November 12, 2004

Herman Dillon, Sr., Chairman
Puyallup Tribal Council
1850 Alexander Avenue
Tacoma, WA 98421

Subject: Status of Tribal Property for Gaming Purposes

Dear Chairman Dillon:

This is in response to your letter dated August 25, 2004, in which you requested the National Indian Gaming Commission (NIGC) to confirm that the Tribe may conduct gaming on the Fife property even though it is presently held in fee simple. We conclude that the Tribe may conduct gaming on the property.

BACKGROUND

The Tribe and State wish to allow the Tribe to conduct gaming on the Fife property. The legal description of the Fife property appears in the Certification prepared on August 31, 2004, by the Manager, Land Titles and Records Office, Northwest Regional Office, Bureau of Indian Affairs, and is enclosed. The Tribe acquired the Fife property on May 24, 2004.[1] The website of the Pierce County Assessor contains the records of the sale of the property.

http://www.co.pierce.wa.us/cfapps/atr/ePIP/summary.cfm?parcel=0420076005

The land is held in fee, although the Tribe plans to ask the United States to acquire the land into trust for the Tribe's benefit.

The Tribe's request was motivated by a project undertaken by the Port of Tacoma to expand a major container terminal development. The expansion requires closing the main access road to the Tribe's Emerald Queen Casino, one of two casinos currently being operated by the Tribe in accordance with the Tribal-State Compact. The Tribe has already relocated a portion of the Emerald Queen Casino to its second existing facility and has purchased a parcel of property in the City of Fife. The Tribe wishes to move the remaining Class III gaming activities to the Fife site. The Tribe, the State of Washington, local governments, and the Port of Tacoma have agreed under the terms of a joint Memorandum of Understanding (MOU) to amend the Tribal-State Compact to allow the

[1] We note that the Fife property referenced here is not the same Fife property referenced in 25 U.S.C. § 1773b(d).

Tribe to offer Class III gaming activities at the Fife property while the application for the trust acquisition for the Fife property is pending.

The NIGC has previously concluded that tribal fee land located within the boundaries of a reservation constitutes Indian land over which a tribe has jurisdiction. Thus, in those circumstances, we have concluded that a tribe may conduct gaming on those lands.

The situation at hand is considerably different, however, because of a Settlement Act, an Agreement between the Tribe, local governments in Pierce County and the United States (the Settlement Agreement), an MOU, and a Tribal-State Compact amendment.

APPLICABLE LAW

A. The IGRA notes that an Indian tribe may engage in gaming under IGRA only on "Indian lands" that are "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1) and (d)(1). Further, if the land upon which gaming is contemplated is not within the limits of an Indian reservation, a tribe may conduct gaming only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

The IGRA defines "Indian lands" as follows:

> (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).

B. The NIGC regulations further clarify the "Indian lands" 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.

Lands that do not qualify as Indian lands under IGRA generally are subject to state gambling laws. National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12382, 12388 (Apr. 9, 1992).

C. Section 2.12 of the "Puyallup Tribe of Indians Tribal Gaming Ordinance," No. 060900 (revised August 30, 2001) reflects the above Federal definitions:

> "Indian Land" 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.

ANALYSIS

At issue is whether a gaming operation conducted on the Fife property would be on Indian lands, and if so, whether the Tribe may exercise jurisdiction over those lands. For purposes of gaming in these unique circumstances, the Fife site is located within the boundaries of the Puyallup reservation. It is therefore on Indian lands as defined by 25 U.S.C. § 2703(A) and 25 C.F.R. § 502.12(a). Furthermore, pursuant to the provisions of the Settlement Act at 25 U.S.C. § 1773c, the Settlement Agreement, the State and Tribe's Memorandum of Understanding, and the Tribal-State Compact amendment, the parties have agreed that the Tribe has jurisdiction over the Fife property and may conduct gaming there under 25 U.S.C. § 2710(b)(1) and (d)(1).

A. **The Fife property is within the limits of the Tribe's reservation**

The Fife property has not been taken in trust by the Secretary but it need not be taken in trust to qualify as Indian land for gaming purposes under the IGRA. It is sufficient if it can be demonstrated that the Fife property is located on the Puyallup Tribe's reservation. The specific language of 25 U.S.C. § 2703(4)(A) defines Indian lands to include "all lands within the limits of any Indian reservation."

The Tribe's reservation was established by the December 25, 1854, Treaty of Medicine Creek, 10 Stat. 1132, and expanded by Executive Order dated September 6, 1873. The State of Washington challenged the reservation boundary but reached a settlement agreement with the Tribe in 1988. The settlement legislation specifically provided that it did not affect the boundaries of the Puyallup Reservation. 25 U.S.C. § 1773b(d). We understand the language as an agreement between the State and the Tribe to disagree while developing a practical approach to the use of the lands. See, e.g. 25 U.S.C. § 1773(a)(2) ("Disputes over certain land claims of the Puyallup Tribe . . ., including . . . (D) jurisdiction over law enforcement, environment, navigation, and authority and control in the areas of land use . . . have resulted in difficult community relations and

negative economic impacts....) and 1773(a)(5) ("There is a recognition that any final resolution of pending disputes through a process of litigation would take many years....") Also see the Settlement Agreement of August 27, 1988 ("The parties agree that this Agreement does not resolve their differences as to the current boundaries of the Puyallup Indian Reservation.").

Commonly, the analytic approach we would take to decide whether the Fife property is within the limits of the Tribe's Indian reservation would be to analyze the history of the reservation factually and legally in order to determine whether the Tribe's reservation boundaries still exist. Such an analysis is unnecessary where, as here, the parties have specifically agreed that the property is within the Tribe's reservation. The proposed compact amendment recites the "the Tribe has borrowed and invested a substantial amount of money to relocate a portion of the EQC . . . and to purchase a parcel of property in Fife, Washington, on the Puyallup Indian Reservation ("Fife Property") to which it will relocate the remainder of the EQC facility." (Emphasis added.) Consequently, at least for the limited purposes of the IGRA, and in the context of the very specific facts herein, we conclude that the Fife property is within the limits of the Tribe's reservation.

B. The Puyallup Tribe, upon approval of the Compact amendment, will possesses jurisdiction over the Fife property.

For a tribe to be able to conduct gaming, the land on which it games must not only meet the Indian lands criteria but must also be land over which the tribe possesses jurisdiction. 25 U.S.C. § 2710(b)(1) and (d)(1).[2]

Our traditional analysis, whether the land is Indian country and whether the Tribe has the theoretical authority to exercise jurisdiction over the Fife property, has no place in the situation at hand. Under the terms of the Settlement Agreement, we cannot look to traditional methods of determining jurisdiction over fee lands. Instead we must look to either specific authorizations within the Settlement Agreement or some other agreement between the Tribe and the State and/or local governments. In short, the Tribe's Settlement Act and the Settlement Agreement adopted therein establish the scope of the Tribe's jurisdiction. Consequently, we look to those enactments.

The Puyallup Tribe of Indians Settlement Act of 1989 provides:

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[2] The NIGC does not herein address whether the Puyallup Tribe exercises present day governmental power over the land. That analysis is necessary only under the definition of Indian lands at 25 U.S.C. § 2703(4)(B), which provides that Indian lands are off-reservation land held in trust or restricted status and over which the Tribe exercises governmental power. In the case at hand, the definition of Indian lands at 25 U.S.C. § 2703(4)(B) is met. When, as here, the land is determined to meet the first criteria, "within the limits of an Indian reservation," no showing of present-day exercise of governmental power is required.

It is the purpose of this subchapter –

(1) to approve, ratify, and confirm the agreement entered into by the non-Indian settlement parties and the Puyallup Tribe of Indians;
(2) to authorize and direct the Secretary to implement the terms of such agreement, and
(3) to authorize the actions and appropriations necessary to implement the provisions of the Settlement Agreement and this subchapter.

25 U.S.C. 1773(b). Thus, the Settlement Act adopts and incorporates the Settlement Agreement into the settlement legislation.

The Settlement Agreement, referenced in the Settlement Act, provides that:

> The 1873 Survey area [including the Fife property] shall not be used as basis for asserting Tribal jurisdiction or governmental authority over non-Indians, except as specifically provided by this Agreement. The Federal definitions of "Indian country", "Indian lands", and/or "Indian reservation" shall not be used by the Tribe or the United States as a basis for asserting Tribal control over non-trust lands either inside or outside the 1873 Survey Area, or the activities conducted on those lands, except as provided by the Agreement, or as otherwise agreed to between the Tribe and State, and /or local governments.
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> * * * *
>
> a. The jurisdiction of the Puyallup Indian Tribe shall extend to existing and future restricted and trust lands. The extent of the Tribe's jurisdiction shall be determined as provided by federal law.
>
> b. Except as otherwise provided in this Agreement, the Tribe agrees not to assert or attempt to assert any type of jurisdiction and governmental authority, existing or potential, including but not limited to the power to tax, as to (a) non-trust lands; (b) any activity on non-trust lands; (c) any non-Indian individual or business, on non-trust lands. (Emphasis added.)

Agreement at pp. 18-19. The Settlement Agreement specifically provides that the Tribe can not assert jurisdiction over non-trust lands. Such lands would include the Fife fee property. However, the Settlement Agreement contemplates the ability of the parties to enter into a separate agreement that changes the scope of the Tribe's jurisdiction – "as otherwise agreed to between the Tribe and State, and/or local governments." Id.

That separate agreement, in this instance, consists of two documents: 1) the February 4, 2004, Memorandum of Understanding between the Puyallup Tribe of Indians, Pierce County, the Port of Tacoma, and the Cities of Tacoma, Fife, and

Puyallup (MOU) and 2) the proposed Third Amendment to the Tribal-State Compact for Class III Gaming between the Puyallup Tribe of Indians and the State of Washington (Compact as amended). The MOU recites the need to move quickly in light of the Tribe's accommodation of the Port of Tacoma's development project and the parties' agreement to authorize the gaming on two locations while the lands are in held in fee pending their acceptance into trust.

The Compact as amended will authorize the Tribe to exercise jurisdiction when it meets the requirements of Section F.1. Section F.1. provides for the possibility of the Tribe owning the land in fee:

1. Fee land. The Tribe is authorized on a temporary basis to operate one of its two gaming facilities on fee land located at 5700 Pacific Highway East, Fife, Washington 98424, which is within the boundaries of the Puyallup Indian Reservation and is hereinafter referred to as "the Fife Property," subject to the limits in subsection (3), below, PROVIDED, that the Tribe demonstrates it is actively requesting and continuing to use its best efforts to ensure that federal legislation is introduced to transfer the Fife Property into trust status, and/or that it also has pending an application to the Secretary of the Interior to transfer said property into trust. In addition, prior to the execution of this Amendment, the Tribe will also provide the State with the following to demonstrate the Tribe's ability to effectively exercise jurisdiction over the Fife Property.

a. The legal description of the Fife Property, and proof of acquisition of the same.
b. Copies of any agreements with local governments relevant to the exercise and division of jurisdiction and governmental authority and the provision of governmental services on and around the new location of the Tribe's casino during the time the land remains in fee ownership. In particular, the Tribe will provide copies of its agreement(s) with the City of Fife and Pierce County dealing with those subjects, including issues such as law enforcement, fire and emergency services and other public health and safety issues. Those agreements will be incorporated into the Compact as Appendix "F"; and
c. Written approval from the National Indian Gaming Commission authorizing an ordinance for Class III gaming on the Fife Property.

Proposed Compact as amended at pp. 2-3.

This language, read together with the MOU, authorizes the Tribe to exercise jurisdiction over the Fife property so long as it meets the three requirements described above.

One of the requirements involves the National Indian Gaming Commission in that the proposed compact amendment requires "written approval from the National Indian Gaming Commission authorizing an ordinance for Class III gaming on the Fife

Property." The Tribe's Class III ordinance was approved on Decemeber 4, 2000. It is a generic ordinance authorizing gaming pursuant to IGRA and does not reference a specific site. Consequently, as long as the other requirements of IGRA are met (including the ability to exercise jurisdiction over the gaming site), the Tribe may conduct gaming on the Fife property.

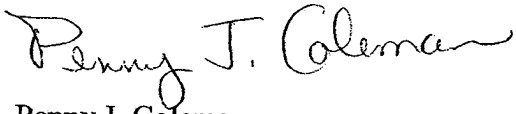
CONCLUSION

The IGRA permits tribes to engage in gaming on "Indian lands" within such tribe's jurisdiction. 25 U.S.C. § 2719(b). After careful review and consideration, we conclude that the land purchased by the Puyallup Tribe and known as the Fife property is such lands. As such, the Tribe may lawfully conduct Class III gaming on the Fife property, under the Compact, as amended, and pursuant to IGRA, provided the Tribe complies with all of the other applicable requirements of IGRA.

Pursuant to the Memorandum of Understanding between the NIGC and the United States Department of the Interior (Department), the Department concurs in our conclusions.

If you have any questions, please contact me or Sandy Ashton, Staff Attorney.

Sincerely,



Penny J. Coleman
Acting General Counsel

Enclosures