To: NIGC Acting General Counsel

From: Cindy Shaw, Senior Attorney

Date: March 14, 2005

Subject: Tribal jurisdiction over gaming on fee land at White Earth Reservation

ISSUE

Can the State of Minnesota regulate pull-tabs sold on fee land owned by non-tribal members within the exterior boundaries of the White Earth Reservation?

SHORT ANSWER

No, the State of Minnesota has no jurisdiction over gaming on the White Earth Reservation because the gaming takes place within the exterior boundaries of the reservation and is therefore Indian gaming under the Indian Gaming Regulatory Act (IGRA), which pre-empts state jurisdiction.

BACKGROUND OF THE ISSUE

U.S. Attorney for Minnesota Thomas B. Heffelfinger and the Commissioner of the Minnesota Department of Public Safety asked the NIGC Office of General Counsel (OGC) for an opinion on whether the State of Minnesota has jurisdiction over pull-tab sales on the White Earth Reservation. The pull-tabs are being sold on fee land that is located within the exterior boundaries of the White Earth Band of Chippewa Indians (Band or Tribe) reservation in White Earth, Minnesota. Of the thirteen (13) fee-land gaming operations as of this date, approximately four (4) are on land owned by enrolled members of the Band.[1] The remaining operations—which are the focus of this memorandum—are on fee lands owned by non-tribal members (Exh. 9).

The existence of fee lands within the White Earth Reservation is the result of the land's history. White Earth's lands, like much of Indian country, has been subject to the federal government's many and sometime contradictory federal Indian policies, including treaty making that created communal rights to the land, legislation partitioning the land into individual allotments, diminishment, and preservation through federal taking into trust.[2] Each of these policies shaped the Reservation today. Particularly at issue here is the effect of allotments, which allowed land to be transferred in fee. The allotment policy created a checkerboard pattern of ownership within the Reservation, with some of the land within the reservation owned in trust by the U.S. government on behalf of the Tribe and some converted to fee land, owned by individuals who may or may not be members of the Tribe. As to the sale of pull-tabs within the Reservation, all of the establishments selling pull-tabs on the White Earth reservation are licensed by the White Earth Tribal Council, which also serves as the tribal gaming commission.[3]

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[1] September 22, 2002, Report from NIGC Field Investigator John Guerber to Region Chief John Peterson (Report).

[2] *See, e.g.,* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Authority over Nonmembers*, 109 Yale L.J. 1, 15 (1999).

[3] September 25, 2002, Memorandum from Region IV Chief John Peterson, to Penny Coleman, Alan Fedman, and Cynthia Omberg.

The State of Minnesota seeks authority over the gaming on non-Indian fee land at White Earth. On August 28, 2002, the Minnesota Alcohol & Gambling Enforcement Division (A&GED) of the Minnesota Department of Public Safety (MDPS) met with NIGC's Region IV Region Chief John Peterson and Field Investigator John Guerber.[4] At the meeting, the A&GED gave the NIGC representatives a copy of a complaint received by the State Attorney General questioning whether the gaming being conducted on the fee land at White Earth was legal. On October 15, 2002, the MDPS formally requested OGC's opinion on the matter.[5] Then-Commissioner of MDPS, Charlie Weaver, stated in the letter, "Our reading of IGRA seems to indicate this [the sale of pull-tabs and play of bingo] is not lawful because it is not occurring on Indian land as it is defined in that act." Mr. Weaver argued that the State of Minnesota has an interest in the matter for a number of reasons: loss of tax revenue; loss of revenue to state-licensed distributors and charitable organizations; and the propensity of the gaming being conducted to lead to forms of gambling that are illegal in Minnesota. We note, furthermore, that Minnesota (except for the Red Lake Reservation) has criminal and civil jurisdiction over Indian country pursuant to P.L. 280. *See* 18 U.S.C. §1162(a) (criminal jurisdiction) and 28 U.S.C. §1369(a) (civil jurisdiction).

Minnesota is not alone in questioning whether states have jurisdiction over non-member fee land within reservations. As state economies become more challenged and Indian gaming becomes more lucrative, states increasingly look to gaming as a source of revenue. The NIGC Office of General Counsel has several Indian lands questions pending from other states that wish either to tax gaming on non-member fee land or to conduct state gaming within a reservation's boundaries. In all cases, the essential question is who has jurisdiction.

Having evaluated the history of the White Earth reservation and statutory language of IGRA, we conclude that the White Earth Band has jurisdiction over the non-member owned fee land. This is because the fee land on which gaming is conducted at White Earth is Indian lands, the gaming being conducted is therefore Indian gaming under IGRA, and, because IGRA is pre-emptive, the Tribe, not the State of Minnesota, has regulatory jurisdiction over the gaming taking place at White Earth.

HISTORY OF WHITE EARTH RESERVATION

The White Earth Reservation covers a large expanse of land in northwestern Minnesota. The Reservation was created through the Treaty of 1867, which carved out an 837,268-acre reserve on land that had previously not been claimed by any one Band. The intent of the treaty was to move all the Minnesota Chippewa Indians onto one reservation, creating a place where they could "conquer poverty by [their] own exertions."[6] Subsequently, the Mississippi Band of Ojibwa (Chippewa), Lake Superior Band of Ojibwa, Pembina, and Pillager bands settled within the Reservation. Indian settlers at White Earth included both full-bloods and half-bloods.

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[4] Report.

[5] October 15, 2002, letter from MDPS Commissioner Charlie Weaver to NIGC Acting General Counsel Penny Coleman.

[6] Quotation from "Chippewa Indians in Minnesota," House Executive Documents 2747, no. 247, 51 Congress, I Session, (1890): 190, cited in The White Earth Tragedy Ethnicity and Dispossession at a Minnesota Anishinaabe Reservation, Meyer, University of Nebraska Press, 1994, p.1.

In 1887, Congress's enactment of the General Allotment Act (Dawes Act) allowed for general allotment and cession of Indian lands throughout the United States. 24 Stat. 388. In 1889, Congress passed the Nelson Act, which applied the principles of the Dawes Act to Minnesota Indians in particular. The Nelson Act provided for cession of all Chippewa Indian lands in Minnesota except for those at White Earth and Red Lake:

> [T]here Commissioners…shall...negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations….

50 Cong. Ch. 24; 25 Stat. 642.

The Nelson Act also provided that the reservation at White Earth was to be partitioned into allotments for Minnesota Chippewa who had been dispossessed of their former reservations:

> except those on the Red Lake Reservation, [the Indians] shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon…be allotted lands in severalty."

Id. As to both White Earth and Red Lake, the Nelson Act provided that land in surplus of the allotment was to be ceded. *Id.* (allotments to be limited to "so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts..."). Once surplus lands were ceded, examiners were to survey the land to determine where there was pine timber. Forty-acres lots could be sold at a cash value according to the examiner's "best judgment and information," not to be less than $3 per thousand feet of timber. Settlers of non-pine timberland, that is, agricultural lands, were to pay the United States $1.25 per acre. The proceeds from the ceded land and timber were to be placed in a fund for the Minnesota Chippewa (also called Anishinaabe or Ojibwe).

The Nelson Act had yet another component which diminished the White Earth Reservation. Pursuant to the Act, the Band and the United States agreed that the Band did "grant, cede, relinquish and convey to the United States [the]…right, title and interest" in four of the reservation's 36 townships. *White Earth Band of Chippewa Indians v. Alexander,* 518 F. Supp. 527, 531 (1981) (quoting July 20, 1889, agreement); *aff'd* 683 F.2d 1129 (8th Cir. 1982). The loss of the four townships, on the northeastern section of the reservation, reduced the size of the reservation by 92,000 acres. *Id.* Approximately 2,900 of these were returned to trust status following enactment of the Indian Reorganization Act in 1934. *Id.* The Minnesota Supreme Court held that the remaining 32 of the original 36 townships on the reservation were not disestablished. *State v. Clark*, 282 N.W. 2d 902 (Minn. 1979), *cert. denied* 445 U.S. 904 (1980) (state lacked jurisdiction over Band members' hunting and fishing on remaining 32 townships).

The 1900s produced several acts designed to enable non-Indian acquisition of Anishinaabe land and resources. The 1902 "Dead Allotment Act" allowed adult heirs of deceased allottees at White Earth to sell their inherited allotments. On April 21, 1904, the 1904 "Clapp Rider" was

enacted which authorized Chippewa of Minnesota to sell timber on their allotments (Exh. 3, p. 6). Seven days later, the Steenerson Act passed, allowing additional 80-acre allotments to White Earth Indians under the Dawes Act.[7] Insufficient land existed at White Earth to give every eligible tribal member an allotment, however (Exh. 4, p. 3). As a result, all reservation land was allottable. In 1906 Congress enacted a second Clapp Rider. Called the "Clapp Act," it removed all restrictions on sale of allotted land at White Earth by both mixed- and full-blood Indians (Exh. 3, p. 7). *See also U.S. v. First National Bank of Detroit, Minnesota,* 234 U.S. 245, 257 (1914).

With the enactment of the Indian Reorganization Act in 1934, Congress repudiated the philosophy of assimilation behind the Dawes Act. As to White Earth in particular, in 1979, the Secretary of the Interior determined that many of the conveyances of allotted land at White Earth had been ineffective because the allottees' interests had been terminated in violation of trust deed restrictions. The result was the 1986 enactment of the "White Earth Reservation Land Settlement Act of 1985," 25 U.S.C. 331 note (Supp. V 1987). Intended to settle title to allotted reservation lands, the Act gave allottees at most two years to sue to recover title to lands, and provided that allottees who did not sue would be compensated based on the market value of the land as of the date of the alleged invalid conveyance, plus interest. Allottees could challenge the adequacy of the compensation.

As a result of this history, land within the White Earth Reservation today is owned in several ways, creating a checkerboard of land ownership status. The Band estimates that 9 percent or 77,000 acres of the Reservation is tribally owned (Exh. 7, p. 1). In addition to trust land, some land is owned in fee by tribal members, some is fee land owned by nonmembers, and some is owned by the State of Minnesota and one of three counties on which the Reservation is located (Exh. 7, Map 6).

The population of the Reservation is also varied. Figures from the 2000 Census indicate that 43.8% of the population, or 4,029 people, are identified as at least part Indian, while 55.5%, or 5,105 people, are identified as "White" only (Exh. 15). Small percentages of African American, Asian, and other ethnicities are also represented on the reservation. *Id.*

7 "…to those Indians who may remove to said reservation who are entitled to take an allotment…one hundred and sixty acres of lands…Provided, That where an allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which together with the land already allotted, shall not exceed one hundred and sixty acres: And provided further, That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this act shall receive a pro rata allotment. Chap. 1786 Apr. 28, 1904 33 Stat., 539.

IGRA's Preemption over State Regulation

Generally, there exists a presumption that federal law does not pre-empt state regulation, particularly in a field that States have traditionally occupied**.** *See New York v. FERC*, 535 U.S. 1, 17-18 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (First, "[i]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). The presumption against federal preemption disappears, however, in the face of Congress's "clear and manifest purpose" to the contrary. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[8] Such purpose is evidenced when the field of regulation has been substantially occupied by federal authority for an extended period of time. *United States v. Locke*, 529 U.S. 89, 108 (2000); *Flagg v. Yonkers S&L Ass'n*, 396 F.3d 178, 183 (2nd Cir. 2005).

Indian affairs is a field with a long history of federal law taking precedent over state jurisdiction. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester* v. *Georgia*, 6 Pet. 515; 1 Stat. 469; 4 Stat. 729). As recently expressed by the U.S. Court of Appeals for the Ninth Circuit:

> The policy of leaving Indians free from State jurisdiction is deeply rooted in our Nation's history. *Rice v. Olson*, 324 U.S. 786, 789 (1945). In determining the extent of State jurisdiction over Indians, State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973). If faced with two reasonable constructions of Congress's intent, this Court resolves the matter in favor of the Indians. *Id.* at 174.

Gobin v. Snohomish County, 304 F. 3d 909 (9th Cir. 2002), *cert. denied* 538 U.S. 908 (2003).

IGRA is an heir to this history. The legislative history of the Act incorporates this history. The Senate Report on S. 555, which became IGRA, states:

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[8] "Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co*. v. *Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co*. v. *Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co*. v. *Varnville Co*., 237 U.S. 597; *New York Central R. Co*. v. *Winfield*, 244 U.S. 147; *Napier* v. *Atlantic Coast Line R. Co., supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U.S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory **[*231]** measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend* v. *Yeomans*, 301 U.S. 441; *Kelly* v. *Washington*, 302 U.S. 1; *South Carolina Highway Dept*. v. *Barnwell Bros*., 303 U.S. 177; *Union Brokerage Co*. v. *Jensen*, 322 U.S. 202." Rice v. Santa Fe Elevator Corp., 331 U.S. at 230.

> It is a long- and well-established principle of Federal-Indian law as expressed in the United State constitution, reflected in Federal statutes, and articulated in decisions of the Supreme court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

S.Rep. No.446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075.

More explicitly, IGRA's legislative history shows clear Congressional intent that the Act be preemptive. The Senate Report declares:

> S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Id. at 3076. [9]

Case law also acknowledges IGRA's preemptive effect. The U.S. Court of Appeals for the Eighth Circuit, in which White Earth falls, directly addressed this question. In *Gaming Corp. of America v. Dorsey & Whitney*, 88 F. 3d 536 (8th Cir. 1996), the Eighth Circuit held that IGRA completely preempted state law where the dispute—a management company's suit against a tribe's legal representatives—arose from the tribe's issuance of gaming licenses, which is covered by IGRA. "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law," the court ruled. *Id.* at 544. Likewise in *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), the Eighth Circuit held that the question of whether an activity is pre-empted by IGRA is determined by whether it occurs on Indian lands:

> As our opinion in Dorsey explained at length, the IGRA established a comprehensive regulatory regime for tribal gaming activities on Indian lands. Both the language of the statute and its legislative history refer only to gaming on Indian lands. See, e.g., 25 U.S.C. § 2701; S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, 3071-3083. The Indians' long-standing rights and interests in controlling activities on their tribal lands, and the States' correspondingly limited power to regulate activities on tribal lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force.

Id. at 1108. In short, the court ruled, states' powers are pre-empted where IGRA applies, and IGRA applies on Indian lands.

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[9] *See also* Additional Views of Mr. Evans, S.Rep. No. 446, 100th Cong., 2d Sess. 36 (1988) ("Finally, this bill should be construed as an explicit preemption of the field of gaming in Indian Country.").

There is some case law to the contrary. The federal district court for the Eastern District of Washington held in 1996 that IGRA did not prevent the State of Washington from conducting the state lottery on lands within the Yakama Indian Reservation. *Confederated Tribes and Bands of the Yakama Indian Nation v. Lowry*, 968 F. Supp. 531 (E. D. Wash. 1996) (order granting motion to dismiss; 968 F. Supp. 538 (E.D.Wash.1997) (Order denying motion for reconsideration); *vacated* 176 F.3d 47 (9th Cir. 1999).[10] That decision was vacated by the Ninth Circuit in 1999, however, albeit on the grounds that the State was immune from the Tribe's suit based on the State's Eleventh Amendment sovereign immunity. Because the action was "so clearly barred" by the Eleventh Amendment, the court deemed it inappropriate to determine "the more complex issues" raised by the case.

In an earlier case, which the *Yakama Nation* district court expressly declined to follow, 968 F. Supp. 531, 534, the Ninth Circuit had also addressed the issue of whether a state lottery could be run on Indian lands. In *Coeur d'Alene Tribe v. Idaho*, 842 F.Supp. 1268 (D. Idaho 1994), *aff'd* 51 F.3d 876 (9th Cir. 1995), *cert. denied* 516 U.S. 916 (1995), *rehearing denied* 516 U.S. 1018 (1995), the federal district court reasoned that IGRA allows state gaming regulations to apply on an Indian reservation. The authority of the state to conduct gaming was not absolute, however. Rather, the scope of state regulation was to be determined by negotiated compacts between tribes and the states, the court held. 968 F. Supp. at 1281. The state lottery was Class III gaming, the court said. *Id*. Lacking compacts, neither the tribes nor, more to the point, the State could conduct a lottery on the reservations, the court concluded. This reasoning confirms IGRA's preemptive character, allowing state regulation only under IGRA's provisions.

Case law thus establishes that, as to gaming on Indian lands, IGRA is completely preemptive, leaving states with no regulatory role except that which is negotiated under the Act. The State of Minnesota may therefore not regulate or tax gaming where IGRA applies. The question is then whether IGRA applies on fee lands within the exterior boundaries of the Reservation.

<u>What Constitutes "Indian Lands" at White Earth</u>

IGRA defines "Indian lands" as:

(A) all lands within the limits of any Indian reservation; and
(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

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[10] In that case, the Tribe had sued for injunctive relief stemming from the state's operation of the state lottery on tribal land. The State moved to dismiss the claim, which the district court granted. In doing so, the court found that the language and legislative history of IGRA showed no congressional intent to preempt State-operated gaming activity on tribal land. 968 F. Supp. at 534. In its Order denying the motion for reconsideration, the court expounded on its earlier decision, stating that the purpose of IGRA is to provide a statutory basis for the operation of Indian gaming and to provide a statutory basis for the regulation of gaming by an Indian tribe. "The state lottery is assuredly not 'gaming by an Indian tribe,'" the court said. 968 F. Supp. at 540. "[A]lthough as a general matter the IGRA is designed to benefit tribes, that benefit does not extend to taking a portion of the revenue derived from the operation of the state lottery on Indian lands," the court said. *Id.*

25 U.S.C. § 2703(4).

NIGC regulations further clarify the Indian lands definition:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either --
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

The land at issue in this matter is fee land within the exterior boundaries of the White Earth reservation. The land thus falls within the "limits" of the reservation and meets the definition of Indian lands under IGRA, 25 U.S.C. § 2703(4)(A), and NIGC's regulations, 25 C.F.R. §502.12(a).

In different circumstances, we would need to engage in a more lengthy analysis. If the land at issue were trust land, rather than within the limits of the reservation, we would need to engage in a two-part analysis: (1) examining if the land were held in trust or subject to restriction, and (2) determining whether the Tribe exercised governmental power over that land. *See* 25 C.F.R. § 502.12(b). Furthermore, in order to prove the Tribe's exercise of actual governmental power, we would also need to prove theoretical jurisdiction. *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213 (10th Cir. 2001) (*Miami III*). Since the land at issue at White Earth is not trust land, however, we need examine only one issue: whether the land is within the limits of the reservation. Finding that it is within the limits because it is within the exterior boundaries of the reservation, we conclude that the land is Indian lands and that IGRA therefore applies.

We note that IGRA's jurisdiction is not limited to gaming conducted by tribal entities or members. Rather, IGRA's jurisdiction runs with the land and allows gaming, even by non-tribal entities, that is conducted on Indian lands. 25 U.S.C. § 2710(b)(4)(A) ("A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described [below]…and are at least as restrictive as those established by State law…."). Gaming by non-tribal entities must meet certain requirements, however, for example, that 60 percent of the proceeds go to the tribe. *See* 25 U.S.C. § 2710(b)(4)(B). These same requirements apply to class III gaming. *See* 25 U.S.C. §2710(d)(1)(A)(ii).

In short, whether the State has jurisdiction at White Earth is not answered by whether the gaming is being conducted by non-tribal members. The answer lies in whether the activity is taking

place on Indian lands. IGRA does not apply—and the State is free to enforce its gambling laws—only if the land on which gaming is conducted is not Indian land. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Because IGRA's applicability is determined by the character of the land on which gaming is conducted rather than by who is conducting the gaming, we note that the situation at hand is not governed by the line of cases analyzing whether tribes have jurisdiction over non-members on non-Indian owned fee land within the reservation. The primary case in this line of cases is *Montana v. United States*, 450 U.S. 544 (1981). S*ee Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001) (*Montana* is "pathmarking case" on tribal regulatory authority over nonmembers). *Montana* and its progeny stand for the proposition that "…the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Montana*, 450 U.S. at 565. S*ee also Brendale v. Confederate Tribe and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (reaffirming *Montana* analysis in questions of tribal adjudicatory authority).[11] Because Congress has made IGRA's application dependent upon whether the gaming is conducted on Indian lands, not upon on whether the gaming is conducted by Indian or non-Indian people, we need not engage in a jurisdiction analysis under *Montana*.

Neither do we need to engage in a jurisdiction analysis under *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Under this analysis, if a reservation has been subject to a surplus land act that diminished the reservation, the land that subject to diminishment is no longer under the superintendence of the federal government and is no longer Indian country. *Id. at* 333 (1894 surplus land act contained statutory language showing Congress's intent to diminish the Yankton

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[11] The *Montana* court did not completely abolish tribal sovereignty over nonmembers, however. Acknowledging that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" *(Montana* at 565), it established two important exceptions to its general rule. The first exception is for nonmembers who have certain agreements with a tribe; the second is for activities by nonmembers that threaten a tribe's well-being:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers *who enter consensual relationships with the tribe or members*, through commercial dealing, contracts, leases, or other arrangements [cites omitted]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe* [emphases added].

450 U.S. at 565-566; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001).

Were a *Montana* analysis appropriate, that is, if the land in question were trust land, so that we needed to evaluate whether the Tribe had jurisdiction, we would find that the Tribe exercises jurisdiction. The gaming conducted on fee land within the White Earth reservation meets this exception by virtue of the license that each non-Indian owner of fee land applied for and was granted (See September 21, 2004, fax from White Earth Tribal Council Background Investigation/Compliance Department to Cindy Shaw). Each of these 13 licenses represents the specific kind of consensual economic agreement between non-members and Tribe that the *Montana* Court anticipated would preserve tribal authority over non-members when it announced the first exception: a "tribe may regulate, through taxation, *licensing*, or other means, the activities of nonmembers…through *commercial dealing*, contracts, leases, or other arrangements." 450 U.S. at 565.

Sioux Reservation so that State of South Dakota had jurisdiction over waste site on fee land owned by non-Indian within reservation's boundaries); *Solem v. Bartlett*, 465 U.S. 463 (1984).[12] IGRA's application does not depend upon whether the land at issue is "Indian country." Instead, Congress specifically used "Indian lands" as the criterion for IGRA's application. While we would need to evaluate jurisdiction—and diminishment's effect on jurisdiction—if we were evaluating whether the land is in Indian country, we do not need to do so here, where the issue is whether the land is Indian lands. In this case, the Indian lands question can be solved by evidence that the land is within the limits of the reservation. We therefore need not inquire into diminishment at White Earth.

We do, however, need to evaluate jurisdiction in the sense that we need to determine whether the White Earth Band is the tribe that exercises jurisdiction over the land at White Earth. IGRA states that a tribe may engage in Class II gaming "on Indian lands within such tribe's jurisdiction" if, among other things, the tribe has an ordinance approved by NIGC's Chairman. 25 U.S.C. §2710(b)(1). The requirements for conducting Class III gaming likewise state: "Class III gaming activities shall be lawful on Indian lands only if such activities are (A) authorized by an ordinance or resolution that (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands…." 25 U.S.C. §2710(d)(1).

The context of IGRA's prescriptions as to jurisdiction—that land be within "such tribe's jurisdiction" and ordinances adopted by "the Indian tribe having jurisdiction over such lands"—indicates that Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land. *See, e.g., Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984), cert. denied sub nom. *Elvrum v. Williams*, 471 U.S. 1015 (1985) (member of either Quileute or Quinault tribes is permissible devisee of Quinault Reservation land, since both tribes exercise jurisdiction over Reservation, and members of both tribes may be considered member of "tribe in which the lands are located" for purposes of Indian Reorganization Act § 4). Since the White Earth Band is the indisputedly the only tribe exercising jurisdiction over the land at White Earth, the Tribe meets IGRA's requirements for being the tribe with jurisdiction over the Indian lands at issue.

CONCLUSION

The gaming at White Earth is being conducted within the limits of the reservation and is thus on Indian land. IGRA preempts state regulation on Indian land. State jurisdiction over the gaming at White Earth is therefore pre-empted.

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[12] Moreover, the simple enactment of a surplus land act does not automatically result in the diminishment of the reservation. Whether an act actually diminishes a reservation depends on Congress's intent in passing the act. Congress's intent must be clear and plain. *Yankton Sioux*, 522 U.S. at 343. One discerns Congress's intent by examining the language of the relevant surplus land act and the individual circumstances surrounding its passage. *Solem v. Bartlett*, 465 U.S. at 469. For example, a surplus land act that simply offers non-Indians a chance to purchase land with the reservation would not remove the land from Indian country. *Yankton Sioux Tribe, supra*. On the other hand, language that provides that the Tribe would "cede" the land and states that the United States will give a "sum certain" show that Congress intended to pay the Tribe for a "total surrender of tribal claims," removing the land from tribal jurisdiction. *Yankton Sioux*, 522 U.S. at 345.