United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 0 8 2006

Bruce R. Greene, Esq.
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

Dear Mr. Greene:

By letter dated October 2, 2006, to the Associate Deputy Secretary James Cason, you request reconsideration of our conclusion that the property acquired in trust for the Sault Ste. Marie Tribe of Chippewa Indians in 1983 in St. Ignace, Michigan is not a reservation within the meaning of the Indian Gaming Regulatory Act (IGRA). In the alternative, you request that it be proclaimed a reservation, retroactive to April 1988. These requests are prompted by the tribe's desire to game under an exception in IGRA on contiguous property acquired in trust in 2000, thus avoiding a two part determination and the concurrence of the governor. I have discussed your requests with Mr. Cason and he has asked me to respond to you.

Your letter of October 2, followed a meeting between you, tribal representatives and Department officials James Cason and Michael Olsen. By letter dated November 9, 2006, you expressed willingness to engage in further discussion while noting that you filed suit on November 8, 2006. *Sault Ste. Marie Tribe of Chippewa Indians v. United States* (W.D. Mi., Case No. 2:06-CV-276). This letter responds to this recent correspondence as well.

The regulatory scheme in IGRA clearly defines the respective rights of tribes and states based on the status of land as of October 17, 1988. The IGRA also expressly differentiates trust land and reservation. We are not persuaded by the arguments in your October 2 letter that the 1983 land was reservation within the meaning of IGRA on October 17, 1988, when IGRA passed, particularly since the tribe had a proclaimed reservation on that date and the 1983 parcel was taken into trust under the Indian Reorganization Act and not proclaimed a reservation.[1] Therefore, we decline to modify our conclusion that the 1983 parcel is not reservation within the meaning of IGRA.

You interpret our February 14, 2006, letter as providing that all land within the meaning of 18 U.S.C. § 1151(a) is also a reservation within the meaning of IGRA. This reading is incorrect. In our full discussion of § 1151(a), we qualified our reference to § 1151(a) with "a declared or proclaimed reservation." This qualifier was omitted in the

[1] This 1983 parcel is located 50 miles from the tribal center in Sault Ste. Marie.

other two references to 18 U.S.C. § 1151(a) in our February 14 letter. Our references were intended to be to declared and proclaimed reservations, not § 1151(a) in general.[2]

Your letter of October 2 correctly points out that there are well-known cases that include unproclaimed or informal reservations as encompassed by § 1151(a). These cases initially concerned state jurisdiction to tax where the Court expressly declined to distinguish tribal trust land from reservation and had their genesis in Oklahoma where there are only former reservations. *Oklahoma Tax Commission v. Sac and Fox Nation,* 508 U.S. 114, 125 (1993). Since IGRA itself has separate provisions for lands in Oklahoma, and distinguishes between tribal trust lands and reservation, these cases cannot be adopted wholesale as part of IGRA's definition of reservation.

Your letter highlights the difficulty of relying on Indian country cases for purposes of the analysis under the IGRA. All three parts of the definition of Indian country rely on the federal set aside and superintendence factors; whereas in IGRA, there is a clear distinction between trust land and reservation, both of which are set aside and under the superintendence of the federal government. Since Congress in IGRA did not define gaming locations in the context of Indian country, and since IGRA maintains a distinction between trust land and reservation land, Indian country analysis cannot be adopted wholesale in interpreting IGRA. We do *not* equate Indian country reservation, defined for purposes of criminal and civil jurisdiction in 18 U.S.C. § 1151(a), with reservation within the meaning of IGRA.[3]

You request also that we proclaim the 1983 parcel to be reservation retroactive to pre-date IGRA. The Associate Deputy Secretary declines to do so. The IGRA is a snap shot of reservations and locations where gaming could occur when the act was passed without meeting an exception. The exceptions are limited. The states had notice of the locations where gaming could occur without their approval when the bill passed. Future

---

[2] You note this fact on page 8 of your letter of March 14, 2006. For clarity: page 5, second to last sentence in second full paragraph thus should read: "The IGRA definition also would include land granted reservation status through court order when the United States is a party[2] and, as discussed further below, land considered reservation within the meaning of 18 U.S.C. § 1151(a), a declared or proclaimed reservation."

Similarly, page 8, first sentence, last paragraph should read: "We do not interpret reservation under the IGRA to automatically include land within 18 U.S. C. § 1151 (a), (b), and (c)."

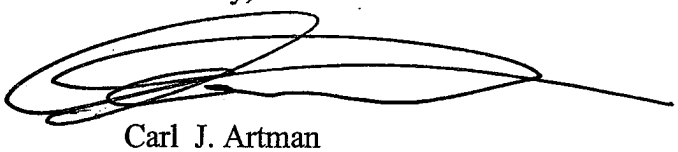
Finally, page 9, second sentence, second full paragraph should read: "As the IGRA maintains a distinction between reservation and trust land, we find that the plain meaning of reservation in § 2703(4) of the IGRA, as commonly understood by Congress when it drafted the statute, is land set aside by the federal government as the Tribe's permanent home, for its occupation and communal residency, for its seat of government, and land included within the meaning of Indian country § 1151(a), a declared or proclaimed reservation."

[3] You cite an August 16, 2006, memorandum from the Regional Director, Midwest Region, for support that the 1983 parcel is reservation within the meaning of IGRA. Only the Office of the Solicitor has authority to provide legal advice within the Department, 209 DM 3. Any interpretation of IGRA in that memorandum that conflicts with the February 14, 2006, letter is without authority and not the position of the Department.

lands in trust and future reservations, unless limited exceptions such as initial reservation apply, cannot be gamed on without the governor's concurrence. Meanwhile, none of the authority you cite compels the Department to issue a retroactive reservation proclamation. Given that the requested retroactive proclamation would have the effect of circumventing this statutory scheme, it is denied.

Finally, you argue that a general trust responsibility and Indian canons of construction allow the Department to interpret IGRA such that if a portion of the new casino is on trust or reservation lands acquired prior to October 17, 1988, gaming can occur in the whole facility.[4] The IGRA, however, is not ambiguous in this respect. It defines the location of permissible gaming in the context of lands, not on the location of a portion of a casino building. The IGRA cannot be interpreted in the manner you request.

Sincerely,



Carl J. Artman
Associate Solicitor, Indian Affairs

cc:

Director, Midwest Region, Bureau of Indian Affairs
Field Solicitor, Twin Cities
Chairman, National Indian Gaming Commission

[4] In this case, over 90% of the casino is on the property acquired in 2000 and less than 10% of the casino is on the 1983 parcel.