



October 25, 2013

The Honorable Cheryl Andrews-Maltais, Chairwoman
The Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535

Re: Wampanoag Tribe of Gay Head (Aquinnah) Settlement Lands

Dear Chairwoman Andrews-Maltais:

Thank you for your August 29, 2013 letter requesting a legal opinion as to whether certain land held in trust on behalf of the Wampanoag Tribe of Gay Head (Aquinnah) is eligible for gaming under the Indian Gaming Regulatory Act. Your request stems from the recent approval, by operation of law, of the Tribe's site specific gaming ordinance.¹ Because the ordinance was not acted upon within 90 days of its submission to the NIGC, it is considered to have been approved by the Chair to the extent that it is consistent with the provisions of IGRA.² You now request clarification as to whether the Tribe's definition of Indian lands is consistent with IGRA's requirements. I have reviewed your request and it is my opinion that the specified lands are Indian lands as defined by IGRA and are eligible for gaming.

Background

The lands at issue are specified in the Tribe's recent amendment to its Class II gaming ordinance, which was approved by operation of law on August 28, 2013. The amended ordinance defines *Indian Lands* as:

(1) "Indian Lands" means: all "Settlement Lands" as defined by the Massachusetts Indian Land Claim Settlement Act, 25 U.S.C. § 1771 et seq., as the "private settlement lands" described in paragraph 6 of the Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts, Indian Land Claims executed on November 22, 1983 ("Settlement Agreement") and "public settlement lands" described in paragraph 4 of the Settlement Agreement as:

- a. Public Settlement Lands: The Common Lands consisting of 238 acres (which include the Cranberry Lands, the Face of the Cliffs, and the Herring Creek), including the Menemsha Lands legally described as:

Parcel One: The Cranberry Lands

¹ See Letter from Acting General Counsel Eric Shepard to Chairwoman Cheryl Andrews-Maltais of August 29, 2013 re: Wampanoag Tribe of Gay Head (Aquinnah) Gaming Ordinance Amendment.

² 25 U.S.C. § 2710(e).

These lands consist of the parcels shown on the Assessors Maps of the Town of Gay Head, as those maps configured on the date of this deed (the "Assessors Maps") as follows: Map 3, Parcel 1 and Map 4, Parcel 63.

Parcel Two: The Face of the Cliffs

"The clay in the cliffs" as set forth in a set-off of the same dated December 21, 1878 in Dukes County Probate Court Proceedings Case No. DI-235, EXCEPTING AND EXCLUDING all property shown as Lot A on a "Plan of Land in Gay Head, Mass. Surveyed for Trustees of Aquinnah Realty Trust, June 8, 1989, scale 1 in.= 30 ft., Vineyard Haven Surveying, Box 1548, Beach Road, Vineyard Haven, MA 02568," and consisting of 504 Sq. Ft., which Plan is recorded in the Dukes County Registry of Deeds as Gay Head Case File No. 85.

Parcel Four: The Herring Creek

Those rights reserved in a set off dated December 21, 1878 in Dukes County Probate Proceeding Case No. DI-235, in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land one rod wide on each side of the creek, so long as the said reservation may be needed for that purpose. The approximate location of Herring Creek is shown on Gay Head Assessor's Map 11. Said Creek runs through Lots 381, 382, 383 and 384 on said Partition Plan, above mentioned and said Creek also runs through The Cook Lands, which is Parcel Three, above mentioned.

- b. Private Settlement Lands: The former Strock Estate consisting of three parcels of about 175 acres legally described as "The land in Gay Head, Dukes County, Massachusetts, shown as Lots 68, 71, 72, 73, 80, 86, 179, 246, 254, 294, 299, 300, 309, 316, 319, 324, and 325 on a "Plan of Gay Head Showing the Partition of the Common Lands as Made by Joseph T. Pease and Richard L. Pease, Commissioners, by John H. Millen, Civil Engineer on file with Dukes County Probate Court."

(2) any lands title to which is held in trust by the United States for the benefit of the Tribe or individual tribal member of the Tribe, or held by the Tribe or individual member of the Tribe subject to restriction by the United States against alienation and over which the Tribe exercises governmental power; and

(3) for all lands acquired into trust for the benefit of the Tribe after October 17, 1988, lands that meet the requirements set forth in 25 U.S.C. § 2719.³

Applicable Law

IGRA permits an Indian tribe to "engage in, or license and regulate, gaming on Indian lands within such Tribe's jurisdiction."⁴ The Act defines *Indian lands* to include trust land over which a tribe exercises government authority.⁵ However, IGRA also prohibits gaming on lands acquired into trust after October 17, 1988, unless—

³ Resolution 2012-23 Identification of Indian Lands For the Purposes of the Wampanoag Tribe of Gay Head (Aquinnah) Gaming Ordinance 2011-01.

⁴ 25 U.S.C. § 2710(b)(1).

⁵ 25 U.S.C. § 2703(4).

- (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on Oct. 17, 1988; or
- (2) the Indian tribe has no reservation on Oct. 17, 1988 and—
 - (A) such lands are located in Oklahoma and-
 - (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
 - (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma....⁶

IGRA also provides a number of exceptions to the after-acquired lands prohibition, including land taken into trust as part of—

- (i) a settlement of a land claim,
- (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
- (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.⁷

Moreover, Department of the Interior regulations specify that for the settlement of a land claim exception, gaming may occur on newly acquired lands if the land at issue is either:

- (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or
- (b) Acquired under a settlement of a land claim that:
 - (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or
 - (2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.⁸

Analysis

As discussed in greater detail below, the lands specified in the amendment are Indian lands as defined by the Indian Gaming Regulatory Act ("IGRA") and are eligible for gaming under the Act. However, because the lands are the subject of the Tribe's Settlement Act, which both grants the Commonwealth of Massachusetts jurisdiction over the settlement lands and limits the Tribe's authority to exercise its jurisdiction on the land, the Settlement Act must be taken into consideration

⁶ 25 U.S.C. § 2719(a).

⁷ 25 U.S.C. § 2719(b)(1)(B).

⁸ 25 C.F.R. § 292.5.

as part of this legal opinion.⁹ In that regard, because the Secretary of the Interior administers land claim settlement acts,¹⁰ the NIGC Office of General Counsel requested the Solicitor's Office's legal opinion as to whether the Settlement Act prohibits IGRA's application to the lands. The Solicitor's Office provided an opinion on August 23, 2013, that it does not.¹¹ Specifically, the Solicitor's Office opined that the Tribe possesses sufficient legal jurisdiction over its settlement lands for IGRA to apply and, if the land qualifies as Indian lands, IGRA impliedly repeals the portions of the Settlement Act repugnant to IGRA.¹² Therefore, the only remaining questions are whether those lands qualify as Indian lands as defined in IGRA and whether they are eligible for gaming under the Act.

Indian Lands

IGRA defines Indian lands to include trust land over which a tribe exercises governmental power.¹³ The land specified in the Tribe's ordinance amendment was taken into trust by the Department of the Interior on December 21, 1988, and March 2, 1993.¹⁴ As discussed in the Solicitor's Office's August 23, 2013 opinion, the tribal government "is responsible for providing a full range of services to the Tribe's members, including education, health and recreation, public safety and law enforcement, public utilities, natural resources management, economic development, and community assistance." Many of these services are provided on the Tribe's land on Martha's Vineyard, including its trust lands.¹⁵ The Tribe therefore exercises governmental power over the land. Accordingly, the settlement lands qualify as Indian lands as defined by IGRA.

Land Claim Exception

The determination of whether the land specified in the ordinance amendment constitutes Indian lands, however, is not the end of the inquiry. Section 2719 of IGRA generally prohibits gaming on lands acquired in trust after October 17, 1988, unless certain exceptions apply. Because the Tribe's settlement lands were taken into trust in December of 1988 and in 1993, the issue is whether section 2719 prohibits the Tribe from gaming on the parcels.

One of the enumerated exceptions from IGRA's general prohibition is for land that was taken into trust as part of a land claim settlement.¹⁶ As the settlement lands were taken into trust as part of the Tribe's land claim Settlement Act,¹⁷ the land qualifies for the exception and the Tribe may operate Class II gaming pursuant to IGRA.¹⁸

⁹ 25 U.S.C. §§ 1771e, 1771g.

¹⁰ *Passamaquoddy Tribe v. Maine* 75 F.3d 784, 794 (1st Cir. 1994) ("Deference is appropriate under *Chevron* only when an agency interprets a statute that it administers. Here, the question of the Gaming Act's applicability cannot be addressed in a vacuum, and the [NIGC], whatever else might be its prerogatives, does not administer the Settlement Act. That role belongs to the Secretary of the Interior")

¹¹ Letter from Michael Berrigan to Jo-Ann Shyloski of 8/23/2013.

¹² *Id.*

¹³ 24 U.S.C. § 2703(4).

¹⁴ See Trust deeds of 12/21/1988 and 3/2/1993.

¹⁵ Letter from Lael Echo-Hawk to Michael Hoenic of 5/23/2012 at 2.

¹⁶ 25 U.S.C. § 2719(b)(1)(B)(i).

¹⁷ 25 U.S.C. §§ 1771a, 1771b, & 1771d.

¹⁸ Although the Tribe's gaming Ordinance is limited to Class I and Class II gaming, the land is also eligible for Class III gaming should the Tribe meet IGRA's prerequisites to do so.

The land also qualifies under the Department of the Interior's regulations for "Gaming on Trust Lands Acquired After October 17, 1988,"¹⁹ which implement the IGRA exceptions, including the land claim settlement exception. Section 292.5 of the regulations "contains criteria for meeting the requirements of . . . the 'settlement of a land claim' exception."²⁰ Pursuant to the regulation, "[g]aming may occur on newly acquired lands if the land at issue is . . . [a]cquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress."²¹

Here, the Tribe's land was acquired pursuant to settlement of its land claim against the State of Massachusetts and the Town of Gay Head,²² and the settlement agreement was ratified by the United States Congress in the Settlement Act.²³ The Settlement Act specifies the lands to be taken into trust as part of the settlement agreement, which are the same as those specified by the Tribe in its ordinance amendment.²⁴ Finally, the Settlement Act extinguishes the Tribe's land claim with finality.²⁵ Accordingly, the land qualifies for the exception as required by the regulations.

In conclusion, because the Tribe possesses sufficient legal jurisdiction over its settlement lands, IGRA applies to them. Further, because the lands qualify as Indian lands under IGRA and the lands satisfy the settlement of a land claim exception to Section 2719, the lands are eligible for gaming under the Act.

If you have any further questions, please don't hesitate to contact the NIGC Acting Associate General Counsel, Michael Hoenig.

Sincerely,



Eric Shepard
Acting General Counsel

¹⁹ 25 C.F.R. Part 292.

²⁰ 25 C.F.R. § 292.5.

²¹ 15 C.F.R. § 292.5(a).

²² Joint Memorandum of Understanding Concerning Settlement of the Gay Head Massachusetts Indian Land Claims, § 4.

²³ 25 U.S.C. § 1771.

²⁴ 25 U.S.C. § 1771d.

²⁵ 25 U.S.C. § 1771b.