NATIONAL
INDIAN
GAMING
COMMISSION

July 22, 1994

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Dear Petitioners:

This letter constitutes the decision of the National Indian Gaming Commission (NIGC) concerning your appeal, pursuant to 25 C.F.R. Part 524, of the Chairman's April 13, 1994, disapproval of a gaming ordinance, submitted under 25 C.F.R. Part 522. The NIGC affirms the Chairman's decision to disapprove the ordinance submitted by the petitioners. We find that the Chairman properly deferred to the Department of the Interior (DOI)'s determination that the Tuscarora Tribal Business Council (TTBC) is not the authorized representative of the Nation, nor are any of the petitioners "authorized tribal officials," within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., and the NIGC definition of an Indian tribe, 25 C.F.R. § 502.13. Because NIGC regulations state that only a federally recognized tribe may appeal a disapproved ordinance, 25 C.F.R. § 524.1, in affirming the Chairman's decision, we find that you lack standing to make this appeal.

BACKGROUND

Our understanding of the Tuscarora Nation of Indians (Nation) is that it is a traditional Indian tribe of the Iroquois Confederacy. The Nation is recognized by the Secretary of the Interior as a tribe. 58 Fed. Reg. 54364 (Oct. 21, 1993). The Nation has long maintained its traditions without a written constitution, code or laws, or other written documents. The Nation government is composed of several chiefs, each of whom heads one of the respective clans of the Nation. They are collectively known as the Council of Chiefs (Council). See, Notice of Appeal, Ref. No. CO-94-03, Affidavit, Joan Smith, pp. 1-2 (April 25, 1994); letter from Joseph E. Zdarsky, Esq. to John Duffy, Esq., Counsel to the Secretary of the Interior (July 27, 1993). Governmental decisions are made by the Council. The

Council is currently recognized by the DOI as the governing body of the Nation. See, letter from B. D. Ott, Eastern Area Director, Bureau of Indian Affairs (BIA), to Chief Leo Henry (April 2, 1993); letter from Ada Deer, Assistant Secretary - Indian Affairs, to Joseph E. Zdarsky, TTBC counsel, (October 18, 1993); letter from Ada Deer, Assistant Secretary - Indian Affairs, to Michael D. Cox, General Counsel, NIGC, (July 12, 1994); letter from B. D. Ott, Eastern Area Director, BIA, to the Honorable Francis J. Sanzillo, Secretary to the Minority, New York State Senate (May 17, 1994).

According to petitioners, in late 1992 or early 1993, the Tuscarora Tribal Business Council (TTBC) was established "to help develop and make available employment and economic opportunities for the Tuscarora people." Affidavit of Joan Smith, Notice of Appeal, Ref. No. CO-94-03, Appendix, p. 3 (April 25, 1994). The TTBC provides educational and recreational opportunities on the Reservation. Id. On March 14, 1994, the TTBC convened a meeting, at which time the TTBC alleges it was elected the new Nation government by those persons in attendance. On March 16, 1994, the election results were communicated to Ada Deer, Assistant Secretary of the Interior for Indian Affairs, with a request that she meet with the TTBC.

On March 16, 1994, the TTBC also submitted a gaming ordinance to the NIGC for the Chairman's approval. On March 25, 1994, the Chairman declined to approve the gaming ordinance based on the fact that the TTBC is not authorized to submit an ordinance for approval pursuant to 25 C.F.R. § 522.1, nor are any of the individual petitioners authorized under 25 C.F.R. § 522.2(a). The Chairman also issued a Closure Order for the bingo facility being run by the TTBC at that time. By letter from Joseph E. Zdarsky, the TTBC sought an expedited review of those decisions. On April 5, 1994, the Chairman met with the TTBC and its counsel to further discuss the Closure Order. By letter on April 8, 1994, the Chairman reaffirmed his prior decision on the Closure Order. On April 25, 1994, the TTBC appealed the Chairman's decision. However, by a joint motion of the parties, the appeal of the Closure Order has been stayed. See, Joint Motion to Stay Proceedings (June 14, 1994).

In addition, by letter of April 13, 1994, the Chairman reaffirmed that he could not approve the TTBC gaming ordinance submitted on March 16, 1994. On April 25, 1994, the TTBC filed a Notice of Appeal regarding the Chairman's decision not to approve the TTBC gaming ordinance. The TTBC claimed that the Chairman erred by deferring to the BIA rather than conducting an independent investigation of which body constituted the Nation government. See, Notice of Appeal, Ref. CO-94-03, pp. 3-4 (April 25, 1994).

The Chairman had informally requested information from the BIA as to the status of the TTBC. The Chairman was provided information to the effect that the Council of Chiefs was still recognized by the BIA as the governing body of the Nation. As a result of a written request to the Assistant Secretary required for another gaming ordinance submitted by Webster Cusick, the Assistant Secretary confirmed in the enclosed July 12, 1994, letter, that the Council of Chiefs is the governing body of the Nation and that the TTBC does not represent the Nation.

While the March 25, 1994, Closure Order and the April 13, 1994, disapproval of the gaming ordinance are linked, they constitute separate actions by the Chairman. Therefore, the NIGC shall review those actions separately. This opinion deals only with the April 13, 1994, gaming ordinance disapproval.

ANALYSIS

We conclude that the Chairman properly deferred to the decision of the Assistant Secretary - Indian Affairs on the make up of the Nation's tribal governing body and that the TTBC consequently does not have standing to appeal this decision. The Secretary's designee, the Assistant Secretary - Indian Affairs, has the necessary expertise on which the Chairman can reasonably rely. IGRA, in mandating deference to the Secretary on recognition of tribes, implied that the Chairman should also defer to the Secretary's recognition of a tribe's governing body. Furthermore, following the decision of the lead agency on such issues promotes consistency in our government-to-government relationships with tribes. Therefore, the Chairman's decision to defer to the Assistant Secretary is reasonable. Regardless, the TTBC made no showing that it should be recognized as the Nation's representative. Consequently, because the TTBC does not represent a tribe and only a tribe can appeal an ordinance disapproval, the TTBC does not have standing to appeal the Chairman's decision.

I. The Chairman should defer to the BIA in areas in which the BIA has expertise.

Traditionally, courts defer to the executive branch agency expert in the field of the dispute at bar. Indian affairs is no exception. For more than 100 years the courts have deferred to the expertise of the executive branch with respect to recognition of tribal bodies. In United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866), the Court stated: "it is the rule of this court to follow the action of the executive and other political departments of government, whose more special duty it is to determine such affairs." Id. at 419. Recent decisions reflect that the courts have continued to defer to the BIA in Indian

affairs matters in which the BIA has developed expertise. James v. United States Department of Health and Human Services, 824 F.2d 1132, 1137 (D.C. Cir. 1987), Golden Hill Paugussett Tribe of Indians v. Weicker, Jr., 839 F. Supp. 130, 135 (D. Conn. 1993).

The BIA's expertise in Indian affairs covers a wide range of activities. Congress delegated general Federal authority over Indian affairs to the Secretary of the Interior. 25 U.S.C. §§ 1(a) and 2, 43 U.S.C. § 1457. The Secretary delegated his authority to act on Indian affairs to the Assistant Secretary-Indian Affairs, the administrative head of the BIA. 209 DM 8.1. Under that authority the Assistant Secretary has promulgated regulations on a wide variety of Indian affairs issues and programs including tribal recognition, 25 C.F.R. Part 83; tribal reorganization under a statute, 25 C.F.R. Part 81; and petitioning procedures for tribes reorganized under federal statute and other organized tribes, 25 C.F.R. Part 82.

In several recent cases, courts have explicitly noted the BIA's expertise in determining whether or not a group should be recognized as a tribe. See, Runs After v. United States, 766 F.2d 347 (8th Cir. 1987), James v. United States Department of Health and Human Services, 824 F.2d 1132, 1137 (D.C. Cir. 1987), Golden Hill Paugussett Tribe of Indians v. Weicker, Jr., 839 F. Supp. 130 (D. Conn. 1993). In Runs After, the court stated that "it cannot be denied that the BIA has special expertise and extensive experience in dealing with Indian affairs." Runs After at 352. In a case last year the court noted that the BIA "employs historians, anthropologists, and genealogists, James, 824 F.2d at 1138, and has evaluated at least 143 petitions for recognition." Golden Hill Paugussett at 134-135. The court also noted that the BIA has a regulatory scheme "to determine which Indian groups warrant recognition," and that the "inquiry is extremely intricate and technical." Id. at 135. The court went on to hold that:

> These factors and BIA's administrative superiority in gathering the relevant facts and in marshalling them into a meaningful pattern, [citation omitted], obligate deferral of the question of plaintiff's recognition as a tribe to the BIA for determination. Congress' delegation of authority, the regulations adopted in implementation thereof, and BIA's development of expertise appropriate thereto, amply demonstrate a scheme for determination of tribal status intended and best left at first blush to the BIA. Id.

Thus, the BIA has achieved considerable knowledge and expertise in dealing with problems of tribal recognition.

When the BIA has recognized a tribe it must then, as the lead Federal agency in Indian affairs, determine how it will