



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 10 2010

Honorable Ron Sparkman
Chairman, Shawnee Tribe
P.O. Box 189
Miami, Oklahoma 74354

Dear Chairman Sparkman:

In January 2008, the Shawnee Tribe (Tribe)¹ submitted an application to have a parcel of land near Oklahoma City, taken into trust for the Tribe for the purpose of gaming. The Tribe also submitted a request for an Indian lands determination that the land, if taken into trust, would qualify as "Indian lands" within the meaning of IGRA and further qualify for gaming under either the "initial reservation" or the "restored lands" exceptions of 25 USC § 2719(b)(1)(B)(ii) and (iii), such that the Tribe could conduct gaming on the land without obtaining the consent of the governor in a two-part determination.

I have determined that the Tribe qualifies as a "restored tribe" within the meaning of IGRA but that the land it seeks to acquire does not qualify as either an initial reservation or as "restored lands" within the meaning of IGRA as interpreted in the Department's governing regulations, 25 CFR Part 292.

Legal Analysis

I. The Shawnee Tribe is a "restored tribe."

On August 25, 2008, after extensive notice and public comment, the Department published comprehensive regulations governing gaming on lands acquired after October 17, 1988 - 25 CFR Part 292. IGRA prohibits gaming on such lands unless the lands qualify for one of the exceptions set out in 25 USC § 2719, one of which applies to land acquired as "restored lands" for a "restored tribe."

The regulations elaborating on the 'restored lands' exception provide in part:

Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

- (a) The Tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;
- (b) The Tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

¹ The Shawnee Tribe has also been known as the Loyal Shawnee and the Cherokee Shawnee.

- (c) At a time after the Tribe lost its government-to-government relationship, the Tribe was restored to Federal recognition by one of the means specified in § 292.10; and
- (d) The newly acquired lands meet the criteria of “restored lands” in § 292.11.

25 CFR § 292.7.

As discussed below, the Tribe meets the requirements of Section 292.7(a)-(c) and thus qualifies as a “restored tribe.” The land does not, however, meet the criteria for “restore lands” within the meaning of Section 292.11.

A. The Shawnee Tribe was federally recognized.

In order to show that a tribe was at one time federally recognized for purposes of Section 292.7(a), a tribe must demonstrate one of the following:

- (a) The United States at one time entered into treaty negotiations with the Tribe;
 - (b) The Department determined that the Tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;
 - (c) Congress enacted legislation specific to, or naming, the Tribe indicating that a government-to-government relationship existed;
 - (d) The United States at one time acquired land for the Tribe’s benefit;
- or
- (e) Some other evidence demonstrates the existence of a government-to-government relationship between the Tribe and the United States.

25 CFR § 292.8.

The Tribe can establish that it had been federally recognized by satisfying any one of the above criteria. The Shawnee Status Act of 2000 (Status Act or Act) establishes directly that the Shawnee Tribe meets the requirements of 25 CFR § 292.8(a), (c) and (d), and indirectly shows that the Tribe meets other criteria.

The “Findings” section of the Status Act states in part:

Congress finds the following:

- (1) The Cherokee Shawnees, also known as the Loyal Shawnees, are recognized as the descendants of the Shawnee Tribe which was incorporated into the Cherokee Nation of Indians of Oklahoma pursuant to an agreement entered into by and between the Shawnee Tribe and the Cherokee Nation on June 7, 1869, and approved by the President on June 9, 1869, in accordance with Article XV of the July 19, 1866, Treaty between the United States and the Cherokee Nation (14 Stat. 799; July 19, 1866).
- (2) The Shawnee Tribe from and after its incorporation and its merger with the

Cherokee Nation has continued to maintain the Shawnee Tribe's separate culture, language, religion, and organization, and a separate membership roll.

(3) The Shawnee Tribe and the Cherokee Nation have concluded that it is in the best interests of the Shawnee Tribe and the Cherokee Nation that the Shawnee Tribe be restored to its position as a separate federally recognized Indian tribe and all current and historical responsibilities, jurisdiction, and sovereignty as it relates to the Shawnee Tribe, the Cherokee-Shawnee people, and their properties everywhere

25 USC § 1041.

The "Definitions" section of the Status Act clarifies that "[t]he term 'Tribe' means the Shawnee Tribe, known also as the 'Loyal Shawnee' or 'Cherokee Shawnee,' which was a party to the 1869 Agreement between the Cherokee Nation and the Shawnee Tribe of Indians."

25 USC § 1041a.

Congress also mandated in the Status Act the creation of a base membership roll, listing those individuals eligible for membership in the Tribe. The Act makes it clear that the current Shawnee Tribe is descended from the Shawnee Tribe with which the Federal Government carried on government-to-government relations in the 19th century. By invoking the 1869 agreement with the Cherokee in the "Findings" and "Definitions" sections, and citing to the Treaty of May 10, 1854, in the base membership roll section, Congress makes it clear that the Shawnee Tribe that was "restored" to Federal recognition by the Act of 2000 is an heir to the political entity recognized as the Shawnee Tribe² by the United States in the 19th century.

The Status Act also makes it clear that "[t]he United States at one time entered into treaty negotiations with the Tribe." It does so by stating that a person shall be eligible for enrollment in the Shawnee Tribe who "is a lineal descendant of any person . . . who was issued a restricted fee patent to land pursuant to Article 2 of the Treaty of May 10, 1854, between the United States and the Tribe (10 Stat. 1053)." 25 USC § 1041c (b)(2)(A). It should be added that the Treaty of May 10, 1854, itself identifies earlier treaties entered into by the United States and the Shawnee: those of November 7, 1825, (7 Stat. 284) and August 8, 1831 (7 Stat. 355). Plainly, the Shawnee and the United States entered into treaty negotiations, and thus the Tribe meets the test of 25 CFR § 292.8(a), showing former Federal recognition.

In addition to invoking a 19th century treaty and an inter-tribal agreement to which the Tribe was party, Congress's use of the phrase "restored to its position as a separate federally recognized Indian tribe" clearly indicates that the Shawnee Tribe had been federally recognized in the past, and that said Federal recognition had ended. *See* 25 USC § 1041(3)). Thus, the language of the Status Act meets the regulatory test set out in 25 CFR § 292.8(c) in that "Congress enacted legislation specific to, or naming, the Tribe indicating that a government-to-government relationship existed."

² Also identified as "Shawanoë" (in 1786, 1795 and 1803) and "Shawanese" (1817).

Finally, having established that the modern Shawnee Tribe is a successor-in-interest to the 19th-century Shawnee, the Status Act's invocation of the Treaty of May 10, 1854, establishes that "(t)he United States at one time acquired land for the Tribe's benefit," satisfying the regulatory test set out in 25 CFR § 292.8(d). The 1854 Treaty says:

The Shawnee tribe of Indians hereby cede and convey to the United States, all of the tract of country lying west of the State of Missouri, which was designated and set apart for the Shawnees in fulfillment of, and pursuant to, the second and third articles of a convention made between William Clark, Superintendent of Indian Affairs, and the chiefs and headmen of the Shawnee Nation of Indians . . . which said tract was conveyed to said tribe . . . by John Tyler, President of the United States, by deed bearing date the eleventh day of May, one thousand eight hundred and forty-four.

10 Stat. 1053, Art. 1.

Thus, the Tribe meets three separate and sufficient tests for proving it formerly enjoyed government-to-government relations with the United States.

B. The Shawnee Tribe lost its government-to-government relationship.

Once a tribe establishes that it was at one time federally recognized, as required by 25 CFR § 292.7(b), it is required by Section 292.7(b) to show that its government-to-government relationship was terminated by one of the following means:

- (a) Legislative termination;
- (b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the Tribe or its members or taking action to end the government-to-government relationship; or
- (c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

25 CFR § 292.9.

The Shawnee Tribe meets the requirement of Section 292.9(c) because there is "Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship." In the Status Act, Congress found that the Shawnee "are recognized as the descendants of the Shawnee Tribe which was incorporated into the Cherokee Nation of Indians of Oklahoma" under an 1869 agreement approved by the President of the United States. 25 USC §§ 1041(1), 1041a(3). Congress found also that "[t]he Shawnee Tribe and the Cherokee Nation have concluded that it is in the best interests of the Shawnee Tribe and the Cherokee Nation that the Shawnee Tribe be *restored to its position as a separate federally recognized Indian tribe* and all current and historical responsibilities, jurisdiction, and sovereignty as it relates to the Shawnee Tribe." 25 USC § 1041(3) (emphasis added).

By definition, a tribe cannot be “restored” to Federal recognition unless it has lost that Federal recognition. Thus the plain language of the restoration legislation clearly satisfies the test set out in 25 CFR § 292.9(c). By recognizing the “restoration” of the government-to-government relationship between the United States and the Shawnee Tribe, Congress established that said relationship had been lost.

C. The Shawnee Tribe has been restored to federal recognition.

In order for a tribe to qualify as having been restored to Federal recognition for purposes of 25 CFR § 292.7, the Tribe must also meet one of the criteria set out in 25 CFR § 292.10. Among the listed criteria is "Congressional enactment of legislation recognizing, acknowledging, affirming, *reaffirming*, or *restoring* the government-to-government relationship between the United States and the Tribe." 25 CFR § 292.10(a) (emphasis added). The Status Act states: “(t)he Federal recognition of the Tribe and the trust relationship between the United States and the Tribe are hereby *reaffirmed*.” 25 USC § 1041b; and further, “[t]he Shawnee Tribe and the Cherokee Nation have concluded that it is in the best interests of the Shawnee Tribe and the Cherokee Nation that the Shawnee Tribe be *restored* to its position as a separate federally recognized Indian tribe.” 25 USC § 1041(3) (emphasis added). Thus, the Status Act incorporates two of the words identified in the regulations as indicating Congressional intent to restore a tribe to federal recognition.

D. Conclusion: the Shawnee Tribe is a “restored tribe.”

In the Status Act, Congress clearly indicated that the modern Shawnee Tribe is a successor political entity to the Shawnee Tribe with which the United States conducted government-to-government relations in the 19th century. The Act and documents referred to therein, e.g. the Treaty of May 10, 1854 and the Cherokee-Shawnee Agreement of 1869, establish that the Tribe formerly had a government-to-government relationship with the United States; the government-to-government relationship ended; and the government-to-government relationship was “restored” and “reaffirmed.” Therefore, the Shawnee Tribe is a “restored tribe” under the Part 292 regulations.

II. The subject land cannot be “restored lands.”

Since the Tribe was restored by an act of Congress, the “restored lands” regulations require the Tribe to show that:

- (1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the Tribe within a specific geographic area and the lands are within the specific geographic area; or
- (2) If the legislation does not provide a specific geographic area for the restoration of lands, the Tribe must meet the requirements of § 292.12.

25 CFR § 292.11(a).

The Tribe asserts that the subject parcel meets the requirements of Section 292.12, and therefore qualifies as “restored lands” under § 292.11(a)(2); and alternatively, that the parcel is located within a “specific geographic area” identified in the restoration legislation, and therefore qualifies under Section 292.11(a)(1).³

A. The parcel does not meet the tests of 25 CFR § 292.12.

In order for the parcel to be “restored lands” pursuant to 25 CFR 292.11(a)(2), it must meet the regulatory requirements set out in 25 CFR § 292.12. In three subsections, Section 292.12 establishes the criteria which the parcel must possess in order to meet the “restored lands” exception.

1. There is no modern connection between the Tribe and the subject parcel.

Subsection § 292.12(a), the modern connections requirement, presents four ways that a tribe can show a modern connection to the parcel. Under Section 292.12(a)(1), a tribe can demonstrate a modern connection to a tract of land if “the land is within reasonable commuting distance of the Tribe’s existing reservation.” Leaving aside the “commutability” question, the Tribe does not have an existing reservation, so this subsection is unavailable to them.

Under Section 292.12(a)(2), a tribe that has no reservation can demonstrate a modern connection to a tract of land if “the land is near where a significant number of tribal members reside.” According to demographic data supplied by the Tribe, more than half of the entire Tribal membership lives in six counties in the northeast corner of the state. Only about 6.5% of the membership lives in the seven counties that could be called “near” to the parcel. I believe that these facts do not conform to the plain meaning of the regulations. The Tribe suggests that, since all the land “near” to the Tribe is in the jurisdictional areas of other tribes (and therefore, they assert, unavailable to the Tribe as a matter of fact), the subject parcel is the “nearest available land,” and should be deemed to meet this regulatory test. I believe that the relevant passages in the Act and the Part 292 regulations are unambiguous on this issue, and do not vest the Secretary with discretionary authority to interpret “near” as meaning “nearest available.”

Under Section 292.12(a)(3), a tribe can demonstrate a modern connection to a tract of land if “the land is within a 25-mile radius of the Tribe’s headquarters or other tribal government facilities.” The subject parcel is about 190 miles from Tribal headquarters, and so does not meet this criterion.

³ The Tribe also argues that the parcel should qualify as an ‘initial reservation’ pursuant to IGRA, (25 USC § 2719(b)(1)(B)(ii), and that the requirement in 25 CFR § 292.6(a) that a tribe be acknowledged “through the administrative process under [25 CFR] part 83” constitutes an impermissible narrowing of the phrase “Federal acknowledgement process” used in IGRA. We do not agree and find the plain meaning of the statute suggests that it applies solely to tribes acknowledged by the process set out in 25 CFR Part 83. But even aside from this dispute, the regulations still preclude the parcel from being deemed an “initial reservation” because 25 CFR § 292.6(d) requires the Tribe to demonstrate significant historical and modern connections to a proposed “initial reservation.” The facts presented by the Tribe show that it has neither. *See* discussion of Section 292.12(b).

Under Section 292.12(a)(4), "other factors" may be shown to "demonstrate the Tribe's current connection to the land." The Tribe has not alleged the existence of any such other factors beyond the fact that both the parcel and the Tribe are in the State of Oklahoma. I interpret the regulations to require a modern connection between the applicant tribe and the specific parcel whereon gaming is intended to occur. I reject the contention that every tribe has "current connections" to every piece of ground in its state of residence.

The facts in this case show that the subject parcel does not meet any of the regulatory tests for "modern connections to the lands" in 25 CFR § 292.12(a).

2. There is no historical connection between the Tribe and the subject parcel.

The "significant historical connections" requirement set out in 25 CFR § 292.12(b) also precludes granting the Tribe's request. This subsection requires that, in order for a parcel to be "restored land," "the Tribe must demonstrate a significant historical connection to the land." In its application, the Tribe attempts to meet this requirement by pointing out that the unassigned area of Oklahoma was acquired from the Creek and Seminole Indians by treaties in 1866 "in compliance with the desire of the United States to locate other Indians and freemen thereon," and that the land would be "sold and used as homes for such other civilized Indians as the United States may choose to settle thereon." Treaty with the Creeks, June 14, 1866, Article 3. From this, the Tribe reasons that, as a civilized tribe that the United States government removed to Oklahoma, it has a historical tie to this unassigned area.

The plain meaning of 'historical connection' that has guided agency practice in making other Indian land determinations refers, however, to actual historical use and occupancy by the Tribe of a particular area. The plain meaning of "significant historical connection to the land" does not encompass such an abstract association as that between the unassigned lands of Oklahoma and the Shawnee Tribe. The Tribe has never made use of the parcel nor any land within the vicinity of the parcel.

These facts show that the Tribe has neither significant historical connections nor significant current connections to the subject parcel, and thus the parcel cannot be deemed "restored lands" under 25 CFR § 292.11(a)(2).

B. The Shawnee Status Act does not identify a specific geographic area.

The Tribe argues in the alternative that the parcel should be deemed restored lands because it meets the requirement of 25 CFR § 292.11(a)(1), which applies when "[t]he legislation requires or authorizes the Secretary to take land into trust for the benefit of the Tribe within a specific geographic area and the lands are within the specific geographic area." The relevant section of the Status Act states-

- (a) Land Acquisition.-- In general. -- The Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 USC 465) [Indian Reorganization Act - IRA] and section 1 of the Act of June 26, 1936 (49 Stat. 1967; 25 USC 501) [Oklahoma Indian Welfare Act - OIWA].

(b) Restriction.--No land recognized by the Secretary to be within the Cherokee Nation or any other Indian tribe may be taken into trust for the benefit of the Tribe under this section without the consent of the Cherokee Nation or such other tribe, respectively.⁴

25 USC § 1041e, "Tribal Land."

The plain reading of the Status Act, as amended, does not support a finding that Congress authorized the Secretary to acquire land in trust for the Tribe within a specific geographic area. Nonetheless, the Tribe asserts that the Secretary should view all the relevant laws, regulations, and facts in a holistic manner to find that Congress implicitly identified a specific geographic area in which the Secretary was authorized to take land into trust for the Tribe. According to this argument, the Act bars the Tribe from acquiring land in other tribes' jurisdictional areas without their permission; and it is unlikely another tribe will give such permission; therefore, the Act effectively prevents the Tribe from acquiring land anywhere other than in Oklahoma's unassigned area. Also, by invoking the land-acquisition authority of the OIWA, Congress has directed the land acquisition to be in Oklahoma.

These facts and laws can be assembled into the following line of argument: The Status Act and Federal policy would be thwarted if the Secretary did not take land into trust for the Shawnee. The acquired land must be in Oklahoma, but must not be within the jurisdiction of any other tribe. Therefore, the Status Act must be read as directing the Secretary to acquire land in the unassigned area of Oklahoma for the benefit of the Shawnee.

This argument is not well-founded in fact. The laws and regulations are clear and unambiguous, requiring no interpretation and therefore permitting no application of canons of statutory construction. The Status Act, as amended, does not identify any area, county, or even state within which the Secretary is to take land into trust for the Tribe. The Act's invocation of OIWA

⁴ In 2005, Congress removed the following subsection from Section 1041e(a) of the Status Act:

(2) Certain land in Oklahoma.-- Notwithstanding any other provision of law but subject to subsection (b), if the Tribe transfers any land within the boundaries of the State of Oklahoma to the Secretary, the Secretary shall take such land into trust for the benefit of the Tribe.

The 2005 amendment reads in its entirety:

SEC. 10213. TRIBAL LAND.

Section 707(a) of Public Law 106-568 (25 USC 1041e(a))
is amended—

- (1) in paragraph (1) by striking "(1) IN GENERAL.—;" and
- (2) by striking paragraph (2).

The amendment was buried deep within a massive highway bill, "The Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users," Public Law 109-59, Aug. 10, 2005. The Act is 834 pages long as published, comprising eleven titles, virtually all of which address aspects of transportation in the United States. The section of the Act revoking 25 USC § 1041e(a)(2) is at 119 Stat. 1144, 1978. This special legislative action removed the mandatory trust acquisition section from the Status Act.

is permissive, not mandatory; the Act also invokes the land acquisition authority of the IRA, and thus, by its plain language, does not limit the land acquisition authority to Oklahoma.

It is also unsupportable to graft an in-state mandate from one section of the regulations onto the 'specific geographic area' provision of another section. While 25 CFR §§ 292.12(a) and 292.6(d) set forth the requirement that any lands to be taken into trust for gaming purposes must be located in the same state or states as the Tribe is located, this in-state requirement does not pertain to 25 CFR § 292.11(a)(1). The in-state requirement functions as a regulatory limitation on the scope of the Secretary's discretion to take land into trust for gaming purposes. But no such limitation is necessary when Congress, which has plenary authority to do so, directs the Secretary to acquire land at a particular location for the benefit of Indians. Viewed another way, Section 292.11(a)(1) describes an *alternative* to Sections 292.12(a) and 292.6(d), with completely different requirements. There is no justification for importing a requirement from one section into the other.

It is illuminating to note that the language of the Status Act, as amended, is very different from the language Congress usually uses when authorizing the purchase of land in "a specific geographic area." A typical example to use for comparison would be the statute mandating that the Secretary accept land for the benefit of the Paskenta Band in a specific county:

- (a) Lands to be taken in trust. The Secretary shall accept any real property located in Tehama County, California, for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to the authority of the Secretary under the Act of June 18, 1934 (25 USC § 461 *et seq.*).

Paskenta Band of Nomlaki Indians of California, 25 USC § 1300m-3.

Plainly, Congress knows how to identify a "specific geographic area" in which lands are to be acquired for a tribe, and did not do so in the amended Status Act.

It must also be noted that existence of 25 CFR § 292.11(a)(2), which sets out the procedure when restoration legislation does not identify a specific geographic area, limits how broadly the Secretary can construe restoration act language in an attempt to apply 25 CFR § 292.11(a)(1). Since Section 292.11(a)(2) directs the Secretary how to proceed when a statute is silent as to where land is to be acquired for a tribe, I would be disregarding the Department's own regulations by inferring Congressional identification of a specific geographic area from the facts, laws, and regulations surrounding a statute that is silent on the matter. The Status Act, as amended, does not identify any specific geographic area wherein to acquire land for the Tribe. To find that Section 292.11(a)(1) is applicable in this circumstance would be to render Section 292.11(a)(2) a nullity, which is an impermissible result.

C. Conclusion: The subject parcel is not "restored lands for a restored tribe."

The Tribe was restored to federal recognition by act of Congress, so the restored lands provisions of 25 CFR § 292.11(a) apply. The Tribe lacks any modern or historical connection to the parcel; the Tribe is not near the parcel; and the Tribe's amended restoration legislation does not identify any specific geographic area in which the Secretary was to acquire land on for the Tribe. Therefore, the parcel cannot be deemed "restored lands."

III. Conclusion: The subject parcel is ineligible for gaming under IGRA.

The Shawnee Tribe is a restored tribe, having been restored to federal recognition by act of Congress. The subject parcel cannot be 'restored lands' for purposes of IGRA because the Tribe has no current or historical connections to it, and because Congress, in the Status Act of 2000, as amended in 2005, did not identify a specific geographic area in which the Department is to take land into trust for the Tribe. There is no ambiguity in the Status Act, as amended, that would allow the Secretary discretion to find the parcel to be restored lands. Therefore, the Tribe's request to accept the subject lands into trust for purposes of IGRA gaming, without a two-part determination, is denied.

Sincerely,



For Larry Echo Hawk
Assistant Secretary – Indian Affairs