




MEMORANDUM FOR THE CHAIRWOMAN

December 21, 2010

From: Michael Gross, Associate General Counsel, General Law 
cc: Paxton Myers, Chief of Staff
Dawn Houle, Deputy Chief of Staff
Lael Echo-Hawk, Counselor to the Chairwoman
Jo-Ann Shyloski, Associate General Counsel, Litigation and Enforcement
Re: Bay Mills Indian Community Vanderbilt Casino, NIGC Jurisdiction

INTRODUCTION

On Wednesday, November 3, the Bay Mills Indian Community opened an off-reservation gaming facility in Vanderbilt, Michigan. The considered opinion of the Department of the Interior Solicitor is that the land is not within a reservation, not held in trust, and not held in restricted fee. Accordingly, the Community's new casino is not on Indian lands within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701- 2721, and the National Indian Gaming Commission lacks jurisdiction over it. We are obligated, therefore, to refer the matter to the appropriate law enforcement agencies.

BACKGROUND

The Vanderbilt casino sits upon land described as:

A parcel of land lying on part of the Northwest $\frac{1}{4}$ of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, Corwith Township, Otsego County, Michigan, described as: Beginning at the Northwest corner of said Section 22; thence South $88^{\circ}15'18''$ East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South $21^{\circ}33'41''$ West and being along the Westerly right-of-way line of Limited Access I-75; thence continuing South $22^{\circ}56'39''$ West

440.43 feet along said right-of-way line; thence continuing South 45°47'56" West, 460.00 feet along said right-of-way line; thence North 89°30'40" West 209.68 feet; thence 537.75 feet long curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the center-line of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the point of beginning, containing 47.55 acres more or less.

The Community purchased the land using money from the land trust established by the Michigan Indian Land Claims Settlement Act of 1997 (MILCSA), P.L. 105-143, 111 Stat. 2652 (Dec. 15, 1997). MILCSA states that "any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.* at § 107(a)(3).

DISCUSSION

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). NIGC's implementing regulations clarify:

Indian lands means:

- (a) Land within the limits of an Indian reservation; or
- (b) Land over which an Indian tribe exercises governmental power and that is either –
 - (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
 - (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. As the Vanderbilt land is neither reservation land nor trust land, it could only be Indian lands under IGRA if it were held in restricted fee. We have enquired of the Solicitor's Office whether the language in MILCSA that this land is to be "held as Indian lands are held" has the effect of making the land Indian land within the meaning of IGRA, and the answer we have received is "no." See letter from Hilary Tompkins, Solicitor, Department of the Interior to Michael Gross, Associate General Counsel, NIGC (December 21, 2010). As the Department of the Interior exercises broad authority over Indian affairs, 25 U.S.C. §§ 2, 9, and has various obligations to the tribes under MILCSA, *see e.g.* §§ 104-106, the statute is the Department's to interpret, and I

defer to the Solicitor's opinion. The land is not Indian land within the meaning of IGRA, and as a consequence, NIGC lacks jurisdiction over the Vanderbilt casino.

IGRA, by its terms, applies only to gaming on Indian lands. *See, e.g.*, 25 U.S.C. § 2710(a)(2) (“any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter”); 25 U.S.C. § 2710(b)(1) (requiring approved tribal gaming ordinance for the conduct of Class II gaming on Indian lands); *id.* (requiring tribal licensure of each gaming facility on Indian lands); 25 U.S.C. § 2710(b)(4)(A) (permitting licensure of individually owned gaming on Indian lands); 25 U.S.C. § 2710(d)(1) (requiring approved tribal gaming ordinance for the conduct of Class III gaming on Indian lands); 25 U.S.C. § 2710(d)(3)(A) (requiring a tribal-state compact for Class III gaming on Indian lands); Sen. Rep. 100-446 at p. A-1. (IGRA “is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands”).

Likewise, the powers IGRA grants the Commission and the Chairwoman extend only as far as Indian lands extend. *See, e.g.*, 25 U.S.C. § 2705(a)(3) (power to approve tribal gaming ordinances for gaming on Indian land); 25 U.S.C. § 2705(a)(4) (power to approve management contracts for gaming on Indian lands); 25 U.S.C. § 2713 (enforcement power for violations of IGRA, NIGC regulations, or tribal gaming ordinances); 25 U.S.C. § 2706(b)(1), (2), (4) (powers to monitor gaming, inspect premises, and demand access to records for Class II gaming on Indian lands); 25 U.S.C. § 2702(3) (“The purpose of this Act is ... to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming...”).

In short, in the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman any jurisdiction to exercise regulatory authority over the Vanderbilt casino. Further, when the Commission obtains information that may indicate a violation of federal, state, or tribal statutes, it is obligated to turn that information over to the appropriate law enforcement officials. 25 U.S.C. § 2716(b).

If you have any further questions, please do not hesitate to ask.