United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

NOV 10 1998

Mr. Barry Brandon
General Counsel
National Indian Gaming Commission
1441 L Street, N.W., 9th Floor
Washington, D.C. 20005

Dear Mr. Brandon:

Your office requested an opinion regarding whether a restricted Indian allotment in the State of Kansas known as the Maria Christiania Miami Reserve No. 35 falls within the statutory definition of "Indian lands" for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701-21 (1988). In a May 23, 1995 opinion we determined that the Tribe did not exercise the necessary governmental power over this land because they did not own it. The land had been erroneously allotted to non-members of the Tribe and the Tribe was duly compensated for this error by the federal government following litigation in the U.S. Court of Claims. The current owners were not members of the Tribe in 1995. Also, the land was over 180 miles distant from the Tribe's headquarters at its reservation in Oklahoma.

A federal court reviewed our decision de novo and agreed with our determination. The Court held that the Tribe relinquished its authority over the land and Congress abrogated the Tribe's governmental authority over the Kansas lands when the Tribe moved to Oklahoma. The Court held that the record was devoid of any evidence that the current owners of the land had consented to become members of the Tribe. Miami Tribe of Oklahoma v. United States, 927 F. Supp. 1419 (D. Kan. 1996). The Court invited the Tribe to resubmit its management contract to your office if these facts changed or if they could provide a more complete record.

The Tribe did so and after extensive briefing on both sides of the Indian lands issue, the federal court held that events subsequent to its 1996 decision changed its holding. Miami Tribe of Oklahoma v. United States, No. 97-2396-JWL (D. Kan. 1998). The Court said that new facts, such as the Tribe's recent enrollment of the landowners as members of the Tribe, lead to a conclusion that the land is "Indian land" under IGRA if the Tribe presently exercises government power over the land. The history of the parcel and the fact that the Tribe relinquished the land and was compensated for it by the federal government was now "irrelevant" according to the

Court. Following the Court's recent decision, your office requested a third opinion, this time regarding whether or not the Tribe exercises the requisite governmental power over the land.

Congress has not spoken to what "exercise of government powers" means in IGRA. Nor does the legislative history provide any guidance. Case law is sparse, the only guidance coming from a federal district court case in South Dakota where five factors were offered:

> 1) whether the area is developed; 2) whether tribal members reside there; 3) whether any government services are provided and by whom; 4) whether law enforcement on the lands in question is provided by the Tribe or the State; and 5) other indicia as to who exercises governmental power over the area.

Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523 (D.S.D. 1993). The Court did not opine regarding the weight given any factor or whether the absence or presence of one factor was determinative. It merely listed the five factors.

The Department of Interior's ("DOI") Indian Gaming Management Staff ("IGMS") conducted a site visit of the land and solicited evidence from the Tribe that might offer evidence regarding these five factors. See, Report of Indian Gaming Management Staff ("Staff Report"), attached. Much of the proof offered is new and was not available to DOI when it wrote its earlier opinions concerning this land. For example, the Tribe now has begun developing the land. A dwelling in the form of a trailer house has been moved onto the land. A tribal outreach office exists there and provides services such as health fairs to patrons. All programs that the Tribe offers in Oklahoma are extended to any Native American that visits the outreach trailer in Kansas, according to the Tribe. Soon a smoke shop will be run out of the building by one of the heirs who has a license from the Tribe to offer this service. The Tribe will collect taxes from the smoke shop operation. The tribal flag is now flown and tribal ceremonies are conducted on the land. While no tribal member resides there, the Tribe does oversee the land and plans to permanently occupy it once it constructs a gaming facility and hotel. Utilities such as water, sewage and telephone have been installed. Additional services, such as enhanced electrical power, will be provided as load demand warrants. The Tribe has budgeted over $20,000.00 for annual maintenance of the land until construction of the casino begins. Id., at 2.

The Tribe polices the land. A uniformed officer of the tribal police patrols the site several days a week and has established a working relationship with the Miami County Police Department to share jurisdiction over this area, to the full extent allowed by federal law. Cross-deputization agreements are being negotiated with local law enforcement agencies that currently have concurrent jurisdiction. Tribal police maintain daily activity logs of police activity on the site. The Tribe evicts trespassers and provided evidence of an eviction notice. Fences have been constructed around the land. A road easement has been obtained from the surrounding landowner and a four lane road has been graded into the property from the main county road. This road easement is on land owned by Butler National Corporation, the contractor who is

developing the land. A Management Agreement between Butler and the Tribe to develop the gaming facility is pending before the NIGC. The Tribe supervises Butler's development and its efforts to bring utilities to the site and provide fire and rescue services. Signs are posted at the entrance that delineate the property as belonging to, and under the control of, the Miami Tribe. Id., at 3.

The Miami Tribe now satisfies four of the five factors identified by the Court in Cheyenne. The only factor lacking is that no tribal member resides there. Thus, according to the Cheyenne test, the Tribe exercises governmental powers over this land. Given the Court's opinion, it is Indian land as defined by IGRA. If you have any questions on this matter, please contact John Jasper at (202) 208-5738.

Sincerely,

Derril B. Jordan

Derril B. Jordan
Associate Solicitor
Division of Indian Affairs

cc:

Chief Floyd E. Leonard
202 South Eight Tribes Trail
P.O. Box 1326
Miami, OK 74355

Kip A. Kubin, Esquire
Payne & Jones, Chartered
Commerce Terrace, College Boulevard at King
11000 King
P.O. Box 25625
Overland Park, Kansas 66225

Philip E. Thompson
Thompson Associates
2307 Thornknoll Drive, Suite 100
Fort Washington, MD 20744

Clark D. Stewart
Butler National Corporation
1546 East Spruce Road
Olathe, Kansas 66061