National Indian Gaming Commission

In Re:	)	
	)	
Wyandotte Nation Amended Gaming Ordinance	)	
	)	**September 10, 2004**
	)	
	)	

FINAL DECISION AND ORDER

The Wyandotte Nation (Tribe) has waived its right to an administrative hearing and has requested a final agency decision with respect to its request for review and approval of an amendment (Ordinance Amendment) to its Tribal Gaming Ordinance. The Chairman of the National Indian Gaming Commission approved the Tribal Gaming Ordinance on June 29, 1994. The Tribal Gaming Ordinance authorizes the Wyandotte Nation to conduct gaming within "Indian Country." Tribal Gaming Ordinance, Section 4(b). The Ordinance Amendment at issue adds a new definition to Section 2 of the Tribal Gaming Ordinance. This new definition defines Indian Country to include all Wyandotte Indian land including the Shriner Tract[1], a parcel of land in Kansas City, Kansas, held in trust for the benefit of the Tribe. Wyandotte Nation Resolution No. 040709, July 9, 2004.

DECISION AND ORDER

The Commission finds that the Tribe may not lawfully game on the Shriner Tract and therefore disapproves the Ordinance Amendment.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

On June 29, 1994, the NIGC Chairman approved the Tribal Gaming Ordinance, which authorizes Class II gaming. The Tribal Gaming Ordinance does not identify any specific parcels of land upon which the Tribe may game. On June 20, 2002, the Tribe submitted

[1] "A tract of land in the Northwest Quarter of Section 10, Township 11, Range 25 Wyandotte County, Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked 'Church Lot' thereon." 61 Fed. Reg. 114, 29757-29758 (June 12, 1996).

an amended gaming ordinance specific to the Shriner Tract property. The Tribe also submitted documentation supporting its claim that the Shriner Tract meets three separate exceptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988. On August 27, 2002, the Tribe withdrew the amended ordinance to give the NIGC more time to issue an Indian lands opinion. The Tribe later advised the NIGC that it did not plan to game on the Shriner Tract after all.

On August 28, 2003, the Tribe commenced gaming on the Shriner Tract. This parcel was taken into trust for the benefit of the Tribe on July 15, 1996. Because the Shriner Tract was taken into trust after October 17, 1988, for gaming to be legal under the IGRA, it must fall within one of IGRA's exceptions to the general prohibition on gaming on lands acquired into trust after October 17, 1988 for gaming to be legal under the IGRA.

On September 2, 2003, the Tribe advised the NIGC by letter that it had commenced gaming. The Tribe also resubmitted the supporting material from June 2002 and subsequently provided additional supporting material and arguments.

On March 24, 2004, the NIGC Office of General Counsel (OGC) provided the Tribe with its written opinion that gaming is not legal on the Shriner Tract under the IGRA. On March 31, 2004, the Tribe requested reconsideration of the March 24, 2004, opinion.

On March 26, 2004, the Tribe filed suit against the NIGC in U.S. District Court for the District of Columbia, challenging the March 24, 2004, NIGC opinion. Complaint for Declaratory and Injunctive Relief, *Wyandotte Nation v. Nat'l. Indian Gaming Commission,* No. CV-04-0513 (D.D.C. March 26, 2004). On April 2, 2004, the Tribe filed a Motion For Leave to Amend Complaint For Declaratory and Injunctive Relief (Motion to Amend Complaint), seeking to add several Kansas State authorities as defendants. The D.C. District Court did not act on this motion but instead transferred the case to the U.S. District Court for the District of Kansas. *Wyandotte Nation v. NIGC,* No. CV-04-0513 (D.D.C. April 2, 2004)(Order). On April 7, 2004, the Kansas District Court granted the Tribe's Motion to Amend Complaint. *Wyandotte Nation v. NIGC,* No. CV-04-0513 (D.D.C. April 7, 2004)(Order Memorializing April 7, 2004 Rulings). The NIGC moved to dismiss the action for lack of a final agency action, a prerequisite for the Court's subject matter jurisdiction. The Tribe did not oppose this motion, and on June 1, 2004, the District Court granted the NIGC's Motion to Dismiss. [2] *Wyandotte Nation v. NIGC, et. al.*, Case No. 04-2140-JAR (D.C. Kan. June 1, 2004) (Order Granting Motion to Dismiss).

The NIGC granted the Tribe's request for reconsideration. Upon reconsideration, the OGC determined that some of the language in the March 24, 2004 opinion was overbroad, and therefore revised the opinion. The March 24, 2004 opinion was superceded by an OGC opinion dated July 19, 2004. The conclusion remains the same. It is the opinion of the OGC that the Tribe cannot lawfully game on the Shriner Tract pursuant to the IGRA.

[2] The case is still a live action as to the State of Kansas defendants.

On July 12, 2004, the NIGC received the Ordinance Amendment for review and approval by the NIGC pursuant to 25 U.S.C.§ 2710. By letter dated July 23, 2004, the Tribe waived its right to an administrative hearing and requested that the Commission issue a final decision on the record. We do not typically agree to forego the Chairman's issuance of an ordinance disapproval letter and any resultant appellate process. However, we do so in this case for several reasons: (1) the question of whether the Tribe may game on the Shriner Tract has been under review by the NIGC for some time; (2) the OGC has already issued its opinion regarding gaming on the Shriner Tract; and (3) the Tribe is involved in active litigation regarding gaming on the Shriner Tract. In this case, we believe it in the best interests of both the Commission and the Tribe to expeditiously resolve this matter.

ANALYSIS

Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after the enactment of IGRA on October 17, 1988, unless one of several exceptions apply. Accordingly, because the Shriner Tract was taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether the Tribe may conduct gaming on the Shriner Tract.

The Tribe argues that three exceptions to the general prohibition on gaming on after-acquired lands apply to the Shriner Tract. The Tribe argues that (1) the Shriner Tract is within the Tribe's last reservation; (2) the Shriner Tract was taken into trust as part of a settlement of a land claim, and (3) the Shriner Tract was taken into trust as part of the restoration of their lands. We address each of these arguments in turn.

Last Reservation

The Tribe argues that the "last reservation exception" applies to the Shriner Tract. The "last reservation exception" provides that gaming may be conducted on lands acquired after October 17, 1988, provided that the tribe had no reservation on October 17, 1988, and the 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. 25 U.S.C. § 2719(a)(2)(B). The first two parts of this exception are met: the Tribe had no reservation on October 17, 1988,[3] and the land is in Kansas, not in Oklahoma. We therefore turn our attention to the remaining question, whether the land at issue is within the tribe's last recognized reservation within the State within which the Tribe is presently located.

To answer this question, we must first determine where the Tribe is presently located. The Tribe argues that it is presently located in Kansas, and that the Shriner Tract is within the Tribe's last recognized reservation in Kansas. The Tribe argues that it is "presently

[3] We understand there are no reservations in the State of Oklahoma, as contemplated by the IGRA. Otherwise, the all encompassing Oklahoma exception in 25 U.S.C. § 2719 (a)(2) would likely not exist.

located" in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. The Tribe argues that the existence of an inter-governmental agreement with Kansas City providing for the maintenance and security of the Huron Cemetery establishes this jurisdiction.

The answer to this question turns on the scope and meaning of the term "presently located." To determine the scope of a statute, we look first to its language. Reves v. Ernst & Young, 507 U.S. 170, 177 (1993). To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); (See also, U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002), "In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams v. Taylor, 529 U.S.420, 432 (2000).

While tribes can be located in more than one state (see e.g. the Navajo Nation which is located in three states or the Standing Rock Sioux Tribe which is located in two states), we believe the plain meaning of the term "presently located" is clear. It is not where the tribe happens to have an isolated tract of land. It plainly means where the tribe is currently to be found, i.e., where the tribe physically resides. To determine where this is, we look to where the seat of tribal government is, and where the Tribe's population center is. The seat of the Wyandotte Tribal government and its population center is in Wyandotte, Oklahoma. We therefore find that the Tribe is presently located in Oklahoma.

We do not subscribe to the Tribe's argument that it is presently located in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. As stated by the Tenth Circuit, "[a]lthough the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. It is further uncontroverted that, since the time of the 1855 treaty, the Huron Cemetery has not been used by the Wyandotte Tribe for purposes of residence. Rather, the tract, which is now separated by a significant distance from the actual reservation of the Wyandotte Tribe in Oklahoma, has consistently maintained its character as a public burial ground." Sac and Fox at 1267.

This plain reading of the statutory language is consistent with our reading of the whole of section 2719(a). The language of section 2719(a) evidences a Congressional intent to limit gaming to tribal reservations or, if no reservation exists, to areas within former reservations or last reservations where the tribe is located. This section of IGRA limits, not expands, the right to game. It is clear that Congress intended to allow some gaming to occur on lands acquired after enactment of the IGRA under this provision, but only contemplated gaming on newly acquired lands far from the current or prior reservation in very specific isolated circumstances.

If a court were to find that the term "presently located" is ambiguous, the court would defer to the NIGC's reasonable interpretation of the statutory language. U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002). The court would also look to the legislative history. The legislative history here does not support the Tribe's views. With respect to lands acquired after October 17, 1988, the Select Committee on Indian Affairs stated, "[g]aming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary [of the Interior] 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." S. Rep. No. 446, 100th Congress, 2d Session 8 (1988).

Because we find that the Tribe is not presently located in Kansas, we need not address the Tribe's other arguments in support of its contention that the Shriner Tract is within its last reservation.[4]

Settlement of a Land Claim

The Tribe argues that the land claim settlement exception to the prohibition on gaming on lands acquired after 1988 applies to the Shriner Tract. This exception allows gaming on land taken into trust after 1988 as part of a settlement of a land claim. The Tribe argues that the Tribe's ICC claims are land claims within the meaning of 25 U.S.C. § 2719(b)(1)(B)(i), and that the Shriner Tract was taken into trust as part of a settlement of those claims. (Tribe's September 2, 2003, submission at 15-17).

Specifically, the Tribe argues that, in Docket Nos. 139 and 141, the ICC held that the Tribe was granted recognized title to Royce Areas 53 and 54 by virtue of the Treaty of Greenville and the Treaty of Fort Industry, and that the ICC, as a precursor to evaluating damages, had to apportion interests in the areas among the various tribal signatories to these two treaties. (Tribe's September 2, 2003, submission at 16). The Tribe argues that a claim requiring a determination of ownership of title to land is a "land claim" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(ii).[5]

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[4] We note, however, that the Tenth Circuit Court of Appeals has held that the Huron Cemetery, adjacent to the Shriner Tract, is not a reservation for purposes of the IGRA because it was not set aside for the Tribe to reside on. Sac and Fox Nation of Missouri v. Norton, 240 F. 3d. 1250, 1267 (10th Cir. 2001; *cert. denied,* Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002). The court found that "IGRA's use of the phrase 'the reservation of the Indian tribe' in 25 U.S.C. § 2719(a) suggests that Congress envisioned that each tribe would have only one reservation for gaming purposes." Id. at 1267. Further, the court held, "IGRA specifically distinguished between the reservation of an Indian tribe and lands held in trust for the tribe by the federal government. If the term 'reservation' were to encompass all land held in trust by the government for Indian use (but not necessarily Indian residence), then presumably most, if not all, trust lands would qualify as 'reservations.' In turn, all of those parcels could be used in the manner in which the Wyandotte Tribe seeks to use the Huron Cemetery and its surrounding tracts." Id.

[5] The Tribe cites to no substantive authority to support this definition, only to cases discussing the Indian Canon of Construction, which provides that ambiguous statutes are to be construed liberally, with ambiguities resolved in favor of Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976). However,

As stated above in our discussion of the "last reservation" exception, the interpretation of the land claim settlement exception must begin with the language of the provision itself. Reeves, 507 U.S. at 177. To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. KMart Corp. 486 U.S. at 291; (See also, Seminole Nation of Oklahoma at 944 ("In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams, at 432.

If the language of the land claim settlement provision is clear and unambiguous, then the plain meaning of the provision will apply and there is no need to turn to the legislative history of the provision or to traditional aids to statutory construction. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 251 (1992); Sacramento Regional County Sanitation Dist. v. Reilly, 905 F.2d 1262, 1268(9th Cir. 1990).

Subsection (b)(1)(B)(i) makes an exception to the no-gaming-on-after-acquired-lands rule for "lands [] taken into trust as part of a settlement of a land claim." This provision requires that there be a claim for land, and that land be taken into trust as part of a settlement of that claim. It is clear and unambiguous. It means a claim made by a Tribe for the return of land. To determine whether the Tribe's ICC claims were land claims requires an inquiry into the nature of the claim brought by the Tribe and the resulting award to the Tribe. The Tribe brought claims before the ICC and the Claims Court exclusively for money damages, not over title to land itself. Furthermore, the Tribe's award was limited to money damages. While the ICC may have evaluated whether the Tribe previously held title to the land, and had to assign interests among the various tribes to ascertain money damages, this does not transform the claim into a land claim. The claim was for money, not the land, and the evaluation undertaken by the court to arrive at the amount of money damages does not change that. Furthermore, Pub. L. 98-602 was merely a mechanism with which to distribute judgment funds awarded to the Tribe.

Congress was fully aware of the ICC and the pre-existing process created for the tribes to bring claims against the United States when it enacted the IGRA. Congress could have included a broad exception to the gaming prohibition on lands taken into trust for property purchased with funds awarded by the ICC and the Claims Court; however, no such exception exists in the legislation. Instead, Congress chose to narrowly except lands taken into trust "as part of . . . a settlement of a land claim."

To find that ICC money judgments fit within the plain language of the after-acquired lands exception would result in the exception swallowing the rule. The ICC handled large numbers of claims during its lifetime, and substantial relief was granted to many

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because we find that the term "land claim" is unambiguous, we need not resort to any statutory construction aids, including the Indian Canons of Construction.

tribes. William C. Canby, Jr., American Indian Law at 267 (2nd Ed. 1988). Interpreting the land claim settlement exception to apply any time a tribe uses such monetary judgments to purchase land would open up the exception far beyond what was intended.

Finally, our conclusion is consistent with that of the Department of the Interior (DOI) that previously determined that the Tribe's land in Park City, Kansas, purchased with Pub. L. 98-602 funds, was not land within the meaning of the IGRA land claim settlement exception. The DOI Tulsa Field Solicitor, in an opinion dated February 19, 1993, concluded that:

> Public Law 98-602 which authorizes the expenditure of judgment funds awarded to the Tribe by the Indian Claims Commission and its successor forum, the United States Claims Court, for acquisition of lands to be taken into trust by the Secretary of the Interior, does not come within the meaning of [IGRA's land claim settlement exception]. While the argument of the Tribe is cogent, we are mindful of the limitations on the jurisdiction of the Indian Claims Commission and the United States Claims Court to award money judgments based upon the fair market value of lands taken by the United States at the time of the taking and not land. 25 U.S.C. §§70-70v. Strictly speaking, settlements reached in cases before the Indian Claims Commission and the United States Claims Court are not land settlements wherein the parties assert competing claims to title to property, but rather are settlements of claims against the United States for money damages.

Memorandum from M. Sharon Blackwell, Field Solicitor, Tulsa, to Area Director, Muskogee Area Office, BIA, February 19, 1993 at 11. We see no reason to depart from this interpretation.

Restoration of Land

Finally, the Tribe argues that the "restored lands" exception applies to the Shriner Tract. This analysis requires a two-part determination: (1) that the Tribe is a "restored" tribe, and (2) that the Shriner Tract was taken into trust as part of a restoration of land. 25 U.S.C. §2719(b)(1)(B)(iii); See also, Grand Traverse Band v. United States Attorney for the Western District of Michigan, ("Grand Traverse Band II"), 198 F. Supp. 2d 920 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004). We agree that the Tribe is a restored tribe.[6] We therefore turn our attention to whether the Shriner Tract was taken into trust as part of a restoration of land.

Federal courts, the United States Department of the Interior, and the OGC have recently grappled with the concept of restoration of land. In so doing, they have established

[6] The Tribe was terminated by the Act of August 1, 1956, 70 Stat. 893, and was restored to federal recognition by the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma: Restoration of Federal Services Act, May 15, 1978, 25 U.S.C. § 861, 92 Stat. 246.

several guideposts for a restoration-of-land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. Grand Traverse Band II at 928 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt *("Coos")*, 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's restoration to federal recognition. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I"), 46 F. Supp.2d 689, 699 (W.D. Mich. 1999); Coos at 164.

Nonetheless, there are limits to what constitutes restored lands. As the OGC stated in its opinion, requested by the court in Grand Traverse II, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." Letter from Kevin K. Washburn, National Indian Gaming Commission General Counsel, to Honorable Douglas W. Hillman, Senior United States District Judge, United States District Court (W.D. Michigan), Re: Whether the Turtle Creek Casino site [h]eld in trust [f]or the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the [IGRA's] general prohibition of gaming on lands acquired after October 17, 1988, dated August 31, 2001, p. 15 (NIGC GTB Opinion); see also Office of the Solicitor's Memorandum Re: Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, p. 8. (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied.").

The courts in Coos and Grand Traverse Band I and II noted that some limitations might be required on the term "restoration" to avoid a result that "any and all property acquired by restored tribes would be eligible for gaming." Coos at 164; Grand Traverse Band I at 700; See also Grand Traverse Band II at 935 ("Given the plain meaning of the language, the term 'restoration' may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion") aff'd, 2004 FED App. 0151P (6th Cir. 2004). All three courts proposed that land acquired after restoration be limited by "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration." Id.

The Associate Solicitor, Department of the Interior adopted a similar interpretation in his Coos Opinion on remand from the Coos court. "We believe [t]hat to apply [the] dictionary definition to the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming on restored lands." Id. at 6.

The Associate Solicitor further stated that:

> [B]ecause IGRA provides certain temporal (i.e. the October 17, 1988 limitation for reservation boundaries) and geographic limitations (i.e., land within or contiguous to the tribe's reservation) we cannot view § 2719(b)(1)(B)(iii) to allow gaming on after-acquired lands with no limitations. Consequently, we do not use a dictionary definition of restored to include all lands "restored." It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied. Tribes that were not terminated and thereby not capable of being 'restored' lost vast amounts of land and were forced to move all over the country such that their reservations on October 17, 1988, are vastly different than their aboriginal land.

Id. at 8.

In addition to the above referenced sources, we also consulted our restored lands opinions with regard to the Bear River Band of Rohnerville Rancheria, (See Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria, dated August 5, 2003) (NIGC Rhonerville Opinion) and the Mechoopda Indian Tribe of the Chico Rancheria (See Memorandum from NIGC Acting General Counsel to NIGC Chairman, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria, dated March 14, 2003)(NIGC Mechoopda Opinion).

In this case, these factors (factual circumstances, location and temporal relationship) and our review of agency and judicial precedent lead us to conclude that the Tribe's land acquisition is not a "restoration."

Factual Circumstances of the Acquisition

During 1994 and 1995, the Tribe negotiated to purchase several properties adjacent to the Huron Cemetery. In January 1996, the Tribe submitted an application to the BIA requesting that the United States accept title to certain parcels of real property located in Kansas City, KS, including the Shriner Tract, in trust for the Tribe. The Nation's trust application cited Pub. L. No. 98-602 as the statutory authority for the requested trust acquisition. On June 12, 1996, the BIA published in the Federal Register a Notice stating its intention to accept title to the Shriner Tract in trust for the Tribe.

On July 12, 1996, the State of Kansas and four (4) Indian tribes in Kansas filed suit against the Assistant Secretary seeking to enjoin the trust acquisition of the Shriner Tract. Plaintiffs argued that (i) Pub. L. No 98-602 was not a mandatory trust acquisition and the Secretary's determination to accept title to the Shriner Tract in trust for the Nation was arbitrary and capricious because the Secretary did not consider the factors enumerated in 25 C.F.R. Part 151, and (ii) was in violation of Federal law because the Secretary did not require compliance with certain Federal statutes, including the National Environmental

Policy Act. Plaintiffs also contended that the Secretary's determination that the Huron Cemetery constituted an Indian reservation of the Nation was arbitrary and capricious and inconsistent with applicable law. Although an injunction was entered against the United States on July 12, 1996, the Nation took an emergency appeal to the Tenth Circuit, and on July 15, 1996, the Tenth Circuit vacated the July 12 injunction. The United States accepted title to the Shriner Tract in trust for the benefit of the Nation on July 15, 1996.

Location-Geographical Proximity and Historical Nexus

The Tribe emphasizes that the most significant evidence demonstrating that lands can be considered "restored lands" is the physical location of the land, and that both the Grand Traverse I and Coos courts ruled that "[p]lacement within a prior reservation is significant evidence that the land may be considered in some sense restored." Tribe's September 2, 2003, Submission at 13. See Grand Traverse I, 46 F., Supp. 2d at 702; and Coos, 116 F. Supp. 2d at 164 (quoting Grand Traverse I). The Tribe also quotes language from Grand Traverse I that "any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." Tribe's September 2, 2003, Submission at 13; Grand Traverse I at 701. The Tribe argues that the Shriner Tract satisfies the "location" prong because it is within the Tribe's prior reservation in the State of Kansas. Tribe's September 2, 2003 Submission at 13.

We agree that the physical location of the land is significant. The parcel at issue on which the Tribe proposes to game is located in Kansas City, Kansas. However, the seat of the Wyandotte Tribal government, its present trust lands, and its population center are in Wyandotte, Oklahoma, a distance of approximately 175 miles from Kansas City. Also in Wyandotte, Oklahoma are the Tribe's Turtle Stop Convenience Store, Turtle Tot Learning Center, a Seniors Program, and educational assistance programs. In 1993, the Tribe completed an expansion of the tribal complex, which includes administrative offices, new classrooms for the Turtle Tots Learning Center, as well as a Library and Heritage Center. See Tribe's web site at www.wyandot.org. It is clear that the Shriner Tract is sited far from where the Tribe is actually located in Wyandotte, Oklahoma.

In Grand Traverse and Rhonerville, the land at issue was located either near the tribal center or near tribal programs. In Grand Traverse, the site was located in the same area as a tribal housing development and an 80-acre youth camp. NIGC GTB Opinion at 1. In Rhonerville, the parcel at issue was six miles from the Rhonerville Tribe's original Rancheria, whose boundaries had been re-established. NIGC Rhonerville Opinion at 2. In Mechoopda, the parcel was located approximately 10 miles from the Tribe's original Rancheria, which it occupied immediately prior to termination, and which was located in what is now the center of the city of Chico, California. NIGC Mechoopda Opinion at 1 and 9. While we do not, in this opinion, establish a standard for determining what is a reasonable distance for purposes of the restoration of lands analysis, we do not believe a distance of 175 miles between the parcel and the tribal center is close enough to establish a geographical connection.

We also look to the historical nexus between the Tribe and the parcel at issue. In Grand Traverse, we found that restoration was shown by the "Band's substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." NIGC GTB Opinion at 15. We further stated, "At the time of termination, Band members lived not far from the [parcel at issue]. For most of the Band's recorded history, it has lived and worked in [the general area of the parcel at issue]". Id. at 18. Finally, it was significant to the NIGC GTB Opinion that the land had "been at the heart of the Band's culture throughout history..." Id. at 19.

In Coos, the Associate Solicitor found that the land had a geographic nexus to the Coos and that the Coos were not seeking to game on far-flung land. Associate Solicitor Coos Opinion at 13. The Associate Solicitor further found it relevant that the Coos had a presence in the area of the parcel at issue at the time of termination. Id. In concluding that the parcel at issue was restored land, the Associate Solicitor stated that he considered that the Coos were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." Id. at 14.

In Mechoopda, we found that the parcel at issue had cultural and historical significance to the Mechoopda Indians. Three buttes with historical significance were located one mile from the parcel. These buttes figured prominently in a tribal myth. In addition, an historic trail linking several tribal villages crossed the parcel. Furthermore, several Mechoopda villages were located in close proximity to the parcel. NIGC Mechoopda Opinion at 10-11.

In Rhonerville, we found that the tribe had a longstanding historical and cultural connection to the parcel at issue. The parcel was located within one mile of two aboriginal villages and two major tribal trails. It was located within three miles of five aboriginal villages. Also within three or four miles from the parcel was the site of a mythic flood in a tribal story telling. Furthermore, the parcel was located 6 miles from the tribe's original Rancheria, which was purchased by the United States for the Rhonerville Indians in 1910. The Rhonerville Tribe was terminated in 1962, and the Rancheria was divided and distributed to individual Indians. At the time the Rancheria boundaries were re-established in 1983, there were still 6 acres in individual Indian ownership. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important to our determination that tribal members resided on the original Rancheria at the time of termination. Rhonerville Opinion at 10.

In contrast, we do not find that the Tribe has a sufficient historical nexus to the Shriner Tract to qualify it as restored land. As evidenced by the information submitted by the Tribe, the Tribe was transient for much of its history. In the first part of the 1600's, the tribe resided in Canada. It then moved to Lake Huron in what is the present State of Michigan. In the early 1700's, the Tribe moved south and into the present State of Ohio and western Pennsylvania. Beginning in 1795, the Tribe began ceding land to the United States. In 1842 the United States granted the Tribe an unspecified area of land located west of the Mississippi River. The Tribe negotiated to purchase land from the Shawnee

Tribe near Westport, Missouri. The Shawnee did not honor their agreement with the Tribe, and at the end of 1843, the Tribe entered into an agreement with the Delaware to acquire land in the Kansas Territory, which includes the parcel at issue. The Tribe occupied this land until the beginning of 1855, when it ceded the land to the United States.

The Tribe occupied the Shriner Tract area for a very brief time (late 1843 to early 1855- only 11 full years). The cases discussed above do not support a finding that this short time period qualifies as an historical nexus. In all of the cases that have analyzed the restored lands question, there was a significant, longstanding historical connection to the land—sometimes even an ancient connection. We are not prepared to find that occupation of land for a period of 11 years, despite that significant roots were put down, rises to the level of an historical connection.[7] We believe that, if we were to so find, we would conceivably be bound to find that the Tribe also had an historical nexus to Michigan, Ohio, Pennsylvania and Missouri, and that if land were taken into trust in those locations, the Tribe could game there. As we said in our Grand Traverse Opinion, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." NIGC GTB Opinion, p. 15.

Furthermore, the Tribe has not shown that it had a presence in the area of the Shriner Tract upon termination. According to the Tribe's submission, it left Kansas in 1855 when it ceded the lands to the United States. The Tribe's status was terminated in 1956. Act of August 1, 1956, 70 Stat. 893. Therefore, more than 100 years elapsed between the time the Tribe left the lands, and the Tribe was terminated. In Grand Traverse, Coos, Mechoopda, and Rhonerville, it was important to the determination of restored lands that the tribes in those cases had a presence on the lands upon termination.

Temporal Relationship of Acquisition to the Tribal Restoration

The Tribe argues that the temporal relationship of the acquisition to the Tribe's restoration is similar to the timelines in the other cases applying the restored lands exception. Tribe's September 2, 2003, Submission at 14. The Tribe points particularly to the temporal relationship in the Grand Traverse case. Id. at 14-15. The Tribe emphasizes that in both its case and the Grand Traverse case, it took years from the time of restoration for approval of a tribal constitution, which was a necessary precursor for any trust acquisition. The Tribe further argues that in both cases, the subject trust acquisitions were the first meaningful acquisitions after restoration, and both were part of a concerted effort to acquire trust lands as part of an economic development program. Finally the

[7] The Tribe argues that the land qualifies as restored because it is within the Tribe's prior reservation. The Tribe argues that the land is within its prior reservation because the land was reservation land of the Delaware Indian Nation, and when the Tribe acquired it, the agreement provided that the Wyandotte Tribe "shall take no better right or interest in and to said lands than is now vested in the Delaware Nation of Indians." 9 Stat. 337. See also page 3, herein. Even if the land could be considered reservation land because it was reservation land of the Delaware, the land does not meet the historical nexus prong, as explained above.

Tribe argues that in both cases, the subject lands were previously ceded to the United States by treaty. Id.

We see several distinctions between the temporal relationship in Grand Traverse and that here. First, with respect to the issue of the tribal constitution, it was noted in Grand Traverse II that the Secretary of the Department of Interior would not take land into trust on behalf of the Grand Traverse Band until its constitution had been approved. Grand Traverse II at 936, aff'd, 2004 FED App. 0151P (6th Cir. 2004). The Band's constitution was approved in 1988, and the subject property was taken into trust in 1989. Therefore, the court found that, "as a matter of timing, the acquisition of the [subject property] was part of the first systemic effort to restore tribal lands." Id. Here, the Tribe has provided no evidence that it was required to have an approved constitution prior to the acquisition of land in trust. In fact, the Tribe's constitution was approved in 1985, yet the United States took land into trust for the Tribe in 1979 and 1984. It is upon this land that the Tribe resides in Wyandotte, Oklahoma.

The Grand Traverse II court further found the absence of any substantial restoration of lands preceding the property at issue to be important. Id. at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Here, the Tribe had a substantial restoration of land preceding the Shriner Tract. In fact, three parcels of land were restored, one within one year and two within six years of tribal restoration.

The Tribe was restored to federal recognition in 1978. The following year, land was taken into trust in Wyandotte, Oklahoma for the Tribe. Noteworthy is a memorandum from the BIA Superintendent of the Miami Agency to the BIA Area Director, Muskogee Area Office, dated November 13, 1978, regarding the Tribe's request to have land taken into trust. The memorandum states, "The Wyandotte tribe was recently reinstated and recognized by the United States Government as Indians and, more recently, acquired a land base with desires of purchasing additional land adjacent and elsewhere." It further states, "The Wyandotte tribe will use their land as a base for tribal economic development...." The trust deed for these 1.5 acres is dated June 8, 1979.

Five years later, in 1984, two additional parcels of land, one 3.8 acres, the other 189 acres were taken into trust for the Tribe. With respect to the 189 acres, the BIA Muskogee Area Director stated in a June 3, 1980, letter to the United States General Services Administration, "I have [d]etermined and hereby certify that subject property is located within the boundary of the former reservation of the Wyandotte Tribe of Oklahoma...."

We do not agree with the Tribe that the Shriner Tract was the first meaningful acquisition. Certainly the Oklahoma land acquisitions, coming on the heels of tribal restoration, and comprising the land upon which the Tribe currently resides, are nothing if not meaningful. The Oklahoma land acquisitions have a strong temporal relationship to tribal restoration, and therefore may more appropriately be considered the Tribe's restored lands. These lands were taken into trust within one and six years of tribal restoration, and were noted by the BIA for being both a land base for the Tribe and within the Tribe's former reservation.

The Shriner Tract, on the other hand, was acquired in trust in 1996, a period of 18 years from the Tribe's restoration in 1978. In Grand Traverse and Mechoopda, the period between restoration and acquisition was 9 years (with the approval of the constitution a requirement in Grand Traverse). In Rhonerville, 10 years elapsed between restoration and acquisition. In Coos, the period between restoration and acquisition was 14 years.

It could be argued that the difference between 14 and 18 years is small. This difference might not be significant if the Tribe met the other factors. However, we cannot find that the land is restored based solely on an 18-year passage of time. Perhaps if the Tribe met the other factors, we might be willing to push the outer limits of what has previously been considered an acceptable delay. However, that is not the case here. Furthermore, here, the Tribe acquired land upon which it currently resides within one and six years of restoration. We conclude that, if any land is to be considered restored, it is this intervening land. [8]

Finally, the Tribe argues that in both Grand Traverse and its case, the subject lands were previously ceded to the United States by treaty. The relevant language from Grand Traverse II is as follows; "The Band has introduced substantial and uncontradicted evidence that the parcel is located in an area of historical and cultural significance to the Band that was previously ceded to the United States." Grand Traverse II at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Our reading of this language suggests that the previously ceded land must be in an area of historical and cultural significance to be considered restored. As discussed above, the Shriner Tract, which the Tribe occupied for some 11 years, does not qualify as historically significant. Therefore, the fact that the land was ceded, without the historical connection, does not warrant a finding of restoration.

Section 2719(a) of the IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions are met. The Shriner Tract was acquired in trust after October 17, 1988. As discussed above, the Shriner Tract does not meet any of the exceptions to the IGRA prohibition on gaming on lands acquired after October 17, 1988. Therefore, the Tribe may not lawfully game on the Shriner Tract. Consequently, we must disapprove the Ordinance Amendment in as much as it defines Indian Country to include

[8] We acknowledge that the Mechoopda Tribe had acquired intervening land. However, that land was purchased to address the housing needs of its members, but was an almond orchard located in a flood plain and unsuitable for housing. In the Wyandotte's case, the land they purchased is where the tribal headquarters is located, and is where the Tribe could game if it chose.

the Shriner Tract.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen	Nelson Westrin	Cloyce V. Choney
Chairman	Commissioner	Commissioner