United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JUN 23 1993

Mr. Michael Cox
General Counsel
National Indian Gaming Commission
1850 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Cox

In an April 5, 1993, letter, you requested our advice to assist in your review of a gaming ordinance and regulations submitted by the Sitka Tribe of Alaska. We recommend against approving the ordinance and regulations based on the Tribe's claim to game on lands which do not fall within the definition of Indian lands.

The first issue identified in your letter is "whether Native villages are Indian Tribes as defined in the IGRA." The 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 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).

As you are aware, Solicitor's Opinion M-36975 (January 11, 1993) concluded that there are Native entities in Alaska that have inherent sovereign governmental authority. Such entities, in our view, are within the IGRA definition of "tribe."

The opinion did not attempt to identify the specific entities that have sovereign governmental authority, leaving preparation of a list of Tribes for later resolution. In view of our conclusion below concerning the jurisdictional claims of the Sitka Tribe, it is not necessary at this time to consider the specific status of the Tribe under the opinion. However, we note that the Sitka Tribe is reorganized under the Indian Reorganization Act, 25 U.S.C. § 476, (IRA). Article VII of the Tribe's IRA Constitution provides that the Tribe will exercise general governmental authorities.

This IRA Constitution was approved by the Assistant Secretary - Indian Affairs on January 3, 1992. Furthermore, at least one state court decision recognized Sitka Tribe's tribal status under the Indian Child Welfare Act. App. of Angus, 655 P.2d 208, 211 (Or. App. 1982), cert. den. 464 U.S. 830 (1983).

The second part of your inquiry concerns the presence or absence of any Indians lands on which the Sitka Tribe may conduct gaming. The ordinance appears to assert general criminal jurisdiction over all persons who commit gambling offenses or other related offenses in Indian country. Ordinance 93-02, (B)i and ii at p. 5. The regulations claim to authorize gaming on:

> those lands referred to in Article II of the Constitution of the STA, and those owned outright by STA on the date of acceptance for Ordinance 93-02.
>
> (d) any land which will be purchased by the tribe, to be used for gaming activity, which will be held in trust by the United States for the benefit of STA or
>
> (e) any individual [and] subject to restriction by the United States against alienation and over which STA exercises governmental power.

Regulation 93-009 Definitions: (c)(i),(d) and (e).

The constitution states that the "jurisdiction of the Sitka Tribe of Alaska shall extend to all lands constituting the Native Village of Sitka to the fullest extent authorized by Federal law." Among the lands said to be within the jurisdiction of the Tribe are corporate lands of Sealaska, Inc. and Shee-Atika, Inc. Art. II, Constitution of the Sitka Tribe of Alaska.

The IGRA defines Indian lands 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).[1]

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[1] The National Indian Gaming Commission expressly declined to define the exercise of governmental power when it published its regulations in spite of a commenter's recommendation that it deal with the question in relation to the definition of Indian lands.

The territorial jurisdiction asserted over gaming in the ordinance, the regulations and, by reference in the regulations, constitution, is much broader than the definition of Indian lands. The ordinance and regulations purport to cover a broad area, including lands held by Alaska Native Claims Settlement Act (ANCSA) corporations and unrestricted fee lands. While the Tribe may argue that it has territorial jurisdiction over these land because it claims that they are Indian country, the definition of Indian lands for IGRA purposes is defined more narrowly. Thus, we cannot agree that the Tribe's proposed ordinance and regulations contain valid IGRA jurisdictional claims.

Although it is not necessary for current purposes to determine whether there are any lands at Sitka meeting the IGRA definition, we offer the following for your information and that of the Tribe.

No reserve was ever set aside for the Native population of Sitka. Indeed, Sitka was not even treated as a Native village under ANCSA, but was instead dealt with as one of four named predominately non-Native communities in which the Native population was made eligible for benefits. 43 U.S.C. § 1613(h)(3). Therefore, there are no lands at Sitka that meet the definition of Indian lands under the "reservation" subsection of the IGRA definition, 25 U.S.C. § 2703(4)(A).

There are only a few isolated lots which arguably fall within the definition of Indian lands under subsection (B) of the definition.

First, there are no lands held in trust by the United States for the Sitka Tribe. Likewise, there are no individual lands held in trust. Although there are a few trust allotments in Alaska which were issued under authority of 25 U.S.C. § 348, none are in the immediate vicinity of Sitka. Nor are there any tribally owned lands held subject to restrictions against alienation. According to the Sitka Tribe, the Tribe only owns a single city lot acquired by purchase in 1986. A copy of the Bureau Indian Affairs (BIA) memorandum and warranty deed in favor of the Tribe are enclosed. The property transferred by this deed is held in fee simple by the Sitka Tribe.

There are some restricted lands located near Sitka which are held by individuals. This category include both Alaska Native allotments, acquired pursuant to the Alaska Native Allotment Act of May 17, 1906,[2] and townsite lots held under Native Restricted

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57 Fed. Reg. 12388 (April 9, 1992).

[2] Formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed with a savings clause for pending applications by ANCSA, 43 U.S.C. § 1617. Allotments were held to be fee lands subject to restrictions on alienation in State of Alaska, 45 IBLA

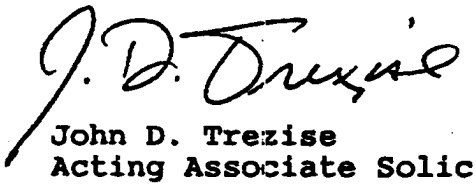
Trustee's Deeds issued pursuant to the Alaska Native Townsite Act of May 25, 1926.[3]

Because Sitka is virtually surrounded by the lands of Tongass National Forest, most of which were withdrawn in 1909, relatively few timely and legally sufficient applications for National Forest allotments were received in the few years immediately preceding the 1971 repeal of the Native Allotment Act, which was the period during which the vast majority of all Native allotment applications were filed. BIA reports that the total number of allotments within a twenty mile radius of Sitka is fourteen, and that none of them are accessible by road.

The other category of individually-owned property present in Sitka is restricted Native townsite lots deeded to Native occupants under authority of the 1926 Native Townsite Act. The BIA's Title Plant reports that there are now about 59 restricted Native townsite lots remaining on their records, although it appears that a larger number of restricted deeds were initially issued to Native applicants in the late 1950's and early 1960's. A few Native lot-owners made subsequent application for removal of restrictions, and reissuance to themselves of unrestricted deeds in accordance with 43 C.F.R. §§ 2564.6 and .7. The exact number is not known.[4]

We hope that this discussion assists you in your review of the pending gaming ordinance and regulations. If you have any questions, please contact our office.

Sincerely,



John D. Trezise
Acting Associate Solicitor

Enclosures

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318 (1980).

[3] 44 Stat. 629, formerly codified at 43 U.S.C. § 733, repealed by Section 703(a) of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2789.

[4] Solicitor's Opinion M-36975 (January 11, 1993) generally concludes that Native villages do not exercise territorial jurisdiction. The Department has received several requests to review that opinion. No decision has been made on whether the opinion will be reviewed.