United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

The Honorable Ned Norris, Jr.
Chairman, Tohono O'odham Nation
P.O. Box 830
Sells, Arizona 85634

JUL 23 2010

Dear Chairman Norris:

On January 28, 2009, the Tohono O'odham Nation (Nation) submitted to the Bureau of Indian Affairs an application to acquire in trust 134.88 acres of land (Glendale parcels) held in fee by the Nation and located in Maricopa County, Arizona (*Tohono O'odham Nation (TON) Application*). Over the past year, the Nation has modified its request, as described in further detail below. The authority for this acquisition is the Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503, 100 Stat. 1798 (1986) (Gila Bend Act) (*TON Exhibit 3*).

Before land is eligible for acquisition under the Gila Bend Act, section 6(d) of the Act requires the Secretary to determine if certain conditions are met:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

By memorandum dated June 30, 2009, the Regional Director, Western Region Office (WRO) transmitted to the Assistant Secretary – Indian Affairs (AS-IA), his recommendation that the property be accepted into trust (*Office of Indian Gaming (OIG) Tab 1*), along with the Nation's request and supporting documentation.

The Nation's application originally sought the acquisition of 134.88 acres consisting of five parcels. By letter dated March 12, 2010, the Nation modified its application and now only seeks to have Parcel 2 of the 134.88 acre property, consisting of 53.54 acres, taken into trust, and asked that the Department of the Interior hold the rest of the Nation's application in abeyance. (*TON Exhibit 2*). *See* Letter dated March 12, 2010, from Mr. Seth Waxman, regarding "Tohono O'odham Nation Mandatory Trust Land Acquisition Request." The Nation indicated that it made this request following the March 10, 2010, decision by the Superior Court of Maricopa County that entered an order granting summary judgment to the City of Glendale (City) in an

annexation suit brought by the Nation. The ruling, which held that a 2001 annexation attempt by the City for certain parcels of the 134.88 acres held in fee by the Nation was valid. *See Tohono O'odham Nation v. City of Glendale* (Ariz. Sup. Ct., No. CV 2009-023501) (March 10, 2010).[1] The ruling does not, however, affect Parcel 2. We, therefore, are making a fee-to-trust determination only for Parcel 2, consistent with the Nation's March 12, 2010 request.

We have completed our review of applicable law, the Nation's request, supporting documentation, the WRO's recommendation, and, among other items, materials submitted by the City and the Gila River Indian Community. For the reasons set forth below, it is our determination that the Parcel 2, consisting of 53.54 acres, is eligible to be taken into trust.

BACKGROUND

The Nation is a federally recognized Indian Tribe. The Constitution of the Nation was adopted by the qualified voters on January 18, 1986, and approved by the Deputy Assistant Secretary – Indian Affairs on March 6, 1986 (*OIG Exhibit 2*). The Nation's headquarters are located in Sells, Arizona.

Pursuant to Article VI, Section 1(i) and 1(j) of the Constitution of the Tohono O'odham Nation, Resolution No. 09-049 adopted by the Tohono O'odham Legislative Council dated January 27, 2009, (*TON Exhibit 7*) requests the Secretary to acquire in trust the 134.88-acre property pursuant to the Gila Bend Act. As noted above, the Nation has since requested that the Secretary hold in abeyance that request with respect to all parcels of the 134.88 acre property other than Parcel 2.

Additionally, the Nation originally sought an Indian lands opinion in a letter dated January 28, 2009, but the Nation withdrew its request in a letter dated July 17, 2009. Consequently, this determination does not address whether the Nation is authorized to game in accordance with the requirements of the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2719 (*See* "Compliance with the Indian Gaming Regulatory Act," *infra.*).

DESCRIPTION OF THE PROPERTY

The legal description of the property is as follows (*TON Exhibit 8*):

PARCEL NO. 2

THE WEST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER AND THE WEST HALF OF THE EAST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER OF SECTION 4, TOWNSHIP 2 NORTH, RANGE 1 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA;

EXCEPT THE WEST 360.14 FEET (MEASURED), WEST 360.00 FEET (RECORD) OF THE NORTH 484.19 FEET (MEASURED), NORTH 484.00 FEET (RECORD); AND

[1] The Nation has appealed the court's decision.

EXCEPT THE NORTH 258.00 FEET OF THE WEST 460.00 FEET OF THE WEST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER OF SAID SECTION 4; AND

EXCEPT THE NORTH 40.00 FEET, THEREOF; AND

EXCEPT THOSE PORTIONS THEREOF WHICH LIE NORTHERLY OF THE FOLLOWING DESCRIBED LINE;

BEGINNING AT A POINT ON THE NORTH-SOUTH MIDSECTION LINE OF SAID SECTION 4, WHICH POINT BEARS SOUTH 01 DEGREES 36 MINUTES 34 SECONDS WEST (RECORD AS SOUTH 00 DEGREES 16 MINUTES 56 SECONDS WEST ACCORDING TO ADOT PARCEL 7-4241),55.01 FEET FROM THE NORTH QUARTER CORNER OF SAID SECTION 4;

THENCE EAST (RECORDED AS NORTH 88 DEGREES 40 MINUTES 28 SECONDS EAST, ACCORDING TO ADOT PARCEL 7-42410), 503.20 FEET;

THENCE NORTH (RECORDED AS NORTH 01 DEGREES 19 MINUTES 32 SECONDS WEST ACCORDING TO ADOT PARCEL 7-4241), 55.00 FEET TO THE POINT OF ENDING ON THE NORTH LINE OF SAID SECTION 4, WHICH POINT BEARS NORTH 88 DEGREES 40 MINUTES 28 SECONDS EAST, 501.66 FEET FROM SAID NORTH QUARTER CORNER OF SECTION 4, AS CONVEYED TO THE STATE OF ARIZONA IN DEED RECORDED IN RECORDING NO. 86-652262 OF OFFICIAL RECORDS; AND

EXCEPT THAT PARCEL OF LAND LYING WITHIN SAID NORTHEAST QUARTER OF SECTION 4 AND BEING A PORTION OF THAT CERTAIN PARCEL DESCRIBED IN RECORDING NO. 95-490799 OF OFFICIAL RECORDS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTH QUARTER CORNER OF SAID SECTION 4;

THENCE NORTH 88 DEGREES 40 MINUTES 25 SECONDS EAST, ALONG THE NORTH LINE OF SAID NORTHEAST QUARTER, 998.19 FEET;

THENCE SOUTH 00 DEGREES 09 MINUTES 14 SECONDS WEST, 40.01 FEET TO THE NORTHEAST CORNER OF SAID PARCEL ON THE SOUTH LINE OF THE NORTH 40.00 FEET OF SAID NORTHEAST QUARTER AND THE POINT OF BEGINNING;

THENCE SOUTH 00 DEGREES 09 MINUTES 14 SECONDS WEST, ALONG THE EAST LINE OF SAID PARCEL, 28.05 FEET;

THENCE NORTH 68 DEGREES 29 MINUTES 09 SECONDS WEST, 42.26 FEET TO A POINT ON THE SOUTH LINE OF THE NORTH 51.64 FEET OF SAID NORTHEAST QUARTER;

THENCE SOUTH 88 DEGREES 40 MINUTES 25 SECONDS WEST, ALONG SAID SOUTH LINE, 455.83 FEET TO A POINT ON THE EAST LINE OF THAT PARCEL CONVEYED TO

ARIZONA DEPARTMENT OF TRANSPORTATION IN RECORDING NO. 86-652262 OF OFFICIAL RECORDS;

THENCE NORTH 01 DEGREES 19 MINUTES 35 SECONDS WEST, ALONG SAID EAST LINE, 11.64 FEET TO A POINT ON THE SOUTH LINE OF THE NORTH 40.00 FEET OF SAID NORTHEAST QUARTER;

THENCE NORTH 88 DEGREES 40 MINUTES 25 SECONDS EAST, ALONG THE SOUTH LINE, 495.50 FEET TO THE POINT OF BEGINNING, AS CONVEYED TO MARICOPA COUNTY IN DEED RECORDED IN RECORDING NO. 99-332877 OF OFFICIAL RECORDS.

TITLE TO THE PROPERTY

The commitment for title insurance No. 5089214, Second Amended, issued by First American Title Insurance Company dated January 21, 2009, reflects the title to be vested in the Nation, a federally recognized Indian Tribe (*TON Exhibit 9*).

On June 5, 2009, the Regional Director requested a Preliminary Title Opinion (PTO) from the Office of the Solicitor, Phoenix Field Office. On June 17, 2009, the Field Solicitor determined that the grantors should be able to convey title to the property in a manner that meets the standards set forth in "Department of Justice Title Standards," provided the various observations, conclusions, and needed actions listed in the PTO are taken prior to closing (*OIG Exhibit 1B*). These actions do not prevent the Secretary from making a final determination on the Nation's application.

COMPLIANCE WITH 25 C.F.R. PART 151 AND THE GILA BEND ACT

The Secretary's authority; procedures, and policy for accepting land into trust are set forth at 25 C.F.R. Part 151. Section 151.3 sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe or individual Indian, but states that it is "subject to the provisions in the acts of Congress which authorize land acquisition." If an acquisition statute is determined to be "mandatory," certain provisions of the Part 151 regulations do not apply to the application. The notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d), requiring that the BIA notify state and local governments of the land-into-trust application, are not applicable, and compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, is not required. Further, the Secretary is not required to consider the criteria for discretionary acquisitions listed at 25 C.F.R. §§ 151.10(a) - (h) and 151.11(a) - (c).

The Department construes mandatory acquisitions to be those authorized by legislation expressly stating that land "shall" be acquired in trust, as well as some additional restriction on the Secretary's discretion. *See* Memorandum dated April 17, 2002, from the Deputy Commissioner of Indian Affairs regarding "Processing of Mandatory Lands into Trust Applications." Here, the Gila Bend Act meets both of these requirements. The Act includes the word "shall" and limits the Secretary's discretion by limiting acquisitions under the Act to a specific geographic area. Gila Bend Act, section 6(d). The Field Solicitor, Phoenix Field Office, has repeatedly found the

Gila Bend Act to be a mandatory acquisition statute, most recently in an opinion dated April 30, 2009, (*OIG Exhibit 1A*).

Before land is eligible for acquisition under the Gila Bend Act, section 6(d) requires the Secretary to determine if certain conditions are met:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

As discussed below, the Secretary concludes that Parcel 2 meets all the requirements of section 6(d), and its acquisition is therefore mandatory.

County location

Section 6(d) requires that land acquired pursuant to the Gila Bend Act be within the counties of Maricopa, Pinal or Pima. Parcel 2 lies wholly within Maricopa County, and therefore, meets this requirement (*OIG Tab 1*).

Location within or without "corporate limits"

Section 6(d) also requires that land acquired pursuant to the Gila Bend Act not be "within the corporate limits of any city or town." Though Parcel 2 sits in an unincorporated island within the City of Glendale's broader geographical boundary, the City of Glendale has never annexed Parcel 2, and the parcel receives no regular services from the City (*OIG Tab 1*). The parcel is unincorporated land under the jurisdiction of Maricopa County (*OIG Tab 1*).

In addressing whether the Glendale Parcels meet the "corporate limits" requirement, the Field Solicitor initially reviewed applicable facts, Arizona law, and Federal law to determine whether or not the Glendale parcels are within the "corporate limits" of the City.[2] The Field Solicitor reasoned that Arizona law leads to the conclusion that the Glendale parcels are not part of the City of Glendale because they are not within the City's "corporate limits" as that term is used by Arizona's statutes and courts. The Field Solicitor concluded that Arizona law supports the

[2] The Field Solicitor completed his analysis prior to the state court ruling in *Tohono O'odham Nation v. City of Glendale*. His analysis does not, therefore, distinguish between Parcel 2 and the remaining Glendale parcels. (*OIG Tab 1*).

interpretation that the term "corporate limits" is a term of art delineating the incorporated area of a city.[3]

In reaching a final determination as to whether Parcel 2 is within the City of Glendale's corporate limits, we have reviewed the numerous submissions and legal arguments presented by the Nation, the City, and the Gila River Indian Community.[4] We find that Parcel 2 is not "within the corporate limits of any city or town." We base our conclusion on the plain meaning of "corporate limits," as used by Congress in the Gila Bend Act.

While there is no statutory definition of "corporate limits" in the Gila Bend Act, the plain meaning of the phrase is clear. The use of "corporate limits" shows a clear intent to make a given piece of property eligible under the Act if it is on the unincorporated side of a city's boundary line.[5] Congress chose to use the term "corporate limits" in the Gila Bend Act, rather than phrases that would have expressed the intent to further insulate cities from trust acquisition, such as "exterior boundary,""within one mile of any city or town," or even "city limits." If Congress had intended the "corporate limits" bar to extend beyond a city's boundary lines, it would have stated so. Annexation is a recognized practice for increasing corporate limits, but the City of Glendale has never annexed Parcel 2, and it is therefore not within the City's corporate limit. Nor, as the Field Solicitor found, does Arizona law clearly support a conclusion that Parcel 2 is within the "corporate limits" of the City of Glendale. Parcel 2 therefore meets the "corporate limit" requirement of section 6(d) of the Gila Bend Act.[6]

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[3] *See Speros v. Yu*, 207 Ariz. 153, 159 (2004) ("It is possible for property to be within the exterior boundary of a city yet not be part of that city"); *Sanderson Lincoln Mercury Inc. v. Ford Motor Company*, 205 Ariz. 202, 206 (2003) ("It follows that an area excluded from the defined area of incorporation is not part of the city, as is true of a county island."). Opponents to the Nation's application rely on *Flagstaff Vending Company v. Flagstaff*, 118 Ariz. 556 (1978), to argue that the Glendale parcels are within corporate limits. *Flagstaff* is limited by the holdings in *Speros* and *Sanderson*, and is distinguishable, from the present facts in this dispute. In *Flagstaff*, the land in question had previously been annexed by the City whereas the Nation's Parcel 2 has never been annexed. The Court in *Flagstaff* also found that the relevant land received fire protection from the city, whereas the Nation's Parcel 2 does not receive any regular services from the City.

[4] Gila River Indian Community and City Glendale have submitted various legal arguments claiming that the 134.88 acres (including Parcel 2) are located "within the corporate limits" of the City. Essentially, Glendale and Gila River argue that the 134.88 are located within the geographic boundaries of Glendale. As this determination makes clear, however, the Gila Bend Act's use of the phrase "within the corporate limits of any city or town" requires the Department to analyze the jurisdictional nature of the fee land in question rather than the geographic location.

[5] *Black's Law Dictionary* defines the noun "limit" as: "a bound, a restriction; a restraint; a circumscription, boundary, border or outer line of thing. Extent of power, right or authority conferred." *Black's Law Dictionary 6th Ed.*, at 926. The plain language of the term "corporate limits" is thus a boundary or border of the corporate body, which in this case is the City of Glendale.

[6] The Field Solicitor applied the canon of construction from Federal Indian law and Indian jurisprudence that "statutes are to be construed liberally in favor of the Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-768 (1985)). The Field Solicitor found that applying this canon to the "corporate limits" language of the Gila Bend Act leads to a finding that the Glendale parcels are not within the City's "corporate limits." The canon is unnecessary here because we have determined that the meaning of "corporate limits" is plain. Even if Congress's intent was less clear, however, we interpret the term not to support a conclusion that Parcel 2 is ineligible under the Act, with or without consideration of the canon.

Number of parcels acquired

Section 6(d) further requires that acquisitions pursuant to the Gila Bend Act meet the requirements of this Act only if they "constitute not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village." The provision goes on, however, to allow the Secretary to "waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate."

The Nation applied for two parcels to be acquired in trust pursuant to the Gila Bend Act prior to its application for the Glendale property.[7] The first, and so far only, land acquired in trust for the Nation pursuant to the Gila Bend Act was acquired on September 28, 2004, when the United States acquired 3,200.53 acres on behalf of the Nation (*OIG Tab 1*). This parcel is located near the City of Casa Grande, Arizona, and while formerly known as the Schramm Ranch, it is now referred to as San Lucy Farms. The second application to acquire land pursuant to the Gila Bend Act was for a parcel known as the Painted Rock property, consisting of 3,759.52 acres (*OIG Tab 1*). This parcel is owned in fee by the Nation and has not been acquired in trust for the Nation (*OIG Tab 1*) and, therefore, is not included in an analysis of the number of acquisitions under the Gila Bend Act. With the acquisition of the Glendale property and San Lucy Farms, there will have been only two areas acquired in trust pursuant to the Gila Bend Act.

In summary, the requirements of section 6(d) have been met.

National Environmental Policy Act (NEPA)

Although NEPA compliance is generally required on trust acquisitions under the provisions of 25 CFR §151.10, as well as the terms of NEPA and the Council on Environmental Quality (CEQ) regulations, NEPA compliance is not required for non discretionary actions. *See, e.g., Accord Minnesota v. Block*, 660 F.2d 1240, 1259 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) ("Because the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decisionmakers fully consider the environmental impact of a contemplated action."); *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) ("The EIS process is supposed to inform the decision maker. This presupposes he has judgment to exercise."). In this instance the acquisition of Parcel 2 for the Nation is explicitly mandated by the Gila Bend Act, and NEPA is not, therefore, required.

[7] The Western Regional Director of the BIA, acting under authority of the Secretary, issued a waiver under Section 6(d) on May 31, 2000, that allowed the Nation to purchase up to five (5) separate areas of replacement lands, rather than three, and further waived the requirement that one of these areas be contiguous to the San Lucy reservation. However, since the Nation has to date only acquired in trust one such replacement area, this waiver is not directly pertinent to this analysis.

Hazardous Substance Determination

The BIA must comply with the requirements of Departmental Manual at 602 DM 2, Land Acquisitions: Hazardous Substance Determinations, to determine whether potential environmental liabilities may exist.

In a memorandum dated June 18, 2009, to the Regional Realty Officer, the Regional Environmental Specialist provided assurances that appropriate inquiry, assessment, and review had been conducted in accordance with 602 DM 2 to support acceptance of the land in trust status without any prior remedial action being required (*OIG Exhibit 1B*).

COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT

The Nation withdrew its request for an Indian lands opinion in a letter to then-Deputy Assistant Secretary Skibine, Director Hart and Director Anspach, dated July 17, 2009. Nonetheless, the Nation must comply with all applicable requirements of the Indian Gaming Regulatory Act (IGRA) in order to game on Parcel 2. Because the land will be acquired in trust after October 18, 1988, the Nation must comply with 25 U.S.C. § 2719 before engaging in any gaming activities on the land. This final determination on the Nation's application to take land into trust does not address or determine the Nation's eligibility to game on Parcel 2 under IGRA.

The Tohono O'odham Nation and the State of Arizona entered into a Class III gaming compact that was approved on July 30, 1993, and a notice of effect was published in the *Federal Register* on August 18, 1993. The compact was subsequently amended and approved on January 24, 2003, and the notice of effect published on February 5, 2003.

The Tohono O'odham Nation Gaming Ordinance was approved by the National Indian Gaming Commission (NIGC) on October 15, 1993, and subsequently amended and approved by the NIGC on September 29, 1997, on July 30, 1999, on May 7, 2003, and on August 17, 2007.

DECISION

Our evaluation of the Nation's request indicates that the legal requirements under the Gila Bend Act for acquiring Parcel 2 in trust have been satisfied. The Regional Director, Western Region, will be authorized to approve the conveyance document accepting the property in trust for the Nation subject to any condition set forth herein, approval of all title requirements by the Office of the Regional Solicitor, and expiration of the thirty day period following publication in the *Federal Register* of the notice required in 25 C.F.R. § 151.12(b). Per the Nation's request, consideration of the remaining Glendale parcels will be held in abeyance.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs