Memorandum

To: Philip N. Hogen, Chairman

Through: Penny J. Coleman, Acting General Counsel PJC

From: John R. Hay, Staff Attorney JRH

Date: September 6, 2006

Re: Gaming By the Big Sandy Rancheria on the McCabe Allotment

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On December 22, 2004, the Big Sandy Band of Western Mono Indians ("Tribe") submitted to the NIGC a Request for Approval of Management Agreement between Big Sandy Entertainment Authority and QBS, LLC, regarding a proposed casino near Fresno, California. On April 19, 2005, the Tribe submitted documentation to support its assertion that the proposed casino site constituted "Indian lands" as defined by the Indian Gaming Regulatory Act ("IGRA").[1] In conjunction with the submission of a Management Agreement, the Tribe has requested that the NIGC provide an advisory legal opinion on whether the proposed casino location qualifies as Indian lands under IGRA.

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[1] The Tribe's submission included the following attachments: A Plan For The Distribution Of The Assets Of The Big Sandy (Auberry) Rancheria (Effective Date, March 5, 1965); Stipulation for Entry of Judgment, San Joaquin or Big Sandy Band of Indians, et al. v. James Watt, et al. (March 25, 1983); BIA, Title Status Report (November 12, 2003); BIA, Tract History Report (February 10, 2004); Trust Patent from the United States of America to Mary McCabe (March 29, 1920); BIA, 1933 California Roll Book (excerpt)(November, 1986); Letter from Sacramento Indian Agency (April 24, 1935); Tribal Resolution No. 84-1 (March 19, 1984); Declaration of Dan Lewis (March 28, 2005); Deed to Restricted Indian Land Special Form (February 2, 1979); Lester McCabe, BIA Index and Heirship Card; Opinion of the Solicitor, Sampson Johns Allotment (September 26, 1996); Declaration of Sherril McCabe (April 7, 2005); Declaration of Tribal Council Member, Phyllis Lewis (March 31, 2005); Declaration of Tribal Administrator, Ric Contreras (March 31, 2005); Tribal Council Resolution No. 0604-03, Affirming Tribal Government Jurisdiction Over Indian Lands Of The Tribe (June 12, 2004); Permit to Enter Trust Lands of the Tribe; Tribal Jurisdiction and Government Services Ordinance, Ordinance No. 1204-01 (December 30, 2004); Map of McCabe Allotment; and Fresno County Assessor's Map, Book 138, Page 06 (June 25, 2003).

By letter dated September 9, 2005, the California Governor's Office of Legal Affairs submitted its views on the Indian lands determination. The Tribe responded to the State's arguments by letter dated October 7, 2005.

By letter dated February 1, 2006, the Table Mountain Rancheria submitted its views on the Indian lands determination. The Tribe has not responded to that submission.

The Office of General Counsel has evaluated all of the information submitted and determined that the McCabe Allotment would qualify as Indian lands under IGRA and, therefore, the Tribe may lawfully conduct gaming on this parcel.

Background

The Tribe is a federally recognized Indian tribe occupying the Big Sandy Rancheria near Auberry, California, approximately 35 miles northeast of Fresno. Pursuant to a tribal-state gaming compact with the State of California, the Tribe conducts class II and class III gaming in its reservation's Mono Winds Casino. The tribe is now developing a new gaming facility outside the boundaries of the reservation.

The parcel of land the Tribe proposes to conduct gaming on is an Indian allotment (hereinafter, the "McCabe Allotment") that has been continuously held in trust since 1920 for McCabe family members.[2] The current allottee, tribal member Sherrill McCabe-Esteves, has been the sole beneficial owner of the McCabe allotment since 1979. The Allotment is located 12 miles outside the Rancheria, in an unincorporated part of Fresno County. The allottee is leasing the parcel to the Tribe.[3] The lease has been submitted to the Bureau of Indian Affairs for review.

The McCabe Allotment is a 40.82[4] acre Indian allotment held in trust by the United States for the benefit of Big Sandy Rancheria tribal member Sherrill Anne McCabe (aka McCabe-Esteves). The McCabe Allotment was originally allotted out of the public domain to Mary McCabe, a member of the Tribe, in 1920 and immediately placed in trust.

Applicable Law

The IGRA explicitly defines "Indian lands" as follows:

(A) all lands within the limits of any Indian reservation; and

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[2] The parcel at issue is described as: The north half of Lot two of the northwest quarter of Section eighteen in Township eleven south of Range twenty-two east of the Mount Diablo Meridian, California, containing forty and eighty-two-hundredths acres.

[3] The lease was submitted to the Pacific Regional Office of the Bureau of Indian Affairs on December 20, 2004.

[4] The BIA trust status report indicates that this is a 40.82 acre parcel. However, a survey done by the Big Sandy Rancheria has found that this parcel is 48.20 acres. In all likelyhood this is simply a scriveners error, however, our opinion is limited to the legal description of the trust document.

(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.

25 U.S.C. § 2703 (4).

NIGC regulations have further clarified the Indian lands definition, providing that:

> 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. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Further, IGRA gives tribes the exclusive right to regulate gaming on Indian lands, specifically providing that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701 (5). IGRA further clarifies the jurisdiction of Tribes as to the different classes of gaming stating that:

> (1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.
> (2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

25 U.S.C. § 2710(a)(1)(2). The requirements for Class III gaming likewise state:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are--
> (A) authorized by an ordinance or resolution that
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands ...

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1)(A)(C).

Analysis

The McCabe Allotment is not within the Big Sandy Rancheria; it is held in trust for the benefit of tribal member Sherrill McCabe. Therefore, the McCabe Allotment constitutes Indian lands if the Tribe possesses jurisdiction and exercises governmental authority over it.

Jurisdiction

As a general matter, tribes are presumed to possess tribal jurisdiction within "Indian country." *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The Supreme Court has stated that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Historically, the term "Indian country" has been used to identify land that is subject to the "primary jurisdiction . . . [of] the Federal Government and the Indian tribe inhabiting it." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). The U.S. Code defines "Indian country" as:

> (a) all land within the limits of any Indian reservation...,
> (b) all dependent Indian communities..., and
> (c) all Indian allotments, the Indian titles to which have not been extinguished....

18 U.S.C. § 1151. *See, e.g., United States v. Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain Indian lands set apart for Indians under governmental care").

This situation is similar to the Sampson Johns Allotment over which the Quinault Tribe possesses jurisdiction. In 1996, the Department of the Interior, Office of the Solicitor concluded that an Indian allotment, located off-reservation and created from the public domain, constituted Indian lands for the purposes of IGRA. *See Opinion of the Solicitor, Sampson Johns Allotment* (September 26, 1996). In that case, the allotment was owned by a member of the Quinault tribe and was located 12 miles from the Quinault reservation. The opinion concluded that the Quinault Tribe possessed jurisdiction over the lands. The opinion noted that a tribe would possess jurisdiction over lands within Indian country unless the "land in question is not owned or occupied by tribal members and is far removed from the tribal community." *Id.*

Similar to the Sampson Johns Allotment, the McCabe Allotment is owned by a tribal member who is a descendent of the original allottee's family and the allotment has been held in trust continuously since 1920 and is located within 12 miles of the Tribe's Rancheria. Therefore, we can conclude that the Tribe has jurisdiction over the land.

Exercise of Governmental Authority

In order for the land to fit the definition of "Indian lands," we must decide whether the Tribe exercises governmental power over the parcel. *See* 25 U.S.C. § 2703(4)(B); *see also Narragansett Indian Tribe,* 19 F.3d at 703.

IGRA is silent as to how NIGC is to decide whether a tribe exercises governmental power. Furthermore, the manifestation of governmental power can differ dramatically depending upon the circumstances. For this reason NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act,* 57 Fed. Reg. 12382, 12388 (1992).

Case law and NIGC opinions provide some guidance. The First Circuit in *Narragansett Indian Tribe* found that satisfying this requirement depends "upon the presence of concrete manifestations of [governmental] authority." *Narragansett Indian Tribe,* 19 F.3d at 703. Such examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.*

In *Cheyenne River Sioux Tribe v. State of South Dakota,* 830 F. Supp. 523 (D.S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993), the court stated that several factors might be relevant to a determination of whether off-reservation trust lands constitute Indian lands. The factors were:

(1) Whether the areas are developed;
(2) Whether the tribal members reside in those areas;
(3) Whether any governmental services are provided and by whom;
(4) Whether law enforcement on the lands in question is provided by the Tribe; and
(5) Other indicia as to who exercises governmental power over those areas.

Id. at 528. The Court did not opine regarding the weight given any factor or whether the absence or presence of one factor was determinative.

In this case, the Tribe's Constitution provides that the Tribe has jurisdiction over any allotment of a tribal member. The Tribe provides governmental services to off-reservation Indian allotments owned or occupied by tribal members including the McCabe allotment and other allotments in the surrounding area. According to the Tribe, such services have included, for example, tribally and HUD funded housing services,

housing and facility maintenance, social, welfare and property maintenance services (including food and meal delivery, home repair, refuse removal, etc.).

The McCabe Allotment is largely vacant and undeveloped. However, the Tribe provides some governmental services to the allotment, including site inspection by tribal police officers, fence repair, maintenance, inspections for unauthorized grazing, and general supervision. The Tribe provided a sworn statement from Ric Contreras, Big Sandy Tribal Administrator, recounting a recent situation where a tribal employee noticed signs that cattle had been illegally grazing on the land. The Tribe took action to seal-off possible entries that cattle may have used to gain access to the property.

The Tribe has submitted a sworn statement from Sherrill McCabe, the allottee, stating that the "Tribe provides governmental services and benefits to the McCabe Allotment, including inspection by Big Sandy tribal patrol officers, fence repair, maintenance, monitoring for un-permitted grazing, and general supervision."

The Tribe submitted a sworn statement from Dan Lewis, a tribal security officer, stating that he "made regular visits to and inspections of the McCabe Allotment" for the purpose of looking out for "trespassers, squatters and any damage to or removal of objects from the land."

The Tribe has submitted copies of resolutions to show that it exercises jurisdiction over off-reservation Indian allotments. Tribal Council Resolution #0604-03, adopted June 12, 2004, requires that all off-reservation trust allotments display a sign stating: "NO TRESPASSING: PROPERTY UNDER JURISDICTION OF BIG SANDY RANCHERIA TRIBAL GOVERNMENT. ENTRANCE ONLY BY PERMISSION OF TRIBAL GOVERNMENT." (emphasis in original). According to the Tribe, these warning signs have been placed on the McCabe allotment.

According to the Tribe, in December of 2004, it began requiring non-Tribal visitors, such as contractors, surveyors, and others, to obtain a permit before entering off-reservation Indian allotments to conduct work on behalf of the Tribe or a tribal member allottee.

These actions identified above are concrete manifestations of the Tribe's exercise of governmental authority over the allotment.[5]

Conclusion

In our opinion, the McCabe trust allotment constitutes Indian lands under the Indian Gaming Regulatory Act. Therefore, the Big Sandy Rancheria may conduct Class II and III gaming activities on the land. It is important to note that this is an advisory opinion

[5] The State of California argues that the Tribe must exercise historical and exclusive jurisdiction to qualify as Indian lands under IGRA. This is an incorrect statement of law. At least since prior to the enactment of IGRA, the Tribe had the authority to exercise jurisdiction. In the specific circumstances described here, nothing more is required. Additionally, there is no requirement that the Tribe exercise governmental power over a historically significant period of time.

issued by the Office of General Counsel and not a final agency action. The Department of the Interior, Office of the Solicitor concurs with this opinion.