this would have on the MSA and the new "diligent enforcement" requirements of the recently settled arbitration suit with the participating manufacturers.
6. Without the ability to have enforcement and regulatory authority on reservation land, ATC would be all but powerless to prevent the massive abuses that other states that surround or border reservation land have been forced to live with for years.

CC: Chief of Staff Michael Lamoureux
Sr. Policy Advisor Carlton Saffa

EXHIBIT

tabbies

C



Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Director and State Health Officer

April 20, 2015

Governor Asa Hutchinson
State Capitol
500 Woodlane Street
Suite 250
Little Rock, AR 72201

Re: Impact of Quapaw Tribe Claiming Sovereign Immunity

Governor Hutchinson-

This is in response to the articulation of public health regulation concomitant with the Quapaw Tribe purchase of 160 acres of property near the Little Rock Port Authority in Pulaski County. Tribes are sovereign nations that maintain a government-to-government relationship with the United States. Public Health in Tribal areas is regulated through 12 different Tribal Epidemiology Centers. The Quapaw Tribe is located within the Oklahoma City Area Inter-Tribal Health Board (OCAITHB) Tribal Epidemiology Center (TEC). These parent organizations act under a cooperative agreement with the Indian Health Services (IHS) and are authorized pursuant Section 214 (a)(1), Public Law 94-437, Indian Health Care Improvement Act as amended by P.L. 573. In the conduct of public health activity, the TEC collects and receives protected health information for the purpose of preventing and controlling disease, injury, or disability, including but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions for Tribal communities they serve. Further, the IHS considers this to be a public health activity for which disclosure of protected health information (PHI) by covered entities is authorized by 45 CFR 164.512(b) of the Privacy Rule.

As you know, the State Board of Health, through delegation to the Arkansas Department of Health, oversees a number of industries, practitioners, and other entities with the mission of protecting the health of all Arkansans. This includes restaurants and food establishments, plumbers, public drinking and sewer water systems, and a number of other groups. We also ensure that employees and patrons of Arkansas businesses are protected from second hand smoke through the Clean Indoor Air Act. These are a few of the areas that may be impacted by this sale.



The Arkansas Department of Health utilizes Rules and Regulations promulgated by the Arkansas State Board of Health to ensure that risk of disease outbreak is minimized. Human health is protected by regulating water sources and water systems. Food and drugs are also protected by regular inspections and permitting qualified vendors. Communicable disease rules curtail the outbreak of airborne and foodborne illnesses in human populations. Surveillance of diseases in the human populations is accomplished by regular reporting from healthcare providers and laboratories to the central depository of records, the Arkansas Department of Health. In order to protect public health within the sovereign territory of the tribal property and also outside of the property it will be necessary to enter into one or more Memoranda of Agreement to share data and health information and to ensure public health services such as immunizations and early childcare. Areas of public health protections that will need to be protected through independent agreement include:

- **Infectious Disease and contact tracing**
- **Quarantine, Isolation, and Exclusion Laws [Communicable of Infectious Diseases]**
- **Involuntary Testing and Treatment Laws**
- **Environmental Health**
- **Tobacco Prevention & Cessation**
- **WIC (Women, Infants & Children)**
- **Injury Prevention & Control**
- **Oral Health**
- **Preparedness & Emergency Response**
- **Vital Records/Certificates**

Please let me know if I can be of further assistance to you in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. Smith', with a horizontal line extending to the right and a small mark at the end.

Nathaniel Smith, MD, MPH
ADH Director and State Health Officer

ADEQ

Benefield, Ryan

Subject: 160 Acres in Pulaski County - Quapaw Tribe

Elizabeth

I have researched ADEQ's regulatory authority related to the 160 Acre tract owned by the Quapaw Tribe near the Arkansas River in Pulaski County. Specifically I looked for Arkansas Environmental Rules administered by the ADEQ that currently are applicable to the subject property. I have excluded federal rules that would be directly enforced by the US EPA should the subject property be held in trust by the United States. ADEQ is charged with the implementation of several State only regulatory programs. These programs include the following:

1. The Arkansas Remedial Action Trust Fund Act and Arkansas Brownfields Program – Sites within the State of Arkansas that are contaminated with hazardous substances that are not eligible due to size and scope as Federal Superfund sites are required to be remediated through the Arkansas Remedial Action Trust Fund and Arkansas Brownfield Program.
2. The Controlled Substance Contaminated Property Cleanup program regulates and insures the cleanup of properties contaminated through the illegal manufacturing of controlled substances.
3. The Arkansas Open-cut mining and Reclamation Act regulates the removal of unconsolidated material from sites other than coal mines and insures the appropriate reclamation of those sites
4. The Arkansas Quarry Operation and Safe Closure Act regulates the removal and reclamation of stone from quarries within the State.
5. The Arkansas Solid Waste Program oversees the proper management of waste tires within the State and regulates Industrial Solid Waste Disposal.
6. The Arkansas Animal Liquid Waste Management System Rules require all Confined Animal Feeding Operations that utilize a liquid waste handling system to be permitted.

The specific programs listed above are not based in Federal Law and would not be applicable should the site be held in trust by the United States. In addition to the programs listed above, the State of Arkansas has implemented more stringent standards throughout the federally delegated programs that will not be applicable at the site. Please let me know if I need to expand on the list above or provide additional information.

Thanks

Ryan Benefield, P.E.
Deputy Director, ADEQ

