United States Department of the Interior

OFFICE OF THE SOLICITOR

SEP 25 1996 In reply, please address to:
Main Interior, Room 6456

Memorandum

To: Director, Indian Gaming Management Staff

From: Robert T. Anderson
Associate Solicitor, Division of Indian Affairs

Subject: Sampson Johns Allotment as "Indian Land" under IGRA.

Your office has requested an opinion as to whether the Quinault Indian Nation may conduct Class III gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988), on a parcel of land known as the Sampson Johns allotment. The Tribe has submitted a Class III gaming compact between the Tribe and the State of Washington which contemplates gaming upon the Tribe's reservation and upon a specific parcel of trust land known as the Sampson Johns allotment.

Pursuant to IGRA, the Secretary must approve a Tribal-State compact in order for the Tribe to legally conduct Class III gaming. As part of the Quinault Indian Nation-Washington State gaming compact, the Tribe and the State assert that publication in the Federal Register of the Secretary's approval of their compact constitutes a finding by the Department of the Interior that the Sampson Johns allotment is "Indian lands" which may be used for tribal gaming under IGRA. Prior to approving the compact, therefore, the Department of the Interior must determine whether the allotment is "Indian land[]" under IGRA.

Based on a review of the relevant evidence and applicable law, we conclude that the Quinault Indian Nation may conduct gaming on the Sampson Johns property because the land is "Indian land[]" as defined by IGRA, *i.e.* the land is trust land owned by Quinault tribal members and the Quinault Indian Nation exercises governmental power over the property. Therefore the Tribal -State gaming compact, including its provision regarding the Department of the Interior's finding that the intended gaming site is "Indian land[]" under IGRA, may be legally approved.

Background

The Quinault Indian Nation (hereinafter Quinault or Tribe) intends to locate their proposed gaming enterprise on an Indian allotment that the Tribe believes is within its jurisdictional area

and over which the Quinault Indian Nation exercises governmental authority. The Shoalwater Bay Tribe of Indians opposes the Quinault Tribe's proposed gaming site because the Shoalwater Bay Tribe recently purchased a neighboring parcel of land in fee simple, which it intends to use for gaming.[1] Shoalwater Bay has submitted a request to the Secretary to investigate Quinault's claim that it exercises governmental power over the allotment. See Material dated July 11, 1996 from the Shoalwater Bay Indian Tribe to Secretary Babbitt (On File with Our Office).

The proposed gaming site is part of lands allotted to Sampson Johns, an enrolled Quinault Indian, on September 7, 1900 out of the public domain.[2] See Trust Patent of February 5, 1916 (on file with our office). The land has been continuously held in trust since 1916 for the beneficial owners of the land and is currently held in trust by the United States for a number of Quinault tribal members, heirs and successors of Sampson Johns.[3] The specific parcel of land intended for gaming is recorded with the Bureau of Indian Affairs as allotment 130-1755-D. The parcel is owned by Emily J. Sherwood, an enrolled Quinault Indian.

The Quinault Tribe has submitted evidence to support its assertion that it exercises governmental power over the parcel in question. According to documents submitted by the Tribe, the land is located approximately twelve miles from the southern border of the Quinault Indian Reservation and is near or within the usual and accustomed hunting, fishing, and gathering territories of the Quinault Tribe. See Treaty with the Quinaielt, Etc., 1855, 12 Stat. 971 (1855).

The Tribe has also submitted sworn statements from Douglas Washburn and Ray Knutzen, Quinault Indian Nation Police officers, stating that tribal police have policed the Sampson Johns

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[1] On August 14, 1992 the Sampson Johns allotment was subdivided into four separate tracts. See Letter of December 16, 1992 from the Acting Assistant Area Director, Portland Area Office, Bureau of Indian Affairs to the Superintendent, Olympic Peninsula Agency, Bureau of Indian Affairs (on file in our office). On January 17, 1996 the Bureau of Indian Affairs approved the sale of one of the four parcels consisting of 56.240 acres to the Shoalwater Bay Indian Tribe. Title to this parcel thus reverted to fee simple. See Deed of January 11th, 1996, Recorded on February 2, 1996 under No. 96 04172 (Shoalwater Bay Tribe Submission Appendix G).

[2] The United States mistakenly patented the allotment to Mr. Johns in fee simple, but on February 5, 1916 corrected the mistake by issuing a trust patent to Mr. Johns which replaced (cancelled) the fee simple patent. Trust Patent of February 5, 1916.

[3] Of the eleven heirs of Sampson Johns who owned an undivided interest in the Sampson Johns allotment, ten are enrolled Quinault tribal members. See Certification of Degree of Indian Blood for Verdi Charlene Smith Mcloud, Geneva L. Smith Underwood, Hazel Strom Smith, Donald Eugene Strom, Leon C. Strom, Theodore Strom II, Theodore Lester Strom, Emily Johns Sherwood, Vance Johns, Jr., Jason Strom (On File with Our Office).

allotment and have periodically responded to requests for police assistance on the land. Declaration of Douglas Washburn, Quinault Indian Nation Police Officer (January 3, 1995); Declaration of Ray Knutzen, Quinault Indian Nation Police Chief (January 2, 1995) (On File with Our Office).

The City of Ocean Shores, Washington, has written a letter indicating that among the local residents of the city, the Sampson Johns allotment is held to be Quinault land subject to the Nation's jurisdiction. The City indicates that primary jurisdiction on these lands is the responsibility of the Quinault Indian Nation. The City expects that the Tribe will have regulatory and enforcement responsibility over a tribal casino located on the trust land. Letter of August 20, 1996 to the Department of the Interior, from Michael L. Pence, City Manager (On File with Our Office). Additionally, the County of Grays Harbor has written a letter indicating that the land is considered territory that has been historically occupied by the Quinault Tribe and held in trust for the benefit of Quinault members for many years. The County states that the property is not taxed by Grays Harbor County and the Tribe has primary jurisdiction. See Letter of August 23, 1996 from Grays Harbor County Board of Commissioners (On file with Our Office).

The Constitution of the Quinault Indian Nation, adopted March 22, 1975, extends the jurisdiction and governmental power of the Tribe to:

> (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (I Kapp. 923) and to all persons acting within the boundaries of those reserved lands or waters; (b) all usual and accustomed fishing grounds, open and unclaimed lands reserved for hunting and gatherings and other lands necessary for the appropriate use of fishing and hunting grounds . . . (c) all lands or waters held by the United States in trust or reserved by the Quinault Nation for the use and benefit of any member of the Quinault Tribe when such lands or waters are not within the boundaries of an established Indian Reservation.

See Article I, Constitution of the Quinault Indian Nation.

The Tribe has submitted a lease document between the manager of a "flea market" on the property and a flea-market vendor. The lease agreement provides that enforcement of the lease provisions will be handled by the Quinault tribal authorities. See Lease between Charing Enterprise and David B. Velasquez-Manager at 3, 6, (October 30, 1995)(On File with Our Office). This document indicates that the occupants of the land who are parties to the lease have consented to Quinault tribal jurisdiction for enforcement of the Lease.

Legal Analysis

Indian gaming activities are regulated pursuant to the Indian Gaming Regulatory Act. IGRA allows Class II and III gaming on Indian lands which it defines as:

> (A) all lands within the limits of any Indian reservation; and
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> (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).[4] While the Sampson Johns allotment is not within the Quinault reservation, it is held in trust by the United States for Quinault tribal members. Thus, the land is "Indian lands" if the Quinault Tribe exercises governmental authority over it. IGRA does not define the circumstances under which a tribe will be considered to exercise governmental power over trust land. The legislative history of the Act likewise provides no guidance on this issue.

Tribal jurisdiction is generally limited to Indian country. In 1948, Congress defined "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). Congress has employed the definition of Indian country in numerous statutes. See e.g. 16 U.S.C. §§ 3371(c) (Indian country as defined in 18 U.S.C. 1151); 3377(c)(preserving tribal jurisdiction on Indian reservations); 25 U.S.C. § 450h (a)(3) (Secretary may acquire land in trust within a tribe's reservation); 25 U.S.C. § 1322 (a) (State may assume jurisdiction in Indian country with a Tribe's consent); 25 U.S.C. § 1903 (10) (Reservation in Indian Child Welfare Act means Indian country as defined in 18 U.S.C. 1151 and lands which are held in trust by the United States for a Tribe or individual Indian); 25 U.S.C. § 3202 (8)(Indian country has the meaning given to the term by 18 U.S.C. 1151). However, IGRA's use of the phrase "Indian lands" rather than "Indian country" indicates that IGRA's jurisdictional reach is not precisely equivalent to statutes which refer to "Indian Country."

Indian tribes possess sovereignty over "their members and their territory." Montana v. United States, 450 U.S. 544 (1981). There is a presumption in favor of tribal jurisdiction over all land

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[4] Section 20 of IGRA imposes restrictions on the ability of Indian tribes to conduct gaming on property acquired after October 17, 1988. See 25 U.S.C. § 2719(b). However, this provision is inapplicable to this case because the Sampson Johns trust status predates IGRA.

within tribal reservations, over dependent Indian communities and lands held in trust for a tribe or its members. See Indian Country, U.S.A., Inc. v. Oklahoma 829 F.2d 967 (10th Cir. 1987), cert. denied, sub nom., Oklahoma Tax Com. v. Muscogee (Creek) Nation, 487 U.S. 1218 (1988); see also DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425 (1975); see generally F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 229-59 (1982 ed.). Under certain narrow circumstances, however, there may be Indian country over which no tribe exercises governmental power. In those circumstances, the area would not be considered "Indian lands" as defined in the IGRA.

Tribal jurisdiction may be lacking when the land in question is not owned or occupied by tribal members and is far removed from the tribal community. See F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 346-48 (1982 ed.)(basis for tribal jurisdiction over allotments outside of reservations is tribal membership, or that allotments are clustered and thus part of a dependent Indian community); Cf., e.g., Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indians, 498 U.S. 505, 511 (1991)(usual tax immunities apply to tribal trust land within original reservation boundaries); Oklahoma Tax Com'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1991 (1993). Assertion of tribal jurisdiction over individual trust parcels, however, has been recognized when there is a tribal nexus to the lands or a political relationship with the owners of the lands. Mustang Production Co. v. Harrison, et al., 1996 WL 477560 (10th Cir. 1996); see also, Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW at 87-93 (1987).[5]

The Sampson Johns allotment identified in the Quinault compact is not located within the exterior boundaries of the Tribe's reservation, but was held in trust prior to the enactment of IGRA on October 17, 1988. In order for the Tribe to conduct gaming on the lands, the Tribe must show that it falls within IGRA's definition of Indian lands, *i.e.*, land that is held in trust by the United States for a tribe or individual and the Tribe exercises governmental power over the land. 25 U.S.C. § 2703(4)(B).

Exercise of Tribal Jurisdiction

In Cheyenne River Sioux Tribe v. South Dakota, 830 F.Supp. 523 (1993), aff'd, 3 F.3d 273

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[5] The Shoalwater Bay Indian Tribe notes that in Miami Tribe v. United States, 927 F. Supp. 1419 (1996), the Miami Tribe was unable to establish jurisdiction over restricted Indian land because, among other reasons, the record was devoid of evidence that the owners of the land had consented to jurisdiction. Id. at 1428, citing Duro v. Reina, 495 U.S. 676 (1990)("A tribe's ... authority comes from the consent of its members."). However, Miami can be distinguished from the present inquiry because in Miami the beneficial owners of the restricted Indian allotment were not members of the Miami Tribe while the beneficial owners in this instance are members of the Quinault Indian Nation and subject to the tribe's jurisdiction as evidenced by the Tribal Constitution. In addition, the land at issue in Miami was located in an area from which the Tribe had been removed and disclaimed jurisdiction.

(8th Cir. 1993), the district court indicated that the determination regarding tribal jurisdiction would require evidence regarding:

> (1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

Id. It is important to note, however, that we do not view as necessary a showing that a tribe has in fact actually exercised governmental power over a tract of Indian country. Rather, it is only necessary that the Indian country be so situated as to allow the exercise of governmental power if a tribe chooses to do so. Of course, the fact that a given tribe has actually exercised such power and that neighboring governments recognize the legitimacy of such authority weighs in favor of a finding that the lands are "Indian lands" under the IGRA.

In the instant case, the Sampson Johns allotment was assigned to Sampson Johns, an enrolled Quinault Indian, on September 7, 1900 and he and his descendants continued to reside on the land for a time. See United States v. Washington, 294 F.2d 830 at 831 (9th Cir. 1961). Additionally, the land is located twelve miles from the southern border of the Quinault Indian Reservation, falls within the Tribe's constitutionally-defined area of tribal jurisdiction and is near or within the usual and accustomed hunting, fishing, and gathering territories of the Quinault Tribe. See 50 C.F.R. § 663.24; 50 Fed. R. 28786, 28795 (June 6, 1996). The Tribe regulates hunting and fishing over its members in this area, provides tribal police services and other services to the area, and is recognized by the City of Ocean Shores and the County of Grays Harbor as exercising regulatory and enforcement jurisdiction over the land. Users of the property have expressed their consent to Quinault tribal jurisdiction for enforcement of provisions of a lease. Therefore, we conclude that the Quinault Indian Tribe exercises tribal jurisdiction over the Sampson Johns allotment.

Conclusion

In our opinion, the Sampson Johns trust allotment constitutes "Indian lands" pursuant to the Indian Gaming Regulatory Act and the Quinault Indian Nation may conduct Class II and Class III gaming activities on the land. If you have any further questions in this regard, please contact Troy Woodward of my staff at (202) 208-6526.