



AUG 24 2011

The Honorable Dr. Ned Norris, Jr.
Chairman
Tohono O'Odham Nation
P.O. Box 837
Sells, Arizona 85634

Re: Tohono O'Odham Nation Class III site-specific, conditional gaming ordinance amendment

Dear Chairman Norris:

Before me for review pursuant to the Indian Gaming Regulatory Act ("IGRA") is an amendment to the Tohono O'Odham Nation's ("Nation") Class III Gaming Ordinance (Ordinance) that was submitted to the National Indian Gaming Commission ("NIGC") on May 27, 2011. The amendment was adopted by the Nation pursuant to Resolution 11-196. In addition to a number of technical changes, the amendment makes a substantial change to the Ordinance's definition of *Indian lands*. The definition is now site-specific, including a 54-acre parcel of land located in Maricopa County, Arizona, currently owned by the Nation in fee ("Parcel 2"). Parcel 2 has not yet been acquired in trust by the Secretary of the Interior. Further, the amendment defines *Indian lands* as "[I]and as defined in 25 U.S.C. § 2703(4)(A) and (B), subject to the provisions of 25 U.S.C. § 2719, including, once taken into trust, a parcel of land known as 'Parcel 2.'" Amendment to Class III Gaming Ordinance, § 2.01(q).

As will be set forth in detail below, the issue before me is whether IGRA permits me to approve a site-specific ordinance amendment that defines *Indian lands* to include a parcel "once taken into trust." As a general matter, site-specific ordinances usually require an Indian lands and gaming eligibility determination to assess whether the site-specific land constitutes gaming eligible *Indian lands*¹ prior to their approval.² When dealing with newly acquired

¹ IGRA permits gaming only on *Indian lands*, which include land within the limits of a tribe's reservation, and trust and restricted fee land over which a tribe has jurisdiction and exercises governmental power. 25 U.S.C. §§ 2703(4); 2710(b); and 2710(d)(2)(A). If the land was taken into trust after October 1, 1988, IGRA, § 2719, prohibits gaming on the land unless an enumerated exception applies. The § 2719 prohibition, however, does not apply to restricted fee land. In the preamble to the Section 20 regulations, 25 C.F.R. Part 292, the Bureau of Indian Affairs specified that "section 2719(a) refers only to lands acquired in trust after October 17, 1988. The omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA...." 73 F.R. 29355 (May 20, 2008).

² No such requirement exists, however, for non-site specific ordinances. See *North County Community Alliance v. Salazar*, 573 F. 3d 738, 747 (9th Cir. 2009). ("We conclude that IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the NIGC under § 2710(b). We also

trust lands, that analysis often includes two factors. One is an analysis of whether the land qualifies under IGRA's definition of *Indian lands*. See 25 U.S.C. §§ 2703(4); 2710(b)(2) and (d)(1)(A)(i). If the land qualifies as *Indian lands*, but was acquired by the United States in trust after October 17, 1988, the other factor considers whether the parcel is gaming eligible – meaning that it qualifies for an exception to IGRA's prohibition against gaming on after-acquired trust lands. 25 U.S.C. § 2719.

Here, however, the analysis is abbreviated because Parcel 2 is fee land that has not yet been acquired in trust. As a consequence, even if Parcel 2 qualified as *Indian lands* under IGRA's definition of the term³, to be gaming eligible, it must satisfy one or more exceptions to IGRA's prohibition against gaming on after-acquired trust lands. See 25 U.S.C. § 2719. Because I find that: to be consistent with § 2719 of IGRA, a determination of gaming eligibility is necessary when assessing whether this site-specific ordinance amendment may be approved; an interpretation of IGRA, § 2719(a) and (b)(1)(B), results in the conclusion that the land at issue must actually be in trust for the § 2719 exceptions to the general prohibition against gaming on after-acquired trust lands to apply; and since Parcel 2 is not yet in trust, it cannot qualify under one or more of the § 2719 exceptions at this time. Therefore, the site-specific ordinance amendment does not meet the requirements of IGRA and is disapproved.

That being said, once Parcel 2 is taken into trust, the Nation is welcome to resubmit its site-specific ordinance amendment for my review, or request an Indian lands opinion regarding Parcel 2 from the Department of the Interior Office of the Solicitor, for a determination of whether Parcel 2 qualifies under one or more of the § 2719 exceptions.

Background

In August 2003, the Nation purchased a 135-acre parcel of land in Maricopa County, Arizona. On January 28, 2009, the Nation submitted a fee-to-trust application to the Department of the Interior to acquire the 135 acres into trust for gaming purposes within Maricopa County, Arizona. See Letter to the Honorable Ned Norris, Jr. Chairman, Tohono O'odham Nation, from Larry Echo Hawk, Assistant Secretary, Indian Affairs, p. 1 (July 23, 2010). The Nation included a request for an Indian lands opinion with its application, arguing that the land qualified for the "settlement of a land claim exception" to IGRA's prohibition against gaming on trust lands acquired after October 17, 1988. See 25 U.S.C. §§ 2719(a) and (b)(1)(B)(i). The Nation withdrew its land opinion request on July 17, 2009, asserting that because the trust acquisition was mandatory under the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. 99-503 (1986), the Secretary was required to take it into trust regardless of whether it was eligible for gaming. See Letter to Norris from Echo Hawk (July 23, 2010) at p. 2.

conclude that the NIGC was not required in 1993, when it approved the Nooksacks' non-site specific ordinance, to make an Indian lands determination for the parcel on which the casino is located.”). See also *Neighbors of Casino San Pablo v. Salazar*, 2011 U.S. Dist. LEXIS 33639, fn. 11 (D.D.C. 2011) (Upon review, it is clear that...the NIGC is not required, as a matter of law, to make an Indian lands determination before approving a non-site-specific gaming ordinance . . .”).

³ An analysis of whether Parcel 2 constitutes *Indian lands* is not necessary to this decision, and, therefore, is not undertaken here.

On March 12, 2010, the Nation amended its request and asked that that the Secretary only take Parcel 2 of the 135-acre tract in trust. The Department determined that the trust acquisition was mandatory, and on July 23, 2010, the Assistant Secretary for Indian Affairs made the final decision to take the land into trust without determining its eligibility for gaming. *See* 75 Fed. Reg. 52550-01. In his decision to accept the land into trust status, the Assistant Secretary made clear that:

Because the land will be acquired in trust after October 17, 1988, the Nation must comply with 25 U.S.C. § 2719 before engaging in any gaming activities on the land. This final determination on the Nation's application to take land into trust does not address or determine the Nation's eligibility to game on Parcel 2 under IGRA.

Id. at p. 8.

The City of Glendale and the Gila River Indian Community challenged the Secretary's final decision, but it was upheld by a federal district court on March 3, 2011. *Gila River Indian Cmty. v. United States*, 2011 U.S. Dist. LEXIS 21520 (D. Ariz. 2011). Plaintiffs appealed the decision to the Ninth Circuit Court of Appeals, and the appeal remains pending. *Gila River Indian Cmty. v. United States*, No. 11-15642 (9th Cir. March 17, 2011). Although the Secretary made the final decision to accept the land into trust, the federal district court enjoined the United States from doing so pending the appeal. *Gila River Indian Cmty. v. United States*, 2011 U.S. Dist. LEXIS 50210 (D. Ariz., 2011).

Meanwhile, on February 14, 2011, the Gila River Indian Community and State of Arizona filed a lawsuit against the Nation for a violation of the Nation's 2002 compact with Arizona. As part of their complaint, the Plaintiffs argue that Parcel 2 was not acquired in "settlement of a land claim" within the meaning of IGRA. The federal district court, however, ruled that the "settlement of a land claim" issue should be addressed in the first instance by the agencies charged with expertise in this area – NIGC and DOI. *State of Arizona v. Tohono O'odham Nation*, 2011 U.S. Dist. LEXIS 64041, *22 (D. Ariz. 2011). As a result, the court stayed its decision on the Nation's motion to dismiss the Plaintiff's claim related to Parcel 2 for 100 days. *Id.*

The Nation submitted the site-specific ordinance amendment at issue here on May 27, 2011. The amendment defines *Indian lands* as "[I]and as defined in 25 U.S.C. § 2703(4)(A) and (B), subject to the provisions of 25 U.S.C. § 2719, including, once taken into trust, a parcel of land known as 'Parcel 2' and more particularly described as:

THE WEST HALF OF THE WEST HALF OF THE NORTHEAST
QUARTER AND THE WEST HALF OF THE EAST HALF OF THE WEST
HALF OF THE NORTHEAST QUARTER OF SECTION 4, TOWNSHIP 2
NORTH, RANGE 1 EAST OF THE GILA AND SALT RIVER BASE AND
MERIDIAN, MARICOPA COUNTY, ARIZONA;

EXCEPT THE WEST 360.14 FEET (MEASURED), WEST 360.00 FEET
(RECORD) OF THE NORTH 484.19 FEET (MEASURED), NORTH 484.00
FEET (RECORD); AND

EXCEPT THE NORTH 258.00 FEET OF THE WEST 460.00 FEET OF THE WEST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER OF SAID SECTION 4; AND

EXCEPT THE NORTH 40.00 FEET, THEREOF; AND

EXCEPT THOSE PORTIONS THEREOF WHICH LIE NORTHERLY OF THE FOLLOWING DESCRIBED LINE;

BEGINNING AT A POINT ON THE NORTH-SOUTH MIDSECTION LINE OF SAID SECTION 4, WHICH POINT BEARS SOUTH 01 DEGREES 36 MINUTES 34 SECONDS WEST (RECORD AS SOUTH 00 DEGREES 16 MINUTES 56 SECON13S WEST ACCORDING TO ADOT PARCEL 7-424 1), 55.0 1 FEET FROM THE NORTH QUARTER CORNER OF SAID SECTION 4;

THENCE EAST (RECORDED AS NORTH 88 DEGREES 40 MINUTES 28 SECONDS EAST, ACCORDING TO ADOT PARCEL 742410), 503.20 FEET;

THENCE NORTH (RECORDED AS NORTH 01 DEGREES 19 MINUTES 32 SECONDS WEST ACCORDING TO ADOT PARCEL 7-4241), 55.00 FEET TO THE POINT OF ENDING ON THE NORTH LINE OF SAID SECTION 4, WHICH POINT BEARS NORTH 88 DEGEES 40 MINUTES 28 SECONDS EAST, 501 -66 FEET FROM SAID NORTH QUARTER CORNER OF SECTION 4, AS CONVEYED TO THE STATE OF ARIZONA IN DEED RECORDED IN RECORDING NO. 86-652262 OF OFFICIAL RECORDS; AND

EXCEPT THAT PARCEL OF LAND LYING WITHIN SAID NORTHEAST QUARTER OF SECTION 4 AND BEING A PORTION OF THAT CERTAIN PARCEL DESCRIBED IN RECORDING NO. 95-490799 OF OFFICIAL RECORDS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTH QUARTER CORNER OF SAID SECTION 4;

THENCE NORTH 88 DEGREES 40 MINUTES 25 SECONDS EAST, ALONG THE NORTH LINE OF SAID NORTHEAST QUARTER, 998.19 FEET;

THENCE SOUTH 00 DEGREES 09 MINUTES 14 SECONDS WEST, 40.01 FEET TO THE NORTHEAST CORNER OF SAID PARCEL ON THE SOUTH LINE OF THE NORTH 40.00 FEET OF SAID NORTHEAST QUARTER AND THE POINT OF BEGINNING;

THENCE SOUTH 00 DEGREES 09 MINUTES 14 SECONDS WEST, ALONG THE EAST LINE OF SAID PARCEL, 28.05 FEET;

THENCE NORTH 68 DEGREES 29 MINUTES 09 SECONDS WEST,
42.26 FEET TO A POINT ON THE SOUTH LINE OF THE NORTH 51.64
FEET OF SAID NORTHEAST QUARTER;

THENCE SOUTH 88 DEGREES 40 MINUTES 25 SECONDS WEST,
ALONG SAID SOUTH LINE, 455.83 FEET TO A POINT ON THE EAST
LINE OF THAT PARCEL CONVEYED TO ARIZONA DEPARTMENT OF
TRANSPORTATION IN RECORDING NO. 86-652262 OF OFFICIAL
RECORDS;

THENCE NORTH 01 DEGREES 19 MINUTES 35 SECONDS WEST,
ALONG SAID EAST LINE, 11 -64 FEET TO A POINT ON THE SOUTH
LINE OF THE NORTH 40.00 FEET OF SAID NORTHEAST QUARTER;

THENCE NORTH 88 DEGREES 40 MINUTES 25 SECONDS EAST,
ALONG THE SOUTH LINE, 495.50 FEET TO THE POINT OF
BEGINNING, AS CONVEYED TO MARICOPA COUNTY IN DEED
RECORDED IN RECORDING NO. 99-332877 OF OFFICIAL RECORDS.

Amendment to Class III Gaming Ordinance, § 2.01(q).

Indian Gaming Regulatory Act (IGRA)

IGRA provides that:

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—...

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman....

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that [certain enumerated requirements be met]....

25 U.S.C. § 2710(b)(1) and (2). Section 2710(b) requirements are applicable to class III ordinances⁴, as IGRA provides:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

⁴ Because I find that the ordinance amendment does not meet the requirements of IGRA, for the reasons set forth herein, there is no need for me to analyze whether the ordinance amendment meets the other requirements in IGRA set forth in § 2710(b). See 25 U.S.C. § 2710(d) (“Class III gaming activities shall be lawful on Indian lands only if such activities are—A) authorized by an ordinance or resolution that-- . . . (ii) meets the requirements of subsection (b)...”).”

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman, ...

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

25 U.S.C. § 2710(d)(1) and (2).

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).

Further, IGRA provides:

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or

(2) the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 17, 1988] and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such

Indian tribe is presently located.

(b) Exceptions.

(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

- (i) a settlement of a land claim,
- (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
- (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719.

Analysis

IGRA prohibits gaming on land taken into trust after 1988 unless an exception applies. 25 U.S.C. § 2719. Specifically, IGRA § 2719(a) states:

Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless...

(b)(1)(B) lands *are taken* into trust as part of—

- (i) a settlement of a land claim...

25 U.S.C. § 2719 (emphasis added).

As described above, the issue before me is whether IGRA permits me to approve a site-specific ordinance amendment that defines *Indian lands* to include Parcel 2 “once taken into trust.” In fact, the Nation asks me to approve a site-specific ordinance amendment for land that is not yet acquired in trust. Because IGRA does not explicitly address whether an exception to the § 2719 prohibition applies to a parcel of land not yet in trust, an interpretation of the statute is necessary. I possess the authority to undertake such an interpretation because the NIGC is the agency charged with administering IGRA. To that end, IGRA explicitly provides that the NIGC Commission “shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA].” 25 U.S.C. § 2706(b)(10).

Initially, it is important to note the November 23, 2005 approval of the Cowlitz Tribe's site-specific gaming ordinance by former NIGC Chairman Hogen. Like the ordinance amendment before me now, the Cowlitz ordinance's definition of *Indian lands* contained a site-specific Indian lands definition that made the Indian lands status of a particular parcel contingent on the Secretary accepting the land into trust.⁵ In the Cowlitz ordinance approval, Chairman Hogen took the reasonable approach of allowing land not yet taken in trust to qualify for an exception to the general prohibition against gaming on after-acquired trust land to enable approval of the ordinance. Letter from Philip Hogen, Chairman, NIGC to John Barnett, Chairman, Cowlitz Indian Tribe (November 23, 2005). This was the prior NIGC approach and a reasonable interpretation of IGRA, § 2719.

However, as detailed below, I interpret IGRA, § 2719(a) and (b)(1)(B), to require that land actually be "acquired" and "taken into trust" for it to qualify under a § 2719 exception. Although this interpretation differs from former Chairman Hogen's, an agency with authority to interpret a statute has the authority to change its interpretation, and a reinterpretation of a statute is "entitled to no less deference... simply because it has changed over time." *National Home Equity Mort. Ass'n v. Office of Thrift*, 373 F.3d 1355, 1360 (D.C. Cir. 2004) (quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 863-864). "On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on an on-going basis." *Id.* Nor is an agency's change in policy or interpretation held to a higher standard of review merely because it is a reinterpretation. *See FCC v. Fox*, 129 S. Ct. 1800, 1811, 1813 (2009) ("the agency need not always provide a more detailed justification than what would suffice for new policy created on a blank slate."); ("the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so.").

As discussed previously, the submission of a site-specific ordinance usually requires an Indian lands and gaming eligibility determination to ensure that the gaming on the specific site will occur on eligible *Indian lands* as defined by IGRA. 25 U.S.C. §§ 2703(4); 2710(b)(2) and (d)(1)(A)(i); 2719. That analysis⁶ is truncated here because even if Parcel 2 is *Indian lands* as defined by IGRA⁷, it cannot qualify for an exception to IGRA's after-

⁵ In an August 10, 2011 submission, the Nation claims that the NIGC conditionally approved ordinances for land not yet held in trust on numerous occasions, including the March 4, 2005 approval of the Cloverdale Rancheria of Pomo Indians of California's ordinance; the May 12, 2005 approval of Guidiville Indian Rancheria's ordinance; and the February 8, 2007 approval of Mechoopda Indian Tribe of Chico Rancheria's ordinance. *Supplement to Request for Approval of Tribal Ordinance Amendment and Related Indian Land Opinion*, p. 1 (August 10, 2011). The cited ordinances are not site-specific and, accordingly, their approval did not require an Indian lands and gaming eligibility determination. *See* fn. 2, *infra*.

⁶ As previously indicated, the analysis contains two prongs. One, whether the land qualifies under IGRA's definition of *Indian lands*. *See* 25 U.S.C. §§ 2703(4); 2710(b)(2) and (d)(1)(A)(i). If the land qualifies as *Indian lands*, but was acquired by the United States in trust after October 17, 1988, whether the parcel is gaming eligible -- meaning that it qualifies for an exception to IGRA's prohibition against gaming on after-acquired trust lands. 25 U.S.C. § 2719.

⁷ The analysis concerning whether Parcel 2 meets IGRA's definition of *Indian lands* is unnecessary given the finding regarding the second prong of the analysis.

acquired trust land prohibition due to the fact that it is not yet in trust. I base this conclusion on a new, reasonable interpretation of IGRA, § 2719.

Review by a court of an agency interpretation is a two-step analysis. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (“[w]hen a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.”). In *Chevron’s* first step, the court must answer “whether Congress has directly spoken to the precise question at issue.” *Id.* If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.” *Id.* If, however, the statute is “silent or ambiguous,” the court must invoke the second step of the *Chevron* analysis and determine whether the agency’s interpretation is “based on a reasonable construction of the statute.” *Id.* at 842-843. “In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844.

Here, because IGRA does not explicitly address whether an exception to the § 2719 prohibition applies to a parcel of land not yet in trust, an interpretation is necessary under step 2 of the *Chevron* analysis.⁸ According to *Chevron*, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer...” *Chevron*, 467 U.S. at 844. Thus, as the agency charged with administering IGRA, my interpretation of § 2719 is entitled to deference under step two of *Chevron*. 25 U.S.C. § 2706(b)(10).

As set forth above, IGRA § 2719 states “[e]xcept as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after the date of enactment of this Act [Oct. 17, 1988] unless... lands *are taken* into trust as part of – (i) a settlement of a land claim...” 25 U.S.C. § 2719(a) and (b)(1)(B) (emphasis added). I interpret the words *acquired* and *taken* as used in § 2719(a) and (b)(1)(B) to mean that the land must be in trust before it may qualify for a § 2719 exception to the general prohibition for gaming on after-acquired trust land.

This new interpretation is consistent with dictionary definitions. The ordinary meaning of the word *acquired* in § 2719(a) is “to come into possession or control of...” *Merriam-Webster’s Collegiate Dictionary*, 10th Ed. (2000). For purposes of § 2719(a), the Secretary must have “come into possession or control” of the land to the extent permitted under a trust acquisition. The language of the statute simply says “acquired.” It does not say “as may be acquired,” or “acquired in the future.” As a consequence, a reasonable interpretation of the statute indicates that the land must be in trust for the exceptions to the general prohibition on after-acquired trust land to apply to the land.

⁸ To the extent that DOI has already interpreted § 2719 through its “Section 20 regulations,” 25 C.F.R. Part 292, those regulations do not address the discreet question at issue here - can land not yet in trust qualify for an exception to the § 2719 prohibition. Furthermore, the NIGC and DOI are each charged with specific duties under IGRA. When two or more agencies administer a statute and work together on its interpretation, the interpretation of each agency is granted *Chevron* deference. *Individual References Servs. Group, Inc. v. Federal Trade Commission*, 145 F. Supp. 2d 6, 24 (D.D.C. 2001).

Furthermore, § 2719 states that exceptions to the general prohibition may only apply to lands “taken into trust.” 25 U.S.C. § 2719(b)(1)(B). The word *taken* is the past participle of *take*, which is defined as “to get into one’s hands, or into one’s possession, power, or control.” *Merriam-Webster’s Collegiate Dictionary*, 10th Ed. (2000). Therefore, before a § 2719 exception can apply to a parcel, the appropriate level of possession, power, or control associated with the trust status of the parcel must have passed to the United States.

Moreover, § 2719 embodies Congress’s specific intent to limit trust land available for gaming to Indian land as it existed on October 17, 1988, except where specific exceptions apply.⁹ These include the “equal-footing” exceptions, which allow recently restored or recognized tribes with recently established land bases not to be shut out of gaming by the general prohibition. 25 U.S.C. § 2719(b)(1)(B). IGRA also allows gaming on after-acquired trust land following a two-part determination, when:

The Secretary, after consultation with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.

25 U.S.C. § 2719(b)(1)(A).

Because the general rule is that gaming is prohibited on after-acquired trust land, my construction of IGRA, § 2719(a) and (b)(1)(B), requiring that land actually be acquired in trust before an exception allowing gaming can apply, is consistent with Congress’s intent.¹⁰

⁹ See e.g., 100 S. Rpt. 446, 8 explaining the two-part determination exception (“Gaming on newly acquired lands outside of reservations is generally not permitted unless the Secretary determines that gaming would be in the Tribe’s best interest and would not be detrimental to the local community and the Governor of the affected state concurs in that determination.”)

¹⁰ While the Indian canon of construction generally requires statutes enacted for the benefit of Indian tribes be “construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985), it is not applicable here. See *Northern Cheyenne Tribe v. Hollowbreast*, 435 U.S. 649, fn. 7 (1976); *Confederate Tribes of the Chehalis Reservation v. Washington*, 96 F. 3d 334, 340 (9th Cir. 1996) (“We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect [another tribe’s] interests.”); *Utah v. Babbitt*, 53 F. 3d 1145, 1150 (10th Cir. 1995) (“[w]e find this [Indian] canon [of construction] inapplicable here because the interests at stake both involve Native Americans.”). The Nation would presumably argue that interpreting IGRA to the benefit of tribes means that lands do not have to be in trust before § 2719’s exceptions apply, while other Arizona tribes have argued exactly the opposite. See Letter from William Rhodes, Governor, Gila River Indian Community, to Tracie Stevens, NIGC Chairwoman (July 7, 2011) (“This policy commits limited Commission resources to matters that are hypothetical in nature and that may never become reality. In certain circumstances, it would also have the unintended consequences of having Commission action lend support to otherwise questionable projects.”). See also Letter from Rhodes to Stevens (July 29, 2011) (“Despite whatever pro-tribal justification can be invoked in favor of a policy that would allow for such ‘conditional determinations’ such a determination is contrary to the plain text of IGRA – to permit gaming only on Indian lands.”). Since either reading will benefit at least one Tribe, the Indian canon of construction does not aid the interpretation here.

In this instance, because Parcel 2 is not yet in trust, it is not “land[] acquired by the Secretary in trust” and has not been “taken into trust as part of... a settlement of a land claim.” Parcel 2, therefore, cannot qualify under one or more of the exceptions to the general prohibition at this time. Hence, the site-specific ordinance amendment does not meet the requirements of IGRA, § 2719.

Further, although IGRA states that the NIGC Chair “shall” approve an ordinance that contains all the requirements in § 2710(b), this does not mean that an ordinance must be approved that contains those provisions but would otherwise contravene another provision of IGRA. *See* 25 U.S.C. § 2710(b)(2); *Chevron*, 467 U.S. at 844 (“the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies....”); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) (“When [the plain] meaning leads to absurd or futile results, however, the court must look beyond the words to the purpose of the statute. Even when the plain meaning does not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, the court follows that purpose, rather than the literal words.”) *See also* *Ishida v. United States*, 59 F.3d 1224, 1231 (Fed. Cir. 1995) (“courts should avoid interpreting a provision in a way inconsistent with the policy of another provision”), citing, *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Here, the ordinance amendment is not in accordance with § 2719(a) and (b)(1)(B).

As explained above, Congress intended that there be a general prohibition against gaming on trust lands that are acquired after the enactment of IGRA unless specific exceptions apply. I must avoid interpreting those exceptions and their application in a manner that conflicts with Congress’s stated intent. It is consistent with Congress’s intent that the exceptions not be applied to land until the specific land is actually acquired and taken into trust.

Finally, it is unreasonable for the NIGC to make speculative gaming eligibility determinations for parcels that may or may not be taken into trust at some point in the future. If the land is never taken into trust, the NIGC will have wasted a tremendous amount of time and resources on an unnecessary determination. Further, doing so may create confusion rather than provide clarity as to the current status of the land’s gaming eligibility. Moreover, speculative gaming eligibility determinations could also lead to unnecessary litigation, which is another drain on agency, tribal, and others’ resources. It is a better practice to wait until the land has been taken into trust to make such determinations.

Given the above, I find that land at issue here must be in trust before it can qualify for an exception to § 2719’s general prohibition against gaming on after-acquired trust lands. Further, my interpretation of IGRA set forth above is consistent with congressional intent. And, I possess the authority to render this interpretation in accordance with IGRA’s mandate for the NIGC to administer the Act. Accordingly, because Parcel 2 is not yet in trust, it cannot qualify for an exception to the after-acquired trust land prohibition against gaming at this time, and the site-specific ordinance amendment does not comport with the requirements of IGRA.

Conclusion

For all of the reasons detailed above, I find that the Nation's site-specific ordinance amendment does not meet the requirements of IGRA at this time and, therefore, is disapproved.

As stated at the outset, once Parcel 2 is taken into trust and before the Nation operates gaming on it, the Nation is welcome to resubmit the site-specific ordinance amendment. The Nation may also appeal this disapproval under 25 C.F.R. Part 524 within thirty (30) days of service of this letter. Please note that failure to file an appeal within the 30 day period will result in a waiver of the opportunity for appeal.

Sincerely,



Tracie Stevens
Chairwoman