

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

July 8, 2015

Randall Trickey, Realty Officer
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, Tennessee 37214

Re: Quapaw Tribe of Oklahoma (the O-Gah-Pah)

Dear Randall:

I recently received the comments provided by the Governor of Arkansas concerning the Quapaw Tribe of Oklahoma's pending fee-to-trust application relating to a tract of land within Pulaski County. I respect Governor Hutchinson, and I appreciate very much that, while he stated he could not support the Tribe's application at this time, he did not go as far as stating his opposition to the trust acquisition. As evidenced by the attachments, the Governor's letter is addressed to certain issues raised by various persons in his administration and in state government. While Governor Hutchinson certainly is entitled to his viewpoint on these matters, some of the issues raised by his advisors reflect a misunderstanding of the issues and the processes and procedures involved in fee-to-trust acquisitions. For that reason, I respectfully would like to add my responses and further comments for the record.

The principal matters addressed in Governor Hutchinson's letter relate to (1) cultural issues, including the Quapaw Tribe's affiliation with the historical sites on the land at issue, (2) the misperception that the Tribe is seeking to have the tract acquired into trust for purposes of gaming, and (3) certain other questions and concerns relating to fee-to-trust acquisitions, including jurisdictional matters and the Bureau of Indian Affairs' application of the trust acquisition regulations in 25 C.F.R. Part 151. I will address each of these key points briefly, so that you have the benefit of the Tribe's perspective on these issues.

Cultural Matters

Many or most of Governor Hutchinson's comments relate to the cultural significance of the land at issue to the Quapaw Tribe and/or the benefits for cultural protection that would be achieved through a conveyance of the tracts into trust. As I noted, I believe the input the Governor received in this area reflects some misunderstandings about not only the site itself but also about the applicable law and the determinations in this area previously made by the state.

1. *Quapaw Tribe's Cultural Affiliation with the Burial Sites on the Land.* Many of Governor Hutchinson's comments relating to cultural issues perhaps can be summed up by his statement that the fee-to-trust application "does not offer definitive proof" identifying the burial

sites on the tracts as associated with the Tribe. There is, indeed, substantial evidence identifying these burial sites as Quapaw, and the State of Arkansas already has accepted, for purposes of applicable law, archaeological sites in close proximity to Thibault Road tracts as Quapaw heritage sites.

Pursuant to the National Historic Preservation Act (the “NHPA”), consultation on an undertaking (e.g., ground-disturbing activities, etc.) is determined by whether a particular Indian tribe attaches religious and cultural significance to historic properties. Using the criteria set forth in Section 106 of the NHPA, the Quapaw are consulting parties on historic properties throughout Arkansas. In particular, the Arkansas Historic Preservation program recognizes the Quapaw Tribe as the tribe with which it must consult in Pulaski County, and in other surrounding counties, as does Arkansas State Highways, the Arkansas Department of Parks and Tourism, the Arkansas State Archeologist, and the Arkansas Archeological Survey.

With respect to a burial site, cultural affiliation does not depend entirely on an individual tribe’s determination of its significance. The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (“NAGPRA”) sets forth the legal process by which cultural affiliation must be determined for purposes of federal law. NAGPRA applies a preponderance-of-the-evidence standard in determining whether the archaeological facts support a cultural affiliation of burial sites with a particular tribe. Additionally, NAGPRA sets forth a legal process under which such a determination is made.

Under the NAGPRA process, the State of Arkansas has determined that the Quapaw Tribe is affiliated with the archaeological sites of this age and type in Pulaski County, and in particular in the areas near the Thibault Road tracts. Specifically:

- The Quapaw Tribe has worked cooperatively with the state concerning Toltec Mounds State Park—including with the Arkansas Department of Parks and Tourism and the Arkansas Archeological Survey—to establish the first “Keep Safe Cemetery” for the secure and permanent reburial of repatriated American Indian remains. In 2003, a formal notice was published culturally affiliating the Quapaw Tribe to Toltec Mounds State Park. *See Nat’l Park Serv., Notice of Inventory Completion: Ark. Dep’t of Parks & Tourism, Ark. State Parks, Little Rock, AR, & Ark. Archeological Survey, Fayetteville, AR, 68 Fed. Reg. 66481-82 (Nov. 26, 2003).* Toltec Mounds State Park is in close proximity to the Thibault Road property and its associated archeological site (3PU1).
- The Quapaw have been associated with the Kinkead-Mainard site (3PU2), which is also in Pulaski County. The NAGPRA notice concerning the cultural affiliation of this site was published in 1999. *See Nat’l Park Serv., Notice of Inventory Completion for Native American Human Remains & Associated Funerary Objects in the Possession of the Univ. of Ark. Museum, Fayetteville, AR, 64 Fed. Reg. 46719 (Aug. 26, 1999).*

- The Keo site in Pulaski County has also been determined to be culturally affiliated with the Quapaw Tribe, along with Ink Bayou site (3PU252). A notice of this determination was published in 2005. See Nat'l Park. Serv., *NAGPRA Notice of Inventory Completion: The Univ. Museum, Univ. of Ark., Fayetteville, AR*, 78 Fed. Reg. 16842-43 (Apr. 1, 2005).
- The latest NAGPRA notice associating the Quapaw Tribe with sites in the vicinity was published in 2014, and included Native American human remains and associated funerary objects from the Goldsmith Oliver site (3PU306) in Pulaski County, as well as other sites in Arkansas. See Nat'l Park Serv., *Notice of Inventory Completion: Ark. Archeological Survey, Fayetteville, AR*, 79 Fed. Reg. 76351-61 (Dec. 22, 2014). The Goldsmith Oliver site is located within the jurisdiction of the Bill and Hillary Clinton National Airport, and the Tribe also worked with the appropriate federal agency to mitigate impacts to that site during airport expansion.

Additionally, the State of Arkansas has recognized the burials on the land adjacent to the Thibault Road properties as Quapaw burials. In 2008 the Quapaw Tribe worked cooperatively with the Arkansas Archeological Survey and the State Archeologist, Dr. Early, and the Wellspun Company with regard to mitigating the ancestral burials on that land. (Ex. A to Gov. Hutchinson's Letter.) Although this work did not result in the publication of a formal NAGPRA notice, the state unquestionably recognized the Tribe's association with the site and these burials.

The Quapaw Tribe has worked collaboratively with the State of Arkansas over many years. As a result, there is a long record of determinations by the State of Arkansas—both formal, for purposes of law, and informal—that support the conclusion that the burial sites on the Thibault Road tracts are, indeed, ancestral Quapaw sites. I believe that what the Governor has been told by certain state agencies amounts only to a scholarly debate about points that really do not matter in the consideration of the Tribe's fee-to-trust application. Nevertheless, there should be no real doubt about the Tribe's established cultural affiliation with these sites and to this land, as recognized by the state under the NAGPRA and other processes.

2. *Reason the Quapaw Tribe Wants to Have the Land Taken into Trust.*
Some of the comments provided to Governor Hutchinson expressed the view that the Quapaw Tribe has not provided a valid reason for seeking to have the Thibault Road tracts placed into trust, or perhaps that such an acquisition is not necessary. Again, respectfully, I want to make clear that the comments in the Governor's letter appear to reflect a lack of understanding of the importance the Quapaw Tribe places on this land, and the importance to the Tribe in having this land taken into trust.

The history of the Quapaw Tribe is well-documented, but I feel the need to say again that Arkansas—particularly the last area of the state in which our Tribe lived—holds a special place in our hearts. The Quapaw were known as the Arkansa until the United States purchased the Louisiana Territory from France. It was only after the United States took control of the Louisiana territory that the Arkansa came to be known as the Quapaw. Arkansas *is* our

Mr. Randall Trickey
July 8, 2015
Page 4

homeland. The Quapaw are from Arkansas, twice removed. The first removal was to Louisiana, where approximately a third of the Tribe died of starvation and disease. The second removal from Arkansas was to Indian Territory, but not before the Quapaw offered to lose their identity as a tribe and use what monies they had to purchase the land so they could stay in their homeland. Paid only 1/12 of a cent per acre for ceded lands, the Quapaw were again removed. The Tribe has come full circle and has fulfilled the dream of our ancestors—to return and purchase land in our native homeland.

I do want to acknowledge that the importance to the Quapaw Tribe of having trust land in Arkansas is very difficult for non-Indians to understand. The best I can do is to explain, again, that the Tribe is seeking to have this land placed into trust because of the significance the Quapaw people place in having this connection to our original homeland in Arkansas, and in particular to this area, which was the last area of that homeland in which Quapaw were permitted to live.

3. *The Tribe's Desire to Have the Culturally Significant Sites on the Land Protected through a Trust Acquisition.* Governor Hutchinson's comments also make the point that it should not be necessary for the Quapaw Tribe to apply to have the land taken into trust to provide additional protection for the cultural sites on the Thibault Road tracts. The Governor's letter also expresses concerns that trust status may make it difficult for the state to protect the African-American burial sites on the tracts. In my view, these comments, which were based upon statements provided to the Governor by others, amount to nothing more than a pretext by some individuals to oppose the application.

The fact that slaves were buried on top of or adjacent to the Quapaw burial mounds on the land does not change the Quapaw Tribe's desire to have this land taken into trust. I would like to point out, respectfully, that it is the Tribe—not the state—that has expressed an interest in preserving and protecting both the Quapaw burial sites and those of the African-American slaves. In fact, our people and these African-Americans share a great deal in common in their experiences in this country. Further, I am advised that there have been longtime efforts on the part of African-Americans in Arkansas to get the state to recognize and invest in the protection of such burial sites, without much result. The Tribe, as both landowner and as a tribal government, is in a unique position to protect the heritage of all of these sites, when the state appears to have neither the desire nor the resources to do so.

I also respectfully disagree with the comment that the State of Arkansas can and will protect Quapaw heritage on the tracts adequately, and that trust status would impede the state's ability to do so. As a Presidential appointee, I served as the Native American/Native Hawaiian member of the federal Advisory Council on Historic Preservation from 2008 to 2012. Through that experience, I have learned first-hand that site preservation is better on federal lands than on lands held in private or state ownership. In fact, the regulations implementing the NHPA state that the "[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the

Mr. Randall Trickey
July 8, 2015
Page 5

property's historic significance" is an example of an "adverse effect." 43 C.F.R. § 800.5(vii). This recognizes the risks inherent in land being owned privately in fee, and the importance of having a culturally significant site, which may be eligible for listing on the National Register of Historic Places, in federal trust. Moreover, the historic properties that are located within the 160-acres subject to the Tribe's fee-to-trust application are not cultural "artifacts," as suggested in Judge Hyde's letter attached to the Governor's comments. Rather, the sites are burial mounds and graves that are of religious and cultural significance to the Quapaw, and that are a part of the land.

Federal laws providing protection to lands held in trust by the federal government include, but are not limited to, the following:

- National Historic Preservation Act
- Antiquities Act
- Archeological Resources Protection Act
- Native American Graves Protection and Repatriation Act
- Executive Orders and Presidential Memoranda, including E.O. 13007, Sacred Sites

When violations do occur on federal lands, federal investigators generally are better trained in cultural resource violations than are state officers, and the penalties under federal law are usually stricter than under state laws.

Overall, I must disagree with the Governor's expressed confidence in the legal ability and resources of the State of Arkansas to protect sites such as those on the Thibault Road tracts. Our Tribe has observed in recent years extensive looting of Quapaw graves and burial sites in Arkansas, with state authorities often in a position of not having available adequate state laws to protect such sites or to deter such plundering. In fact, Arkansas state officials frequently advise us that they are hampered in their efforts to prevent pot hunters from robbing graves by the lack of adequate state laws, and in particular by Arkansas laws that seem to give landowners the right of ownership over many artifacts.

Concerning the burial sites that are not American Indian on the 160-acres, I reiterate that the Quapaw Tribe has a firm commitment to preserving the Thibault slave cemetery, and to working collaboratively with the organization, Preservation for African American Cemeteries, to do so. Other historic sites located within the perimeter will also be protected and preserved by the Tribe in accordance with appropriate federal authorities and with proper coordination with Arkansas historic preservation authorities. The application of federal law on federal land provides the best possible protection for the sites on the Thibault Road tracts. Most importantly,

the Tribe cares the most of any government about its cultural heritage, and will take the best care of preserving these sites.

Concerns About Future Gaming

While Governor Hutchinson's comments do not mention gaming, the suggestion that the Quapaw Tribe intends to use the land for gaming at some point in the future appears in certain of the attachments, including in the memorandum prepared by the Office of the Attorney General and in a letter prepared by the Arkansas Racing Commission. I believe the specter of gaming is being raised by third-parties without justification and solely as a reason to oppose the application. Nevertheless, I would like to briefly address this issue again.

1. *Misperception that the Tribe is Seeking to Have the Thibault Road Tracts Acquired into Trust for Purposes of Gaming.* I think this concern incorrectly assumes that any trust land can be used for gaming, and ignores the many requirements under law that the Quapaw Tribe would be required to satisfy before gaming could occur on this or any tract. In general, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*, prohibits gaming on Indian trust lands acquired after October 1988, unless certain statutory exceptions can be satisfied. *See id.* § 2719(a). Additionally, Indian gaming facilities must be licensed to ensure that they are in compliance with federal law. *See* 25 C.F.R. Part 559. It is not possible, as some parties appear to be suggesting, for a tribe to simply set up gaming on any trust land without federal oversight. The suggestion to the contrary reflects a misunderstanding of federal law.

The Tribe has stated, unequivocally, in a letter to the Assistant Secretary, which was provided to you for inclusion in the file concerning the application, that it will not use this land for gaming. The Tribe has been direct and forthcoming with the Governor and other state officers and agencies concerning its commitment not to seek to conduct gaming on this land. I do not believe this issue fairly should prevent the acquisition of these tracts into trust.

2. *Further Assurances that Gaming Will Not Be Conducted on the Land.* Although I do not believe it is necessary, the Quapaw Tribe will provide further assurances that it will not seek to conduct gaming on the Thibault Road tracts, including entering into an appropriate intergovernmental agreement with the state. Such agreements have been deemed to be enforceable in other instances, and to prevent the issuance of licenses for tribal casinos. If this remains an issue, the Tribe is open to considering any other appropriate means for satisfying the Governor and other state authorities that the Tribe will not seek to conduct gaming on these tracts.

Other Concerns About Fee-to-Trust Acquisitions

Finally, the attachments to the Governor's comments raise a number of concerns about fee-to-trust acquisitions in general, although for the most part they do not appear to be specific to the Quapaw Tribe. In particular, the Attorney General's memo contains a laundry list of concerns about activities in which Indian tribes *might* engage—again, not concerns specific to

Mr. Randall Trickey
July 8, 2015
Page 7

the Quapaw Tribe—which I do not think fairly should justify a denial of the Tribe’s pending application. I think it is also noteworthy that the former Arkansas Attorney General, Dustin McDaniel, provided a letter of support for the fee-to-trust application last fall. Nevertheless, I would like to respond briefly to the matters raised in the memo and other attachments to the Governor’s letter.

1. *Concerns that Trust Land Would Present Jurisdictional Issues.* It is difficult for me to provide a response to the kinds of concerns addressed in the Attorney General’s memo, because they appear to be a list of perceived horrors about Indian tribes in general, and I do not think they are fair or accurate, and at the least they reflect a lack of understanding about tribal sovereignty. The Quapaw Tribe has a long record of working with the states in which it is located or in which it has program or other jurisdiction—including Arkansas. I think it is unwarranted to suggest that the Tribe will set up any of a range of activities offensive to the state on the land that is subject to the fee-to-trust application. If Governor Hutchinson has any specific concerns in these areas, we will be glad to discuss them with him and his, and, as I have suggested on many occasions in this process, we would be willing to enter into intergovernmental agreements to address and resolve them.

One overriding point that concerns me is the suggestion that the state’s authority and jurisdiction would be threatened by the trust acquisition of a mere 160 acres, for which the Tribe has no plans for any change in use. Trust land is land the title to which is held in the name of the United States, and Arkansas, like most states, contains a substantial amount of such federal land. I believe the Governor and other state officers are applying a heightened scrutiny to the Tribe’s request to have a relatively small amount of land transferred to federal ownership, than they would in other instances of a federal acquisition.

2. *Concern that the Tribe Has Not Followed the Correct Process for Acquisition of Land into Trust.* The Attorney General’s memo is addressed at length to a discussion about whether the Tribe’s application under 25 C.F.R. § 151.10 is appropriate as a so-called “on-reservation” acquisition, in accordance with the definition of an Indian reservation as set forth in 25 C.F.R. § 151.2(f). The Tribe, in fact, filed the application consistent with previous determinations by the Bureau of Indian Affairs with respect to similar lands. These regulations are unique to Indian land acquisitions, and I believe your office is best equipped to interpret and apply them, consistent with the agency’s discretion. I also believe the Tribe’s application was made pursuant to the correct law, and that it is complete.

The Attorney General’s legal analysis is incorrect in its broad-sweeping conclusion that only Congress may confirm a former reservation as having been disestablished, and that Congress has taken no such action with respect to the Tribe’s former reservation in Arkansas. There should be no dispute, as the Tribe stated in the application, that the Tribe’s 1818 treaty set aside a formal reservation in present day central Arkansas, and that this reservation was disestablished through the 1824 treaty removing the Tribe to Louisiana. These treaties were ratified by Congress, and therefore reflect congressional action both establishing and disestablishing the reservation. Further, the decisions cited by the Tribe in its application reflect

Mr. Randall Trickey
July 8, 2015
Page 8

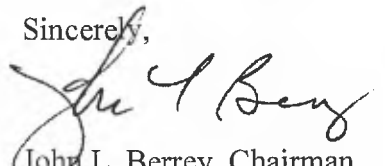
on their face judicial determinations that the Tribe's former reservation in Arkansas was disestablished. The premise of the Attorney General's analysis is that courts can never determine that an Indian reservation has been disestablished is incorrect.

Finally, the Attorney General is also incorrect in stating that the Quapaw Tribe has not satisfied the environmental requirements for a fee-to-trust application, in particular the requirements under the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* In fact, the Tribe submitted an environmental phase I study concerning the land, which satisfies the requirements in this instance. The Attorney General's stated view that much more should be required is not consistent with applicable law.

As I stated at the outset, I have a great deal of respect for Governor Hutchinson, and I met and have worked with him and his office on various matters. My comments are not intended to be critical of him, although I believe his letter, and in particular some of the attachments, express concerns about the Tribe's fee-to-trust application that reflect misunderstandings, or that are otherwise unwarranted. I believe the Quapaw Tribe has submitted an application to have the Thibault Road tracts taken into trust that is complete, that satisfies the requirements of law, and that should be approved. Regardless of the Bureau's decision on the application, the Tribe and I will continue to work with Governor Hutchinson and with the State of Arkansas cooperatively and collaboratively on matters of importance to both the Tribe and the state.

I appreciate very much your consideration of these comments. Please do not hesitate to contact me if you have any additional questions, or if there are other matters you would like for the Quapaw Tribe to address.

Sincerely,



John L. Berrey, Chairman
Quapaw Tribe of Oklahoma

JLB/

cc: Quapaw Tribal Business Committee
Kevin K. Washburn, Assistant Secretary—Indian Affairs