JUL 11 2008

Frances G. Charles
Chairwoman
Lower Elwha Klallam Tribe
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Port Angeles, WA 98363
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Re: Approval, Lower Elwha Klallam Tribe gaming ordinance amendment

Dear Chairwoman Charles:

This letter responds to your request that the National Indian Gaming Commission (NIGC) Chairman review and approve the Lower Elwha Klallam Tribe's (Tribe) Amended Gaming Control Ordinance of 2006 (Ordinance), adopted by Lower Elwha Klallam Tribal Business Committee by Resolution # 11:08 on April 7, 2008. The Ordinance is consistent with the requirements of the Indian Gaming Regulatory Act (IGRA) and the NIGC's implementing regulations. Accordingly, the Ordinance is hereby approved.

The Ordinance's definition of *Indian Lands* now contains a legal description of a parcel of land referred to as the "Halberg Addition:"

Indian Lands means:

(1) All lands within the limits of the Tribe's reservation, as of October 17, 1988;

(2) Any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Indian Tribe exercises governmental power; and

(3) For all lands acquired into trust for the benefit of an Indian tribe after October 17, 1988, the lands meet the requirements set forth in 25 U.S.C. § 2719, including, but not limited to the 240.77 acre parcel commonly referred to as the Halberg Addition, which is contiguous to the Lower Elwha Klallam Reservation and more specifically described in the Bureau of Indian Affairs Final Opinion of Title, dated October 11, 2001.

Ordinance, § 102(o). Because the definition references the Halberg Addition, which was acquired into trust for the benefit of the Tribe on October 11, 2001, the proposed definition requires me to determine the applicability of IGRA's general prohibition against gaming on lands acquired into trust after October 17, 1988. 25 U.S.C. § 2719(a). If the prohibition applies, the Ordinance would purport to authorize gaming where IGRA prohibits it, and I would have to disapprove the Ordinance. Based on my review, however, I conclude that the prohibition does not apply because the Halberg Addition is contiguous to the Tribe's reservation and, therefore, eligible for Indian gaming.

Indian Lands

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines 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.

25 U.S.C. § 2703(4). The National Indian Gaming Commission's implementing regulations clarify:

> 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. The Halberg Addition is not within the limits of the Tribe's reservation. As such, in order to qualify as Indian lands, the Halberg Addition must be held in trust or restricted fee, and the Tribe must exercise governmental power over the land. I find that the Halberg Addition meets both criteria.

Trust Land

On October 11, 2001, the Bureau of Indian Affairs (BIA) issued a memorandum acknowledging that valid title to the Halberg Addition is vested in the United States of

America in trust for the Tribe. As such, the Halberg Addition conforms to the first requirement of IGRA's Indian lands definition.

Governmental Power

The Tribe also exercises governmental power over the Halberg Addition. This conclusion, however, is not as straightforward as simply noting that the United States holds the land in trust for the Tribe. 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

The presumption of jurisdiction exists for any federally recognized tribe acting within the limits of *Indian Country. See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). This jurisdiction, an inherent sovereign power, can only be modified by a clear and explicit expression of Congress. *See Yankton Sioux Tribe*, 522 U.S. at 341; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Over time, the term *Indian Country* has referred to lands upon which the federal government and the Indian tribe that owns the land share primary jurisdiction. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 529 (1998). The term *Indian Country* is defined by 18 U.S.C. § 1151 as follows:

> (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.

In its review of 18 U.S.C. § 1151, the *Venetie* court found that the statute contains two of the indicia previously used to determine what lands constitute Indian Country: (1)

lands set aside for Indians and (2) federal superintendence of those lands. *See Venetie*, 522 U.S. at 527. In Venetie, the court observed that Section 1151 reflects the two criteria the Supreme Court previously held necessary for a finding of Indian Country. 522 U.S. at 527. Further, reservation status is not necessary for a finding of Indian Country. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) ("No precedent of this Court has ever drawn the distinction between tribal trust land and reservation that Oklahoma urges.")

The Tenth Circuit found that "[o]fficial designation of reservation status is not necessary for the property to be treated as Indian Country under 18 U.S.C. § 1151," rather, "it is enough that the property has been validly set aside for the use of the Indians, under federal superintendence." *United States v. Roberts*, 185 F.3d 1125, 1133, n.4 (10th Cir. 1999). Further, "reservation status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151." *Roberts*, 185 F.3d at 1130. Thus, as long as the land in question is in trust, the courts make no distinction between the types of trust lands that can be considered "Indian Country." *Roberts*, 185 F.3d at 1131, n.4. Accordingly, lands held in trust, fee simple restricted status, allotments and reservations are all considered Indian Country. *See United States v. Sandoval*, 231 U.S. 28 (1913) (fee restricted land as Indian Country); *United States v. Pelican*, 232 U.S. 442 (1914) (allotment as Indian Country); *United States v. McGowan*, 302 U.S. 535 (1938) (trust land as Indian Country).

Here, then, once the United States took the Halberg Addition into trust for the benefit of the Tribe, the land became Indian Country within the meaning of 18 U.S.C. § 1151. The site was "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Potawatomi*, 498 U.S. at 511. Accordingly, the Tribe has jurisdiction to exercise governmental authority at the Halberg Addition.

2. Exercise of Governmental Authority

In order for the Halberg Addition to be Indian lands within the meaning of IGRA, the Tribe must also 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.*

The Tribe's Constitution extends the Tribal Community Council's authority to all "community lands," including its trust lands:

> The Lower Elwha Community Council shall have the following powers...
>
> (b) to encumber, lease, permit, sell, assign, manage or provide for the management of community lands, interests in such lands or other community assets; to purchase or otherwise acquire lands or interests in lands within or without the reservation; and to regulate the use and disposition of community property of all kinds, subject to the approval of the Secretary of the Interior or his authorized representative.

Constitution and Bylaws of the Lower Elwha Tribal Community, Art. 4 § (1)(b). In the exercise of that authority, the Tribal Community Council, through the Elwha Klallam Business Committee, passed Resolution 21-04 and chose the Halberg Addition as the preferred location for a fish hatchery. *Hatchery Site Alternatives Investigation and Preferred Alternative Approval*, Resolution 21-04.

Based on the foregoing, the Tribe exercises governmental authority over the Halberg Addition, it has jurisdiction to exercise that authority, and the land is held in trust for the Tribe by the United States. Accordingly, the Halberg Addition is Indian land within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

Section 20 Prohibition

The determination of whether the Halberg Addition is Indian lands, however, is not the end of the inquiry. The United States took the Halberg Addition into trust in October 2001, and, as such, the land may fall into IGRA's general prohibition against gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a). 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, however, because the land is located contiguous to the boundaries of the Tribe's reservation as it existed on October 17, 1988. 25 U.S.C. § 2719(a)(1).

Contiguous is defined as: "In close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by." Black's Law Dictionary 320 (6th ed. 1990). The Department of the Interior has also adopted a similar definition for purposes of acquiring land into trust. Although

not effective yet, the Department recently published regulations pertaining to § 2719 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." 73 F.R. 29354, 29376. The Halberg Addition shares several common boundaries with the Tribe's original reservation, established in 1968, and is, therefore, contiguous to it.

In 1936 and 1937, the United States Government acquired 372 acres for the Tribe and, in 1968, used the land to establish a reservation for the Tribe. The Halberg Addition:

> [I]s located adjacent to the Lower Elwha Klallam Reservation on the southeastern boundary of the Reservation. The subject surrounds an existing 15 acre portion of the reservation purchased by the U.S. Government in 1936 and 1937 and established as the Lower Elwha Reservation in 1968.

Phase I Environmental Site Assessment, Lower Elwha Klallam Tribe-Halberg Addition, § 3.1, November 8, 1999. Maps submitted by the Tribe further demonstrate that Halberg Addition borders the southern boundary of the original reservation and also surrounds a 15-acre parcel of land located 900 feet away from the main body of, yet still part of, the original reservation. *Lower Elwha Klallam GIS Department Map,* prepared by Randall E. McCoy, 3/13/08. Consequently, the Halberg Addition is contiguous to the Tribe's Reservation and the § 2719 prohibition does not apply.

Conclusion

Based on our review of the submitted ordinance and tribal land information, the Halberg Addition is Indian land within the meaning of IGRA. Because the Halberg Addition is contiguous to the Tribe's original reservation, the general prohibition against gaming on land acquired after October 17, 1988, does not apply. As the Ordinance otherwise is consistent with the requirements of IGRA and NIGC regulations, it is approved.

Thank you for submitting the Lower Elwha Klallam Tribe Amended Gaming Control Ordinance of 2006 for our review and approval. The NIGC staff and I look forward to working with you and the Tribe on future gaming issues.

Sincerely,

Philip N. Hogen
Chairman