United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

NOV 15 1993

Michael Cox, General Counsel
National Indian Gaming Commission
1850 M St., N.W., Suite 250
Washington, D.C. 20036

Dear Mr. Cox:

In your September 21, 1993, letter, you requested our views on two issues: first, whether the Klawock Cooperative Association (KCA) is a "tribe" for purposes of the Indian Gaming Regulatory Act (IGRA) and second, whether there are "Indian lands" as defined under IGRA on which the KCA may conduct gaming. We conclude that KCA is a tribe under IGRA, and that the United States holds lands in trust for the KCA which meet the Indian lands definition.

TRIBAL STATUS. We conclude that the KCA falls within the Indian tribe definition because it is organized under the Indian Reorganization Act (IRA); its constitution contains a broad statement of powers of the tribal government and it is listed as a federally-recognized tribe in the Department's official listing of tribes.

IGRA defines an Indian tribe as:

> any Indian tribe, band, nation, or other organized group or community of Indians which--
> (A) is recognized as eligible by the Secretary of the Interior for the special programs and services provided by the United States to Indians because of their status as Indians, and
> (B) is recognized as possessing powers of self-government.

25 U.S.C. § 2703(5).

The KCA has been included on all lists of Alaska Native entities recognized and eligible to receive services has published by the Department, beginning with the first such list published in 1982. Most recently, the KCA was included in the October 21, 1993, list of Alaska tribal entities published at 58 Fed. Reg. 54364. In pertinent part, the preamble to this list states that the Bureau of Indian Affairs (BIA) has:

> found that the villages and regional tribes listed below have functioned as political entities exercising governmental authority and are, therefore, acknowledged to have "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes."

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Id. at 54365. The Federal Register notice further explains that:

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribe; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

Id. at 54366.[1]

The inclusion of the KCA on the list is based on the KCA Constitution and Bylaws and Corporate Charter which were authorized and approved under the IRA, 25 U.S.C. §§ 473a, 476 and 477, on June 15, 1938, and are still in effect. The Constitution contains language similar to the broad constitutional provisions relied on by the 80 tribes who have already entered into Class III gaming compacts. It authorizes the KCA tribal government:

> (a) To negotiate with the Federal and Territorial Governments on behalf of the Association and to advise and consult with representatives of the Interior Department on all activities of the Department that may affect the Association.
> (b) To manage and control all its economic affairs and enterprises in accordance with the charter of the Association which may be issued under the Act of June 18, 1934.
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> (f) To make assignments of land or water areas of the Association for use and occupancy to members of the Association in accordance with the customs of the Indians forming this Association or with the regulations of the Association.
> (g) To aid needy members and advance the economic and social security of its members.

These broad powers in the IRA constitution make it clear that the KCA is an Indian tribe which exercises the powers of self-government necessary to engage in gaming.

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[1] A footnote to this passage concerning tribal jurisdiction over land is discussed, infra.

INDIAN LANDS. The second question is whether the KCA has Indian lands on which it can conduct gaming. IGRA defines Indian lands as including "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)(b). The NIGC regulations have further clarified the definition by 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 (Emphasis added).

The proposed ordinance defines lands on which gaming may be conducted to be:

> (A) all lands of the Klawock Cooperative Association as may have Indian reservation status under federal law;
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> (B) all lands title to which is held in trust by the United States for the benefit of the Klawock Cooperative Association or any member of the Tribe, provided that the trust title existed on or before October 17, 1988;
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> (C) all lands held by the Klawock Cooperative Association or any member of the Tribe subject to a restriction by the United States against alienation and over which the Klawock Cooperative Association exercises governmental power; and
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> (D) all lands which may be acquired by the Klawock Cooperative Association in the future which meet the requirements of [IGRA].

KCA Gaming Ordinance, §1.03(8).

There is no reservation at Klawock. A reservation was established in 1914 by President Wilson for the "Natives of indigenous Alaska race" residing in Klawock, but that reservation was revoked by President Coolidge in 1926 and reduced to a school reserve of less than two acres. E.O. No. 1920 (April 21, 1914); Unnumbered Executive Order (April 17, 1926). See D. Case, Alaska Natives and American Laws 90 (1984). The school reserve was, in turn, revoked in 1971 by §19(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1618(a).

In the absence of a reservation, the only lands at Klawock included within the ordinance are approximately 58 restricted Native townsite lots and approximately three acres of land held in trust by the United States for KCA.

In our opinion, the 58 townsite lots do not constitute Indian lands on which gaming may be conducted under IGRA. However, the trust land is Indian land for purposes of IGRA.

With respect to the townsite lots, Klawock is one of approximately 100 Alaska communities which petitioned for and achieved establishment of a Federal townsite under the Acts of March 3, 1891, 26 Stat. 1009, and May 25, 1926, 44 Stat. 629, as amended. On July 22, 1941, a townsite containing a total of 192.73 acres was patented to the trustee who began issuing deeds in 1949. The substantial majority of the initial applicants were Natives, and most obtained restricted townsite lot deeds initially although only about 58 lots remain in restricted status at this time. These remaining lots encompass in total slightly less than six acres.

Solicitor's Opinion M-36975, issued by then-Solicitor Thomas Sansonetti on January 11, 1993, discusses the extent of tribal jurisdiction over townsite lots. The opinion states that the jurisdictional status of individual townsite lots is comparable to that of Alaska Native allotments. With respect to Native allotments, the Solicitor opined that he was "not convinced that any specific villages or groups can claim jurisdictional authority over allotment parcels." Id. at 129.[2] The Sansonetti opinion is subject to review, but unless and until withdrawn or modified, it remains the position of the Department. The townsite lots are thus not subject to the territorial governmental jurisdiction of KCA.[3]

The three acres of trust land are lands originally taken into trust in support of KCA's fish processing enterprise.[4] The site is one of only four trust holdings in Alaska. Similar cannery sites are held in trust for the villages of Kake and Angoon. The Klawock, Kake and Angoon sites in aggregate total 30

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[2] There are no allotments at Klawock. Based on an examination of master title plats and other available information, the BIA Land Law Examiner in charge of the Area Title Plant indicates that there are no Alaska Native allotments in the immediate vicinity of Klawock. His records reveal that a number of applications were filed under the Act of May 17, 1906, 34 Stat. 197, as amended, formerly codified at 43 U.S.C. §§ 270-1 - 270-3, but that all were rejected by the Department.

[3] We note that, in an October 4, 1993, letter from Bert Hirsch, the attorney for KCA to NIGC Chairman Hope, Mr. Hirsch indicates that the Tribe is pursuing gaming on the three acres of trust land and apparently not on the townsite lots.

[4] The Sansonetti opinion refers to the site as consisting of 1.91 acres. The deed, however, describes the acreage as 2.97 acres.

acres. The fourth trust holding is the Annette Islands Reserve of the Metlakatla Indian Community, the sole reservation in Alaska not revoked by ANCSA.

Under the Sansonetti opinion, the touchstone of whether a Native village may exercise territorial jurisdiction over land is whether the land constitutes "Indian country" under 18 U.S.C. § 1151. M-36975, pp. 108-111. The Klawock trust land and the two other cannery sites are identified in a footnote in the Sansonetti opinion, but the status of these sites as land over which Native villages may exercise governmental authority was not analyzed by the opinion. M-36975, p. 112, n. 277. Under the analytical approach of the opinion, however, it is clear that the Klawock site constitutes a "dependent Indian community", one of the three categories of Indian country defined in 18 U.S.C. § 1151. As a result, KCA may exercise governmental authority over the site and it constitutes Indian land for purposes of IGRA.

In Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988) (Venetie I), the Ninth Circuit summarized a number of factors that have been developed to determine whether a dependent Indian community exists:

> In [United States v.] Martine, [442 F.2d 1022 (10th Cir. 1971)] the Tenth Circuit approved a three-pronged analysis, considering:
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> 1) the nature of the area;
> 2) the relationship of the area inhabitants to Indian tribes and the federal government; and,
> 3) the established practice of government agencies toward that area.
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> 442 F.2d at 1023.
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> In [United States v.] South Dakota, [665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982)] the Eighth Circuit applied a more extensive analysis, including the Martine considerations as well as:
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> 1) the degree of federal ownership of and control over the area;
> 2) the degree of cohesiveness of the area inhabitants; and,
> 3) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.
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> 665 F.2d at 839.

Venetie I, 856 F.2d at 1391.

The Klawock trust land meets these factors. The land is owned by the United States in trust for KCA. It was taken into trust pursuant to § 5 of the IRA, 25 U.S.C. § 465, for the benefit of the Klawock Native community.

The trust land has eight cottages that are rented to approximately 17 tribal members. KCA leases space to three businesses and operates a tribal smoke shop that employs two members. The tribal office is also located on the trust lands. The Tribe employs four people: the President of the Tribe, who also acts as the administrator for tribal business, a bookkeeper, an assistant bookkeeper and a receptionist. Also housed in the tribal office is the

manager for Hira Fisheries, a joint venture between KCA and the Alaska Native Village corporation, Klawock Heenya. In addition, the tribe employs 20 other workers who are renovating the cannery facilities, under a $1 million grant to KCA from the U.S. Department of Commerce. The number of employees working on this three-acre parcel appears to be fairly significant in light of the small number of total members, 500, and the even smaller number of members living in the area, 275-300.

The tribal employees carry on a number of other governmental functions from the tribal offices. The Tribe recently received a Small Tribes grant for training and the purchase of office equipment. It received an Administration for Native Americans grant for training and a Department of Education Indian library grant. KCA also recently applied for a Housing and Urban Development Community Development Block Grant for Tribes and Alaska Villages. KCA participates in the Self-Governance Demonstration Project as part of a compact between the United States and an umbrella tribal organization, the Central Council of Tlingit and Haida. KCA also administers the BIA roads moneys that it receives through the Central Council Self-Governance Project.

In addition to being the site for carrying on the government-to-government relationship with outside agencies, the tribal offices are often the site for internal tribal business. The tribal council meets there for many of its meetings. In one instance, the tribal offices served as the site for convening the Elders Council to resolve a dispute involving job performance and embezzlement.

Because the KCA trust land meets the test for dependent Indian community, under general principles of Federal Indian law it is subject to the territorial jurisdiction of KCA, much as if it were reservation land. See Oklahoma Tax Commission v. Sac and Fox Nation, __ U.S. __, 113 S. Ct. 1985, 1991-92 (1993). Unlike certain other categories of land in Alaska covered in the Sansonetti opinion, the trust land was not dealt with in ANCSA. Nor is it affected by other Alaska-specific legislation that the Sansonetti opinion found to limit tribal territorial jurisdiction. M-36975, at 113-130. Consequently, we conclude that the KCA trust land meets the IGRA test for Indian lands.[5]

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[5] We note that, the proposed ordinance does not apply the qualifier, "exercises governmental power" in its inclusion of trust lands. As noted earlier, it defines Indian lands to include "all lands title to which is held in trust by the United States for the benefit of the Klawock Cooperative Association or any member of the Tribe, provided that the trust title existed on or before October 17, 1988." KCA Gaming Ordinance, §103(8)(B). To be consistent with NIGC regulations and our understanding of the IGRA definition, the ordinance should be modified to provide that KCA exercises governmental powers over trust lands.

If you require any further information, please contact Penny Coleman at (202) 208-6526.

Sincerely,

Michael J. Anderson

Michael J. Anderson
Associate Solicitor
Division of Indian Affairs