



January 10, 2014

Leanne Walker-Grant, Chairperson
23736 Sky Harbour Road
Box 410
Friant, CA 93626

Re: Request for Indian lands legal opinion – 60 acre parcels

Dear Chairperson Walker-Grant:

This letter responds to the request of the Table Mountain Rancheria (Tribe) that the National Indian Gaming Commission Office of General Counsel (NIGC OGC) issue a legal opinion addressing whether 60 acres of land, not located within the boundaries of the Tribe's current day reservation but acquired into trust by the United States for the benefit of the Tribe, is eligible for gaming under the Indian Gaming Regulatory Act (IGRA).¹ Based on my review, it is my opinion that the land is contiguous to the Tribe's reservation as it existed on October 17, 1988, making it exempt from IGRA's general prohibition of gaming on after-acquired land. The Tribe also possesses jurisdiction and exercises governmental power over the lands. Therefore, the lands are eligible for gaming pursuant to IGRA.

The Tribe requested a legal opinion concerning the 60-acre parcels of land located in the Fresno County, California, which are described as follows:

Parcels 7, 8, and 9 of Parcel Map No. 3179, according to the amended map thereof recorded in Book 33 Page 21 and as amended in Book 34 Page 94 of parcel maps, Fresno County Records.

The Bureau of Indian Affairs (BIA) confirmed that this land was accepted into trust on March 13, 2007, and is identified as tribal tract number 551 T5393 in BIA documents. *See* Letter from Regional Director, Bureau of Indian Affairs – Pacific Regional Office, to Esther Dittler, Staff Attorney, NIGC (May 6, 2013).

¹ In this case, because the lands are already in trust and do not concern whether a specific area of land is a "reservation," the tribe may submit its request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming. 25 C.F.R. § 292.3(a).

Applicable Law

Under the Indian Gaming Regulatory Act (IGRA), a tribe may engage in gaming only on Indian lands, 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2, that are within such tribe's jurisdiction, 25 U.S.C. §§ 2710(b)(1), 2710(d)(1)(A)(i), 2710(d)(3)(A). Further, if the land upon which gaming is contemplated is not within the limits of a current reservation, the land qualifies as Indian lands only if the tribe exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). 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 State against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The NIGC's regulations further clarify the definition of Indian lands:

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.

Finally, Section 20 of IGRA prohibits gaming on lands accepted by the Secretary of the Interior into trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within certain statutory exemptions or exceptions. *See* 25 U.S.C. § 2719. One exemption excludes lands which are "located within or contiguous to the boundaries of the reservation of the Indian tribe" on October 17, 1988 from the general prohibition of gaming on after-acquired trust lands. 25 U.S.C. § 2719(a)(1).

Regulations implementing Section 20 of IGRA were promulgated by the Department of Interior (Interior) in 25 C.F.R. part 292. Section 292.4 of the regulations provides, in pertinent part:

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

- (a) If the tribe had a reservation on October 17, 1988 the lands must be located within or contiguous to the boundaries of the reservation. . . .

In the regulations, the term “contiguous” is defined as “two parcels of land having a common boundary notwithstanding the existence of non-navigational waters or a public road or right-of-way and includes parcels that touch at a point.” 25 C.F.R. § 292.2.

As discussed below, the parcels qualify as Indian lands upon which the Tribe may conduct gaming because they are held in trust for the Tribe, the Tribe has jurisdiction over these parcels, the Tribe exercises present governmental power over these parcels, and the lands satisfy 25 U.S.C. § 2719(a)(1) and Interior’s regulations, 25 C.F.R. § 292.4(a).

Jurisdiction and Exercise of Governmental Power

For a tribe to be able to conduct gaming under IGRA on trust land not within the bounds of its reservation, the trust land on which it proposes to game must be land over which it has jurisdiction, 25 U.S.C. §§ 2710(b)(1), 2710(d)(1)(A)(i), 2710(d)(3)(A), and exercises governmental power, 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12. In order to exercise governmental power over its land, the Tribe must first have jurisdiction to do so. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute on other grounds*, *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (in addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff’d and remanded*, *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

1. Jurisdiction

Generally speaking, an Indian tribe possesses jurisdiction “over both their members and their territory.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). It is well settled that a tribe retains primary jurisdiction over the land that the tribe inhabits if the land qualifies as *Indian Country*. *See Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998). Congress defined the term *Indian Country* as:

- (a) All lands within the limits of an Indian reservation under the jurisdiction of the United State Government, notwithstanding the issuance of any patent, including rights of way running through the reservation,

- (b) All dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territories thereof, and within or without the limits of a state, and
- (c) All Indian Allotments, the Indian titles to which have not been extinguished including rights of way running through the same.

18 U.S.C. § 1151. “This definition applies to questions of both criminal and civil jurisdiction.” *Cabazon*, 480 U.S. at 253 n.5. Thus, “lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151.” *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999).

Here, once the United States took Parcels 7, 8, and 9 into trust for the benefit of the Tribe, the land became Indian Country within the meaning of 18 U.S.C. § 1151. Accordingly, the Tribe has jurisdiction over Parcels 7, 8, and 9.

2. Exercise of Governmental Power

In order for Parcels 7, 8, and 9 to be Indian lands within the meaning of IGRA, the Tribe must exercise present-day, governmental authority on the land. IGRA does not specify how a tribe exercises governmental authority, though there are many possible ways in many possible circumstances. For this reason, the Commission has not formulated a uniform definition of “exercise of governmental power” but rather decides that question in each case based upon all the circumstances. *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The courts provide useful guidance. For example, governmental power involves “the presence of concrete manifestations of ... authority.” *Narragansett Indian Tribe*, 19 F.3d at 703. Examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.*

For the past twenty years, the tribal police have been patrolling the parcels to protect the cultural sites and water storage facility. *See* Letter from George Skibine, Attorney for Table Mountain Rancheria, Dentons US LLP, to Eric Shepard, Acting General Counsel, NIGC (June 24, 2013). Further, the Tribe located and currently maintains a 500,000 gallon drinking water tank on the parcels. Additionally, for the past thirteen years, the lands have been the location of the Tribe’s annual pow-wow. The lands are also used for various other cultural events each year. Finally, there are also tribal cultural sites that the Tribe maintains and protects on the parcels.

Based on the foregoing, the Tribe exercises governmental power over Parcels 7, 8, and 9. Accordingly, Parcels 7, 8, and 9, are Indian lands within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

Application of 25 U.S.C. § 2719

A determination of whether Parcels 7, 8, and 9 qualify as Indian lands is not the end of the inquiry. IGRA generally prohibits gaming on lands acquired in trust after October 17, 1998, unless one of the statute's exemptions or exceptions can apply. 25 U.S.C. § 2719. Accordingly, for lands taken into trust after October 17, 1988, it is necessary to review the prohibition and its exemptions and exceptions to determine whether a tribe can conduct gaming on such lands.

Section 2719 states:

...gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless –

- (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988.

25 U.S.C. § 2719(a) and (a)(1). It is my opinion that the prohibition does not apply because the lands are located contiguous to the boundaries of the Tribe's reservation as it existed on October 17, 1988. 25 U.S.C. § 2719(a)(1).

As set forth above, the Interior enacted regulations interpreting Section 2719 of IGRA. As to the exemption set forth in 2719(a)(1), Interior regulations mandate that for gaming to be allowed on newly acquired lands under such exemption, the land must meet certain location requirements depending upon whether the tribe had a reservation on October 17, 1988. 25 C.F.R. § 292.4. "If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation." *Id.* at (a). Interior regulations define *contiguous* as, "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point." 25 C.F.R. § 292.2.

The BIA confirmed that the boundaries to the Tribe's reservation were restored in 1961. *See* E-mail from Carmen Facio, Regional Realty Officer, Bureau of Indian Affairs – Pacific Regional Office, to Esther Dittler, Staff Attorney, NIGC (July 10, 2013). Parcels 7, 8, and 9 are separated from the reservation's west boundary, as it existed on October 17, 1988, by Sky Harbor Drive. *Id.* Maps attained from Fresno County, indicate that Sky Harbor Drive is a public road. *See* Assessor's Map Bk. 300-Pg. 35. Further, maps provided by the BIA and the Tribe demonstrate that Parcels 7, 8, and 9 are only separated from the reservation's west boundary by Sky Harbor Drive. *See* Table Mountain Rancheria Record of Survey, Map of Tract No. 1833; Table Mountain (551) Ver. 2 (June 12, 2013). As such, the lands satisfy the definition of contiguous.

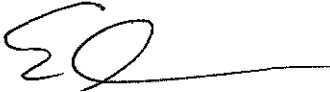
Further, in 2006 the DOI Pacific Southwest Regional Solicitor prepared an endorsement and comments that concluded that the lands are contiguous to the Tribe's reservation. *See* Solicitor's Endorsement/Comments, from Daniel G. Shillito, Regional

Solicitor – Sacramento, CA (March 27, 2006). The BIA notes that the Solicitor, in its March 27, 2006, letter, previously found that this land was contiguous to the Tribe's reservation for land acquisition purposes. *See* Letter from Regional Director, Bureau of Indian Affairs – Pacific Regional Office, to Esther Dittler, Staff Attorney, NIGC (May 6, 2013). Consequently, Parcels 7, 8, and 9 are contiguous to the Tribe's reservation as it existed on October 17, 1988, and the § 2719 prohibition does not apply.

Conclusion

Based upon my review of the materials submitted by the Tribe and obtained from the BIA, it is my opinion that the parcels described above are Indian lands eligible for gaming under IGRA. Because the parcels are contiguous to the Tribe's original reservation, the general prohibition against gaming on lands acquired after October 17, 1988, does not apply. The Department of the Interior - Office of the Solicitor concurs with this opinion.

Sincerely,

A handwritten signature in black ink, appearing to be 'ES', followed by a horizontal line extending to the right.

Eric Shepard
Acting General Counsel