February 25, 2021

In the matter of:	
Appeal of Chairman's August 19, 2020 Disapproval of Amendment to Gaming Ordinance of the Central Council of the Tlingit and Haida Indian Tribes of Alaska	**Final Decision and Order**

I. DECISION AND ORDER

This appeal arises from the Chairman's disapproval of a site-specific gaming ordinance under the Indian Gaming Regulatory Act (IGRA). The Central Council of the Tlingit and Haida Indian Tribes of Alaska (Tribe) has an approved gaming ordinance that the National Indian Gaming Commission (NIGC) Chairman approved on May 13, 2016. The Tribe amended the Ordinance on April 29, 2020, with the goal to make it site-specific as to a portion of an allotment issued to Jimmie A. George, a member of the Tribe, and held by his heirs in restricted status. The Tribe submitted the amended ordinance to the NIGC Chairman for approval on May 21, 2020. The Chairman disapproved the amended gaming ordinance on August 19, 2020, citing, "[T]he lands specified in the Ordinance are not Indian lands as defined by IGRA, and therefore not eligible for gaming pursuant to IGRA." The Tribe filed a timely appeal.

The Commission has conducted a de novo review of the issue under current law, and for the reasons discussed herein, the Commission hereby disapproves the gaming ordinance.

II. LEGAL STANDARD

This decision is guided by the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2710(b)(1) requires a tribe to have an approved gaming ordinance prior to conducting class II gaming activities:

> **(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts**
>
> (1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—
>
> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

Additionally, § 2710(b)(2) of IGRA provides guidance to the Chairman on ordinance approvals, and requires the gaming to be conducted on *Indian Lands*:

> (2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming *on the Indian lands within the tribe's jurisdiction* if such ordinance or resolution provides that—. . . (emphasis added)

Indian lands is defined in § 2703(4) of IGRA 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.* (emphasis added).

25 C.F.R. Part 502.12 of the federal regulations defines Indian Lands as:

> *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.

When a gaming ordinance is site-specific as to a parcel of land, the NIGC prepares an Indian Lands Opinion to ensure that the land in question falls within IGRA's definition of Indian Lands. This process includes a request to the Department of the Interior (DOI) for a courtesy concurrence since the two agencies have a shared responsibility for determining Indian Lands under IGRA.

The parcel of land identified in the Tribe's proposed gaming ordinance is held by individual Indians in restricted status and not within the boundaries of a reservation. Therefore, in order to qualify as Indian Lands, the definitions of § 2703(4)(B) of IGRA and § 502.12 of the federal regulations must be met and requires the Tribe to exercise governmental power over the parcel for it to be deemed Indian lands and eligible for gaming under IGRA. As discussed below, the Tribe must have jurisdiction over the Parcel before it can exercise governmental powers over it.

The land specified by the Tribe's amended ordinance is a 20-acre portion of an allotment held in restricted status by the heirs of Jimmie A. George, Sr. Jimmie A. George, Sr. was a

Tlingit and Haida member and applied for the original allotment in 1971 under the Alaska Native Allotment Act of 1906 prior to the passage of the Alaska Native Claims Settlement Act which repealed the ANAA.[1] The original allotment was 160 acres, which was the maximum size of an allotment under the ANAA. The allotment was issued to Jimmie A. George, Sr. in 1988 based upon his family's historical and personal use of the allotment. Part of the original allotment was exchanged in 2005 for a different 220-acre allotment which contains the 20-acre parcel in question (Parcel). The heirs of Jimmie A. George, Sr. (George heirs) hold the allotment. The Tribe represented the George heirs during the 2005 land exchange. In 2015, the George heirs entered into a lease with the Tribe for the Parcel. The lease is a 25-year business lease and listed the intended uses for the Parcel to be,

> . . . governmental administration, programs, services, regulatory functions, the promotion of tribal cultural heritage and economic development, including but not limited to the construction and operation of a native-style lodge with a restaurant and gift shop, bingo, dining and entertainment that includes cultural performances and music, and the operation of governmental facilities and Business Enterprises under the governmental authority of the CCTHITA.

The Tribe prepared its own Indian Lands Opinion and included it with its submission packet. This Tribal Indian Lands Opinion provided a brief history of traditional Tlingit and Haida occupation and jurisdiction over the land which is noted by the Commission. The Commission respectfully accepts and acknowledges this history as fact for the purpose of the appeal. This analysis must consider whether or not the Tribe has retained governmental power over the Parcel for purposes of IGRA.

[1] 43 U.S.C. § 1617 (a).

While IGRA guides the decision before the Commission, the Parcel is subject to a number of laws that Congress has passed over the years which have impacted the status of the Tribe in relation to the land including, the Alaska Native Allotment Act of 1906 (ANAA),[2] the Alaska Native Claims Settlement Act (ANCSA),[3] the Forest Reserve Act of 1891,[4] and a Jurisdictional Act of 1935[5] that allowed the Tribe to bring its land claims against the United States. The Commission is compelled to consider all of these laws to assess the legal status the Tribe maintains over the land.

While there is no question that the Tribe traditionally exercised governmental authority over the land, the question of whether the Tribe continues to exercise governmental power over the Parcel for purposes of IGRA is an extended analysis.

III. PROCEDURAL AND FACTUAL BACKGROUND

The Tribe filed a timely appeal of the Chairman's disapproval of its amended gaming ordinance. The Tribe filed its brief on October 22, 2020. In that brief, the Tribe raised a Due Process argument. The Tribe argued that because it was the Chairman who disapproved the gaming ordinance and the Chairman who was part of the Commission reviewing the decision on appeal, the Tribe was denied due process. Essentially, the Tribe argued that the Chairman could not be neutral and that this fact denied the Tribe of due process. The Tribe later filed a Motion for Recusal prompting the Commission to act affirmatively on the issue. The Commission issued its Order denying the Tribe's Motion for Recusal on January 14, 2021, but would like to address the issue for the record.

[2] 34 Stat. 197 (1906) (Repealed 1971).
[3] 43 U.S.C. §§ 1601-1629.
[4] Act of March 3, 1891, 32 Stat. 1095.
[5] Act of June 19, 1935, 49 Stat. 388.

IGRA establishes the Chairman's authority to approve or disapprove a gaming ordinance and for his/her decision to be appealable to the Commission.[6] The Commission under IGRA comprises three Commissioners—a Chairman and two Associate Members.[7] At the time the Tribe filed this appeal, the Commission was comprised of a Chairman and Vice Chair. IGRA requires two Commissioners to form a quorum in order to conduct business.[8] Under the previous Commission's composition, the Chairman and Vice Chair would both have had to participate in order to form a quorum, and both would have had to vote to overturn the Chairman's disapproval in order for the Tribe to be successful in its appeal. The former Secretary of the Interior published his intent to nominate a third Commissioner to the Commission on December 14, 2020, and Commissioner Jeannie Hovland was appointed to the Commission on January 17, 2021. The Commission denied the Tribe's Motion to Recuse, but granted a 30-day extension of its decision in order to allow Commissioner Hovland to participate in this appeal. The original decision was due from the Commission on January 20, 2021, and that would have only given Commissioner Hovland three days to become familiar with the issue and facts of this matter and this would not have been enough time to allow anyone enough time to meaningfully participate in this process.

The Commission would also like to state further for the record that even if the Secretary of the Interior had not appointed a third Commissioner, the appeal before a two-member Commission would have been proper. The Commission is following the structure that Congress provided in IGRA. IGRA authorizes the Chairman to approve or disapprove gaming ordinances and that decision is reviewable by the Commission. There have been times throughout the

[6] 25 U.S.C. § 2705(a)(3).
[7] 25 U.S.C. § 2704(b)(1).
[8] 25 U.S.C. § 2704(d).

NIGC's history where the Agency was led by a two-person Commission. And, this fact has not prevented the Agency from performing its duties under IGRA.[9] Tribes would be disadvantaged if the Commission was unable to carry out its functions. Given the particular timing of this appellate decision in relation to the appointment of Commissioner Hovland, the definition of a full Commission included a three-person Commission. To not allow an extension of time for the Commissioner to learn about the issues and to meaningfully participate would have denied both the Tribe and the Commissioner the benefit of that participation.

IV. ANALYSIS

A. JURISDICTION AND GOVERNMENTAL POWER ANALYSIS

As noted above, the Allotment is a restricted-fee Indian allotment that is not within an existing reservation and therefore the Tribe must show that it exercises governmental powers over the Parcel in order for it to be Indian Lands and eligible for gaming.[10] As a threshold to exercising governmental powers, the Tribe must first show that it has jurisdiction over the Parcel.[11] The requirement for a tribe to possess jurisdiction before exercising governmental

[9] Even if the Chairman wanted to unnecessarily recuse himself, the Chairman is required to participate due to the rule of necessity. "The rule of necessity allows a judge, normally disqualified, to hear a case when 'the case cannot be heard otherwise." *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1164 (9th Cir. 2006) (quoting *United States v. Will*, 449 U.S. 200, 217 (1980)); *see also Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) ("Essentially, the rule of necessity requires an adjudicatory body (judges, boards, commissions, etc.) with sole or exclusive authority to hear a matter to do so even if the members of that body may have prejudged the results of a particular hearing. If the Chairman was to disqualify himself, the Commission would lack a quorum to make a decision. 25 U.S.C. § 2704(d).

[10] 25 U.S.C. § 2703(4)(B).

[11] *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("a necessary prelude to the exercise of governmental power is the existence of jurisdiction," and "Absent jurisdiction, the exercise of governmental power is, at best, ineffective, and at worst, invasion."); *see also 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 as stated in *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]"); *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); *State ex rel. Graves v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000); *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001) ("before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land.").

powers is consistent with IGRA's plain language regarding tribal regulation of class II gaming, "An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands **within such tribe's jurisdiction**…,"[12] and class III gaming, "Class III gaming activities shall be lawful on Indian lands only if such activities are…adopted by the governing body of the **Indian tribe having jurisdiction over such lands**."[13]

Generally speaking, an Indian tribe is presumed to possess jurisdiction over land that the tribe inhabits if the land qualifies as "Indian country."[14] Congress has defined "Indian Country," for federal criminal jurisdictional purposes, to include all "Indian allotments…."[15] Although this definition is limited to criminal jurisdiction, courts have applied it to civil jurisdiction.[16] There is no question that the Parcel in question qualifies as Indian Country under 18 U.S.C. § 1151(c). While Indian Country status provides the statutory basis for the exercise of federal jurisdiction it does not necessarily follow that all Indian allotments are subject to tribal jurisdiction. Courts have only stated the general rule that allotments are presumed to also have tribal jurisdiction.[17] The analysis for tribal jurisdiction rests on Congressional intent.[18]

While the definition of Indian Country provides some insight into the jurisdictional question it is important to note that Congress did not use the term "Indian Country" in IGRA, but

[12] 25 U.S.C. § 2710(b)(1) (emphasis added).
[13] 25 U.S.C. § 2710(d)(1) (emphasis added).
[14] *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1 (1998); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, 567 F. 3d 1235 (10th Cir. 2009) ("[A]s a general matter, Indian tribes exercise court jurisdiction over Indian country").
[15] 18 U.S.C. § 1151(c).
[16] V*enetie*, 522 U.S. at 527.
[17] *See supra* n.14; *see also* Sansonetti, T., GOVERNMENTAL JURISDICTION OF ALASKA NATIVE VILLAGES OVER LAND AND NON-MEMBERS Op. Sol. Int. M-36975, pg. 126 (Jan. 12, 1993) (hereafter "Sansonetti Opinion").
[18] *Kansas v. United States*, 249 F.3d 1213, 1231 (10th Cir. 2001) ("An Indian tribe's jurisdiction derives from the will of Congress").

instead used and separately defined the term "Indian lands" to determine eligibility for gaming.[19] The proper analysis of whether the Tribe has jurisdiction over the Parcel involves a fact specific analysis of the Parcel in question and whether Congress has diminished tribal sovereignty over the Parcel.[20]

Tribes possess "attributes of sovereignty over both their members and their territory."[21] "[S]overeign power, even when unexercised, is an enduring power ... and will remain intact unless surrendered in unmistakable terms."[22] However, "Congress possesses plenary power over Indian affairs, including the power to ... eliminate tribal rights."[23] Thus, a tribe retains jurisdiction over lands where that jurisdiction has not been withdrawn by Congress and unilateral acts by the tribe cannot revive jurisdiction.[24] When looking at whether the Tribe possesses jurisdiction over the Parcel, we must look at its history and surrounding acts of Congress.

There are generally two types of allotments. The first type of allotments are those that were carved out of an existing Indian reservation and the other type are allotments made from lands in the public domain. While this distinction does not change federal jurisdiction, or the status of the allotment as Indian Country, we believe it provides some insight into the presumption of tribal jurisdiction over individual Indian allotments. On the one hand, you have individual Indian allotments that were carved out of an existing Indian reservation, under statutes like the General Allotment Act, and given to members of that tribe. On the other hand, you have

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[19] 25 U.S.C. § 2703(4); *see also Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1218 (D. Kan. 1998).
[20] *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001); see also *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1422 (D. Kan. 1996) (question of jurisdiction is a question of law and requires "evaluation of various treaties, United States Attorney General Opinions, House of Representative and Senate Committee Reports and court decisions…").
[21] *United States v. Wheeler*, 435 U.S. 313, 323 (1978).
[22] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).
[23] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
[24] *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("an Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist.").

individual Indian allotments issued under statutes like the Act of March 3, 1875, sec. 15, 18 Stat. 402, 420 which permitted an Indian born in the United States, "who has abandoned, or may hereafter abandon, his tribal relations," to obtain a homestead under the Homestead Act of 1862, 12 Stat. 392. While both of these individual Indian allotments are "Indian Country" they show radically differing Congressional policies.

It is logical to presume tribal jurisdiction over an allotment made to an individual member of the tribe within the tribe's exterior reservation boundaries. Conversely, it is not logical to presume tribal jurisdiction over an allotment made to an Indian who has renounced his tribal membership. The Commission notes that portion of the DOI M-Opinion 36975 (Sansonetti Opinion) which states, "that whether an individual allotment is subject to tribal jurisdiction depends upon a particularized inquiry into the relevant statutes and circumstances surrounding the creation of the allotment."[25] In order to analyze whether the Tribe maintains jurisdiction over the Parcel we must look to the statute that created it.

1. ALASKA NATIVE ALLOTMENT ACT

The original allotment was issued to Mr. George under the Alaska Native Allotment Act of 1906. The language of the ANAA, authorized the Secretary of the Interior,

> . . . to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district . . . and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress.[26]

[25] Sansonetti Opinion at 126-127.
[26] 34 Stat. 197 (Repealed 1971).

The plain language of the ANAA created an individual interest in the land, but did not provide any indication on the part of Congress to create or preserve a tribal interest in the land allotted. Additionally, the legislative history of the ANAA does not contain any reference to a tribe or tribal jurisdiction. In a report to the Senate Committee on Public Lands, it was noted the ANAA was meant to extend "to the Natives of Alaska the rights, privileges and benefits conferred by the public land laws upon citizens of the United States."[27] The legislative history of the ANAA provides valuable insight that Congress was concerned about protecting individual Alaska Natives' rights to their property.

2. CREATION OF TONGASS NATIONAL FOREST AND LAND SWAP

The location of Mr. George's original allotment is within the Kootznoowoo Wilderness area.[28] In 2005, part of Mr. George's original allotment was exchanged for the Parcel that is the subject of this appeal.[29] Nearly 100 acres of the original allotment was exchanged for the 220-acre Parcel.[30] The exchange was authorized pursuant to a number of federal laws.[31] The purpose

[27] S. Doc. No 101, 59th Cong. 1st Sess. (1906). Likewise, in a report to the House Committee on the Public Lands, the ANAA was proposed because: "The fact that Indians in Alaska are not confined to reservations..., but they live in villages and small settlements...where they have their little homes upon land to which they have no title, nor can they obtain a title under existing laws... Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo... is forced to move and give way to his white brother." H.R. Rep. No. 3295, 59th Cong. 1st Sess. (1906).

[28] The Kootznoowoo Wilderness area was designated as a National Monument by the President and Congress. Presidential Proclamation No. 4611, 3 C.F.R. 69 (1978); Alaska National Interest Lands Conservation Act, 503(b), 94 Stat. 2371, 2399 (1980).

[29] It is important to note that the Tribe would have to have jurisdiction and exercise governmental power over both of the parcels of land involved in the exchange because it does not seem logical that jurisdiction and governmental power would carry over from parcel to parcel. However, if the Tribe is asserting that it has jurisdiction and exercises governmental power over all of its traditional lands, this is a vast area and must be recognized by more than just the Tribe. It must be acknowledged by Congress. And, there is no language in the ANAA to indicate an intent by Congress to vest or preserve the Tribe's jurisdiction over the allotted lands.

[30] The subsequent allotment was considerably larger than the original allotment. This was based on the value of the ANAA allotment compared with the allotment that the George heirs received in exchange and currently hold. When the government exchanged one allotment for another, the value of each were factored into that exchange. This lends further credibility to the idea that the ANAA allotments provided a personal interest in the land to the individual who applied for it and demonstrated a connection to it.

[31] These include the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716; the Federal Land Exchange Facilitation Act of August 20, 1988, 43 U.S.C. § 1716; the General Exchange Act of March 20, 1922, 16

of the exchange was to consolidate federal land ownership in Wilderness areas, by authorizing the exchange of private Wilderness inholdings for other non-Wilderness lands within the National Forest.

The location of the Parcel is within the Tongass National Forest. The Tongass National Forest was created by a series of Executive Proclamations made on August 20, 1902, September 10, 1907, and February 16, 1909. These Executive Proclamations were issued under the Forest Reserve Act of 1891 that allowed:

> SECTION 24—The President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.[32]

In creating the Tongass National Forest, President Theodore Roosevelt proclaimed, "that there are hereby reserved from settlement, entry, or sale, and set apart as a public reservation, for the use and benefit of the people."[33]

It is well settled that reservation of lands for forest purposes effectively extinguishes Indian title.[34] Here, the President established the Tongass National Forest which encompasses the Parcel. Under the rule relied on in *U.S. v. Gemmill*, the act of establishing a national forest covering the Parcel would have extinguished the Tribe's title.[35]

U.S.C. §§ 485, 486; the Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(f); the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3192(h).

[32] 26 Stat. 1103.

[33] *See e.g.* Tongass Proclamation, Sept 10, 1907.

[34] *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1478 (D. Ariz. 1990), aff'd sub nom. *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991) (citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1386, 1391–92 (Ct. Cl. 1975) and *U.S. v. Gemmill*, 535 F. 2d 1145, 1149 (9th Cir. 1976)).

[35] *U.S. v. Gemmill*, 535 F. 2d 1145, 1149 (9th Cir. 1976) (citing *U.S. v. Pueblo of Ildefonso* (Ct. Cl. 1975) 513 F.2d 1383, 1386, 1391-92).

3. SETTLEMENT OF TRIBE'S LAND CLAIMS

The Indian Lands Opinion prepared by the Tribe mentioned and quickly dismissed the effect of the Tribe's land claims brought against the United States. However, the extinguishment of the Tribe's title coincides with the history of the Tribe's jurisdictional act and the claims brought by the Tribe before the United States Court of Claims for losses against the United States. The jurisdictional act was passed by Congress and allowed the Tribe to bring,

> [a]ll claims of whatever nature, legal or equitable, which the said Tlingit and Haida Indians of Alaska may have, or claim to have, against the United States, for lands or other tribal or community property rights, taken from them by the United States without compensation therefor, or for the failure or refusal of the United States to compensate them for said lands or other tribal or community property rights, claimed to be owned by said Indians and which the United States appropriated to its own uses and purposes without the consent of said Indians, or for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska, and for loss of use of the same, at the time of the purchase of the said Russian America, now Alaska, from Russia, or at any time since that date and prior to the passage and approval of this Act . . .[36]

The Tribe settled its land claims in 1959.[37] The court determined that establishment of forest reserves constituted a taking of land and water aboriginally used and occupied by the

[36] Act of June 19, 1935, 49 Stat. 388.
[37] *Tlingit and Haida Indians of Alaska v. United States*, 177 F.Supp. 452 (Ct. Cl. 1959).

Tribe.[38] Thereafter, the Tribe was compensated for its land claims in 1968.[39] The language of the Jurisdictional Act bars the Tribe from making any additional claims related to the land.[40] Additionally, the establishment of the National Forest and the compensation to the Tribe extinguished any title to the land that the Tribe may have had.[41] Finally, once the Tribe's aboriginal title was extinguished, it cannot be revived.[42] It does not follow logically that the Tribe's jurisdiction would survive extinguishment of its aboriginal title.

4. ALASKA NATIVE CLAIMS SETTLEMENT ACT

Even ignoring the extinguishment of the Tribe's aboriginal title based on the creation of the Tongass National Forest, Congress clearly extinguished any jurisdictional claims of the Tribe based on historical use and occupancy with the passage of ANCSA. At its outset, section 1603 (a)-(c) of ANCSA abolishes all claims of aboriginal title:

[38] The court exhibit of the photo of the lands at issue in the 1959 lands claim appears to encompass both the land originally allotted to Jimmy A. George, Sr. and the Parcel which also appears to encompass the lands comprising the Tongass National Forest.
[39] *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 787 (Ct. Cl. 1968).
[40] Section 3 of that Jurisdictional Act states: "the final judgment or decree shall conclude and forever settle the claim or claims so presented..." Act of June 19, 1935, 49 Stat. 388.
[41] In *Gemmill*, the Ninth Circuit determined that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by Congressional payment of compensation to the ... Indians for these lands." *See also United States v. Dann*, 873 F.2d 1189. The Ninth Circuit considered the effect of a judgement brought by a tribe before the Indian Claims Commission in the case, *United States v. Dann*. In the *Dann* case, the United States brought an action against members of the Dann family for grazing on federal land without obtaining the proper permit. The Danns claimed aboriginal title as members of the Western Shoshone. The Western Shoshone ultimately settled a claim before the Indian Claims Commission which included the land in question. And, the court determined that the claims were completely settled and had the effect of completely extinguishing the Tribe's aboriginal title. The court left unanswered questions about the effects of the claims based on aboriginal title personal to the Danns, but that is not the issue before the Commission. The issue before the Commission is whether the Tribe exercises governmental power over the land in question.
[42] *See, e.g., Delaware Nation v. Commonwealth of Pennsylvania*, No. 04–CV–166, 2004 WL 2755545, at *10 (E.D. Pa. Nov. 30, 2004) ("[W]e find that the original right to possession, 'once having been extinguished, could not be revived, even if title were thereafter acquired by those who originally possessed that right.'") (quoting *Tuscarora Nation of Indians v. Power Auth. of N.Y.*, 164 F.Supp. 107, 113 (W.D.N.Y. 1958), aff'd, 446 F.3d 410, 417 (3d Cir. 2006)).

(a)Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b)Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal Claim Extinguishment Where Based on Right, Title, Use, or Occupancy of Land or Water Areas; Domestic Statute or Treaty Relating to Use and Occupancy; Or Foreign Laws; Pending Claims

All claims against the United States, the State and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.[43]

[43] 43 U.S.C. § 1603 (1971).

ANCSA contained a broad extinguishment of claims based on aboriginal title and at the same time withdrew certain lands for the benefit of the Corporations. The Tribe was not listed as being eligible for withdrawn lands.[44] Exempted from withdrawn lands were lands held as National Parks. Additionally, there is an exemption in 1615(c) for Tlingit and Haida citing the Tribe's settlement it received from the U.S. Court of Claims as the reason for it not being included on the list of villages eligible for withdrawn land. This all indicates that Congress considered the Tribe's claims already settled. And any title remaining was extinguished with ANCSA's passage.

Furthermore, *United States v. Atlantic Richfield Co.* examined the effect ANCSA had on aboriginal title in Alaska. There, the tribe was attempting to pursue trespass claims that arose prior to ANCSA's passage against private corporations based on the theory of aboriginal title.[45] The court analyzed the language of ANCSA and found that it acted to extinguish all claims based on aboriginal title because it extinguished any that existed at the time of ANCSA's passage.[46] The court went through a historical analysis of the laws impacting aboriginal title in Alaska. It contrasted the history of Alaska Natives to Natives in the lower 48 states.[47] The court pointed out that the United States did not enter into treaties with Alaska Natives and to the fact that Congress had only created one reservation in Alaska which ANCSA preserved. The court stated that many Alaska Natives were opposed to the reservation system that existed in the lower 48 and the resulting system of wardship that often followed.[48] The court ultimately decided that ANCSA's

[44] *Id*. at §1610.
[45] *U.S. v. Atlantic Richfield Co.*, 435 F. Supp 1009, 1014 (L. Civ. R. 1977).
[46] *Id*. at 1029.
[47] *Id*. at 1015.
[48] *Id*.

language in section 4(a) was expansive and phrased with a tense that barred all claims under aboriginal title, even those pre-dating the passage of ANCSA.[49]

Ultimately, ANCSA indicates that Congress saw the Tribe as having settled its land claims before the U.S. Court of Claims. Further, ANCSA extinguished all other claims based upon aboriginal title.[50]

5. SANSONETTI OPINION

The Tribe argues in its brief against the Chairman's reliance on the DOI M-Opinion 36975 (Sansonetti Opinion) which was issued by Solicitor Thomas L. Sansonetti on January 12, 1993. The Sansonetti Opinion has not been repealed and is controlling on the DOI. The Sansonetti Opinion did not create any new law, but merely summarized the state of the law at the time it was issued. The Commission's review included the Sansonetti Opinion, but focused primarily on the laws passed by Congress in order to determine whether or not the Tribe maintains jurisdiction over the Parcel.

When analyzing the Tribe's modern history, it is clear that Congress did not intend for the Tribe to exercise jurisdiction over the Parcel. First, it established a National Forest encompassing the area in question and later settled all land claims by allowing the Tribe to bring them against the United States in the Court of Claims. Then, it passed ANCSA which was another act that settled all of the remaining land claims in Alaska and extinguished aboriginal title. The Sansonetti Opinion merely summarizes the history of the Congressional relationship with Alaska Native Tribes. However, the Commission, without relying on the Sansonetti Opinion, has examined the issue in light of controlling law and has arrived at the same conclusion as the Chairman.

[49] *Id*. at 1022-1023.
[50] *See supra* n.43.

6. OTHER CONSIDERATIONS

The Commission has also considered the other factors the Tribe has raised to establish it meets the definition of Indian Lands in IGRA. However, without jurisdiction over the Parcel, the Tribe cannot meet the definition of Indian Lands in IGRA. One of the arguments the Tribe urges the Commission to consider in its analysis is the assertion that the business lease contains language between the George heirs and the Tribe that acknowledges, "LESSORS acknowledge and agree that the leased premises and the activities thereon, are subject to the laws, jurisdiction and governmental power and authority of the CCTHITA and the United States." Since the land is held in restricted status, the business lease must be approved by the Bureau of Indian Affairs (BIA). The Tribe argues that the BIA's approval is some form of acknowledgement by the United States of the Tribe's governmental authority over the Parcel. The lease is between a Tribe and Tribal member land owners. The lease approval is not an NIGC function and the Commission hesitates to comment on or make an assessment as to the extent the BIA lease approval governs this analysis. Regardless, private parties cannot by agreement create the Tribe's governmental power over the Parcel unless it already exists and is inherently recognized by Congress.[51]

The DOI concurred in the Chairman's decision to disapprove the Tribe's gaming ordinance. The Commission also notes the limiting language of that section which states, ". . . *subject to the laws,* jurisdiction and governmental power and authority *of* the CCTHITA and *the United States*." (emphasis added). Therefore, the Tribe's governmental power and authority is subject to the laws of the United States and must derive from a separate source under the law.

[51] *Miami Tribe of Okla. v. U.S.*, 249 F.3d at 1230–31 ("An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts.").

Next, the Tribe points to the many services it provides to its membership as examples of ways it exercises jurisdiction and governmental powers over the land. The Tribe points to the services that it provides to its membership such as head start programs, temporary assistance to families, immersion programs, family support classes, and higher education scholarships. As to the services the Tribe provides its members, those seem to have more to do with administration of programs to its members. But, without establishing it has jurisdiction over the land, the administration of these programs cannot be used for the governmental powers analysis. For example, the Commission has considered the photo of the "no trespassing" signs and the security vehicle patrolling the Parcel. However, the act of patrolling land does not confer jurisdiction to the Tribe, and the Tribe has not shown authority that empowers it with jurisdiction to enforce laws over the land. Furthermore, the Tribe's submission included an Environmental Assessment that was completed prior to the allotment exchange in 2003. The Assessment listed applicable laws and stated, "City and Borough of Juneau (CBJ)… regulates traffic and penal codes, health and sanitation codes, and building codes on restricted property. To date, CBJ has not attempted and has no plans to apply zoning regulations to restricted properties." The Assessment also listed Alaska state laws as being applicable and noted the several federal laws that were applicable to the land. Notably missing from that report was mention or acknowledgement of applicable Tribal laws. Additionally, the Tribe did not include a statement from any other local jurisdictions acknowledging the Tribe's jurisdiction over the Parcel. That is not to say this would have been conclusive evidence as to the issue, but it would have been a stronger indication that this is not a unilateral assertion of jurisdiction. The Tribe also points to its Indian Reservation Roads Program Inventory Data Sheet FY 2015 Inventory and its forestry management plan. The arguments

presented regarding the roads inventory are also not conclusive because the fact that the roads are in the Tribe's Inventory does not mean the Tribe exercises jurisdiction over the roads.

Every Indian Lands Opinion considers the facts specific to the individual tract of land. The Commission has analyzed the facts specific to the Tribe against the backdrop of the legislation passed by Congress. The Commission's assessment of facts provided by the Tribe does not support a finding that the Tribe has met the threshold jurisdictional requirement. In fact, the evidence shows that Congress has taken affirmative action to dissolve the Tribe's jurisdiction over the Parcel. A tribe must have jurisdiction over land in order to be able to exercise governmental power over it.[52] Since the Tribe has not met the threshold of showing it has jurisdiction over the Parcel, the Commission does not get to the governmental power analysis.[53] That is not to say that this was an easy decision for the Commission to make. The Commission appreciates the Tribe's desire to increase its economic base. However, the Commission must make its decision based on the facts and law guiding its analysis and IGRA requires a Tribe to have jurisdiction and exercise governmental power over the lands in question in order for them to qualify as Indian lands eligible for gaming.

V. CONCLUSION

Based on the foregoing, and in light of current laws, regulations, and cases cited above, it is clear to the Commission that the specific and unique history of the Parcel has removed it from IGRA's definition of Indian Lands. Our analysis of the Parcel shows that the Tribe does not have jurisdiction over the Parcel, and thus cannot exercise the governmental power that IGRA requires

[52] *See supra* n.11.

[53] *Kansas v. U.S.*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("A proper analysis of whether the tract is "Indian lands" under IGRA begins with the threshold question of the Tribe's jurisdiction. That inquiry, in turn, focuses principally on congressional intent and purpose, rather than recent unilateral actions of the Miami Tribe.").

in order for the Parcel to be qualified as Indian Lands under the law. Therefore, the Commission disapproves the Tribe's amended gaming ordinance.

Dated this 25th day of February, 2021.

E. Sequoyah Simermeyer
Chairman

Kathryn Isom-Clause
Vice Chair

Jeannie Hovland
Commissioner

Certificate of Service

I hereby certify that on February 25, 2021, I served the foregoing Final Order and Decision by email to:

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