

National Indian Gaming Commission

In Re:)
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Wyandotte Nation Amended Gaming)
Ordinance)
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September 10, 2004

FINAL DECISION AND ORDER

The Wyandotte Nation (Tribe) has waived its right to an administrative hearing and has requested a final agency decision with respect to its request for review and approval of an amendment (Ordinance Amendment) to its Tribal Gaming Ordinance. The Chairman of the National Indian Gaming Commission approved the Tribal Gaming Ordinance on June 29, 1994. The Tribal Gaming Ordinance authorizes the Wyandotte Nation to conduct gaming within "Indian Country." Tribal Gaming Ordinance, Section 4(b). The Ordinance Amendment at issue adds a new definition to Section 2 of the Tribal Gaming Ordinance. This new definition defines Indian Country to include all Wyandotte Indian land including the Shriner Tract¹, a parcel of land in Kansas City, Kansas, held in trust for the benefit of the Tribe. Wyandotte Nation Resolution No. 040709, July 9, 2004.

DECISION AND ORDER

The Commission finds that the Tribe may not lawfully game on the Shriner Tract and therefore disapproves the Ordinance Amendment.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

On June 29, 1994, the NIGC Chairman approved the Tribal Gaming Ordinance, which authorizes Class II gaming. The Tribal Gaming Ordinance does not identify any specific parcels of land upon which the Tribe may game. On June 20, 2002, the Tribe submitted

¹ "A tract of land in the Northwest Quarter of Section 10, Township 11, Range 25 Wyandotte County, Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked 'Church Lot' thereon." 61 Fed. Reg. 114, 29757-29758 (June 12, 1996).

an amended gaming ordinance specific to the Shriner Tract property. The Tribe also submitted documentation supporting its claim that the Shriner Tract meets three separate exceptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988. On August 27, 2002, the Tribe withdrew the amended ordinance to give the NIGC more time to issue an Indian lands opinion. The Tribe later advised the NIGC that it did not plan to game on the Shriner Tract after all.

On August 28, 2003, the Tribe commenced gaming on the Shriner Tract. This parcel was taken into trust for the benefit of the Tribe on July 15, 1996. Because the Shriner Tract was taken into trust after October 17, 1988, for gaming to be legal under the IGRA, it must fall within one of IGRA's exceptions to the general prohibition on gaming on lands acquired into trust after October 17, 1988 for gaming to be legal under the IGRA.

On September 2, 2003, the Tribe advised the NIGC by letter that it had commenced gaming. The Tribe also resubmitted the supporting material from June 2002 and subsequently provided additional supporting material and arguments.

On March 24, 2004, the NIGC Office of General Counsel (OGC) provided the Tribe with its written opinion that gaming is not legal on the Shriner Tract under the IGRA. On March 31, 2004, the Tribe requested reconsideration of the March 24, 2004, opinion.

On March 26, 2004, the Tribe filed suit against the NIGC in U.S. District Court for the District of Columbia, challenging the March 24, 2004, NIGC opinion. Complaint for Declaratory and Injunctive Relief, *Wyandotte Nation v. Nat'l. Indian Gaming Commission*, No. CV-04-0513 (D.D.C. March 26, 2004). On April 2, 2004, the Tribe filed a Motion For Leave to Amend Complaint For Declaratory and Injunctive Relief (Motion to Amend Complaint), seeking to add several Kansas State authorities as defendants. The D.C. District Court did not act on this motion but instead transferred the case to the U.S. District Court for the District of Kansas. *Wyandotte Nation v. NIGC*, No. CV-04-0513 (D.D.C. April 2, 2004)(Order). On April 7, 2004, the Kansas District Court granted the Tribe's Motion to Amend Complaint. *Wyandotte Nation v. NIGC*, No. CV-04-0513 (D.D.C. April 7, 2004)(Order Memorializing April 7, 2004 Rulings). The NIGC moved to dismiss the action for lack of a final agency action, a prerequisite for the Court's subject matter jurisdiction. The Tribe did not oppose this motion, and on June 1, 2004, the District Court granted the NIGC's Motion to Dismiss.² *Wyandotte Nation v. NIGC, et. al.*, Case No. 04-2140-JAR (D.C. Kan. June 1, 2004) (Order Granting Motion to Dismiss).

The NIGC granted the Tribe's request for reconsideration. Upon reconsideration, the OGC determined that some of the language in the March 24, 2004 opinion was overbroad, and therefore revised the opinion. The March 24, 2004 opinion was superseded by an OGC opinion dated July 19, 2004. The conclusion remains the same. It is the opinion of the OGC that the Tribe cannot lawfully game on the Shriner Tract pursuant to the IGRA.

² The case is still a live action as to the State of Kansas defendants.

On July 12, 2004, the NIGC received the Ordinance Amendment for review and approval by the NIGC pursuant to 25 U.S.C. § 2710. By letter dated July 23, 2004, the Tribe waived its right to an administrative hearing and requested that the Commission issue a final decision on the record. We do not typically agree to forego the Chairman's issuance of an ordinance disapproval letter and any resultant appellate process. However, we do so in this case for several reasons: (1) the question of whether the Tribe may game on the Shriner Tract has been under review by the NIGC for some time; (2) the OGC has already issued its opinion regarding gaming on the Shriner Tract; and (3) the Tribe is involved in active litigation regarding gaming on the Shriner Tract. In this case, we believe it in the best interests of both the Commission and the Tribe to expeditiously resolve this matter.

ANALYSIS

Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after the enactment of IGRA on October 17, 1988, unless one of several exceptions apply. Accordingly, because the Shriner Tract was taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether the Tribe may conduct gaming on the Shriner Tract.

The Tribe argues that three exceptions to the general prohibition on gaming on after-acquired lands apply to the Shriner Tract. The Tribe argues that (1) the Shriner Tract is within the Tribe's last reservation; (2) the Shriner Tract was taken into trust as part of a settlement of a land claim, and (3) the Shriner Tract was taken into trust as part of the restoration of their lands. We address each of these arguments in turn.

Last Reservation

The Tribe argues that the "last reservation exception" applies to the Shriner Tract. The "last reservation exception" provides that gaming may be conducted on lands acquired after October 17, 1988, provided that the tribe had no reservation on October 17, 1988, and the lands are located in a state other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located. 25 U.S.C. § 2719(a)(2)(B). The first two parts of this exception are met: the Tribe had no reservation on October 17, 1988,³ and the land is in Kansas, not in Oklahoma. We therefore turn our attention to the remaining question, whether the land at issue is within the tribe's last recognized reservation within the State within which the Tribe is presently located.

To answer this question, we must first determine where the Tribe is presently located. The Tribe argues that it is presently located in Kansas, and that the Shriner Tract is within the Tribe's last recognized reservation in Kansas. The Tribe argues that it is "presently

³ We understand there are no reservations in the State of Oklahoma, as contemplated by the IGRA. Otherwise, the all encompassing Oklahoma exception in 25 U.S.C. § 2719 (a)(2) would likely not exist.

located” in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. The Tribe argues that the existence of an inter-governmental agreement with Kansas City providing for the maintenance and security of the Huron Cemetery establishes this jurisdiction.

The answer to this question turns on the scope and meaning of the term “presently located.” To determine the scope of a statute, we look first to its language. Reves v. Ernst & Young, 507 U.S. 170, 177 (1993). To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); (See also, U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002), “In interpreting a statute, the [Tenth Circuit] gives effect to a statute’s unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”). Furthermore, we must give the words of the statute “their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.” Williams v. Taylor, 529 U.S.420, 432 (2000).

While tribes can be located in more than one state (see e.g. the Navajo Nation which is located in three states or the Standing Rock Sioux Tribe which is located in two states), we believe the plain meaning of the term “presently located” is clear. It is not where the tribe happens to have an isolated tract of land. It plainly means where the tribe is currently to be found, i.e., where the tribe physically resides. To determine where this is, we look to where the seat of tribal government is, and where the Tribe’s population center is. The seat of the Wyandotte Tribal government and its population center is in Wyandotte, Oklahoma. We therefore find that the Tribe is presently located in Oklahoma.

We do not subscribe to the Tribe’s argument that it is presently located in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. As stated by the Tenth Circuit, “[a]lthough the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract’s status as a burial ground. It is further uncontroverted that, since the time of the 1855 treaty, the Huron Cemetery has not been used by the Wyandotte Tribe for purposes of residence. Rather, the tract, which is now separated by a significant distance from the actual reservation of the Wyandotte Tribe in Oklahoma, has consistently maintained its character as a public burial ground.” Sac and Fox at 1267.

This plain reading of the statutory language is consistent with our reading of the whole of section 2719(a). The language of section 2719(a) evidences a Congressional intent to limit gaming to tribal reservations or, if no reservation exists, to areas within former reservations or last reservations where the tribe is located. This section of IGRA limits, not expands, the right to game. It is clear that Congress intended to allow some gaming to occur on lands acquired after enactment of the IGRA under this provision, but only contemplated gaming on newly acquired lands far from the current or prior reservation in very specific isolated circumstances.

