ROBB & ROSS

AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

JOSEPH W. ROBB*
STERLING L. ROSS JR.*†
ALAN J. TITUS
PHILIP A. ROBB

591 REDWOOD HIGHWAY, SUITE 2250
MILL VALLEY, CALIFORNIA 94941
TELEPHONE: (415) 332-3831
FAX: (415) 383-2074

* A PROFESSIONAL CORPORATION
† CERTIFIED SPECIALIST IN ESTATE PLANNING, PROBATE AND TRUST LAW, THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

December 19, 2006

Mr. George Skibine
Office of Indian Gaming Management
Bureau of Indian Affairs, DOI
1849 C Street, NW, Mail Stop 3657-MIB
Washington, DC 20240

Re: Proposed Rule – Gaming on Trust Lands Acquired After October 17, 1988
RIN 1076-AE 81

Dear Mr. Skibine:

I write on behalf of Artichoke Joe's, a cardroom in San Bruno, California, about 10 miles south of San Francisco, to provide comments on BIA's proposed rule governing gaming on trust lands acquired after October 17, 1988.

Artichoke Joe's is a family-owned business in its third generation, and its interest in the regulations is easily explained. In California, state licensed cardrooms are restricted to the operation of poker-style table games, and cannot operate slot machines, while Indian tribes are allowed to operate slot machines on Indian lands. Indian lands have always been located in remote, mostly rural areas of the state, but now, tribes are attempting to buy lands in urban areas for operation of casinos, and are claiming that these new lands are "Indian Lands." This is not what Congress intended when it passed the Indian Gaming Regulatory Act ("IGRA") and not what California voters intended when they approved Indian casinos, and the BIA should prohibit the practice. However, the proposed regulations fail to close this loophole.

Tribal efforts to obtain new lands in desirable locations for gambling, usually near population centers or transportation corridors and usually financed by outside investors, have aptly been dubbed "reservation shopping." This new phenomena is popular in the San Francisco Bay Area. In 2000, the Lytton Indians convinced Congress to take into trust the site of Casino San Pablo, just 10 miles north of Oakland, and in 2005, the Lytton began to operate slot machines at Casino San Pablo. In addition, at least five more tribes are attempting to obtain other urban lands in the Bay Area, namely the Guidiville Pomo, the Scotts Valley Pomo, the Graton, the Dry Creek Pomo, and the Koi Nation. None of these lands are properly considered tribal lands.

Reservation shopping has the potential to disrupt communities in many ways, especially in a state like California which does not allow any other persons to operate casino games. Urban casinos create land use issues, involving the size of the structures, traffic and parking, and the fact casinos are open 24 hours per day. Casinos drain millions of dollars from a community, and this generates economic problems, including impacts on other businesses, net job losses in the area, and problem gambling. Problem gambling creates social problems, perhaps the biggest of which is the generation of crime. Reservation shopping for gaming venues also sets a bad precedent as a way for other businesses to circumvent state laws.

IGRA did not speak with a clear voice on the issue of reservation shopping, a practice unknown at the time. Section 20 of IGRA (25 USC 2719) generally prohibits gaming on lands acquired in trust after the date it was enacted in 1988. However, section 20 contains some exceptions. It contains specific exceptions for settlements of land claims, initial reservations, and restored lands for restored tribes, and a general exception whene the Secretary determines that a proposed casino will not be detrimental to the surrounding community. However, in a separate section, IGRA has other provisions which restrict operation of Indian gaming to Indian lands under the jurisdiction of the tribe. Class II gaming is allowed only "on Indian lands within such tribe's jurisdiction" (25 USC 2710 (b)(1)) and class III gaming is allowed only if authorized by an ordinance or resolution adopted by "the Indian tribe having jurisdiction over such lands." (25 USC 2710(d)(1)(A).) Thus section 2710 seems to impose requirements not included in section 2719.

A requirement that the Indian tribe have jurisdiction over the proposed land would seem essential to make the proposed Indian casino constitutional. Under our federalist system, a state has "primary jurisdiction" over all land within its borders as those borders are defined in the state's Act of Admission. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333; 81A *C.J.S.*, States §17. The main exception is lands withheld by the federal government for its own use or as Indian lands. Once a state has been admitted to the Union, and sovereignty over the land within its borders transferred to the state, the federal government can acquire "exclusive or partial jurisdiction over lands within a state" only by an affirmative act of consent by the state, given either before or after the acquisition. 91 *C.J.S.*, United States §9 (Emphasis added). For example, in 1911, the California Legislature ceded jurisdiction over lands in Riverside County to the Federal government for use by the Soboda Indians. Statutes of 1911, Ch. 675. See Calif. Govt. Code §111(g). Absent the state's consent, the Federal government has no right to seize jurisdiction.

The Federal government can own lands over which the state retains primary jurisdiction, and in such cases, it holds the land as "an ordinary proprietor." *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885). Further, the Federal government can create reservations on federally owned land, "reserving certain land for a particular purpose, such as an Indian reservation, a

national forest, or a national park or monument." 91 *C.J.S.*,, United States §99. Such a reservation does not affect sovereignty. Absent cession, the state retains its sovereignty over the land despite the Federal government's actions.

Consistent with these laws, but contrary to the recent assertion of Indian sovereignty over some lands such as Casino San Pablo, the Federal government historically considered rancheria lands to be under state jurisdiction. In 1912, the BIA took the position that the federal government had no jurisdiction over rancherias which had been purchased from private landowners and which therefore had been under state jurisdiction. A letter from DOI in Washington D.C. dated June 19, 1912, reads, "Inasmuch as the lands occupied by these Indians were purchased from private individuals while same were under the jurisdiction of the State of California, said jurisdiction would continue until such a time as the State ceded its police jurisdiction. It is not believed that the State did cede jurisdiction." A copy of that letter is enclosed.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court held that states cannot regulate gaming on Indian lands. However, that case did not consider rancheria land, but an old reservation, and the case assumed the land was sovereign Indian land. When IGRA was passed, it "preempted state law" but Indian preemption applies only where Indian sovereignty already exits. When both the state and an Indian tribe have claims to jurisdiction, the doctrine of Indian preemption is applied to resolve the competing claims. However, the doctrine has never been used to allow Congress to divest a state of long-standing jurisdiction over lands within its borders and to confer jurisdiction on the tribe. Neither placement of land in trust for a tribe, not declaration that use of the land is reserved for the tribe can create jurisdiction. Rather, the tribe must have historically retained sovereignty. *United States v. Wheeler*, 435 U.S. 313, 322-323, quoting from F. Cohen, *Handbook of Federal Indian Law* 122 (1945).

Based on that law, section 2710 of IGRA sets forth an important requirement lacking in section 2719. However, the proposed regulations ignore the restrictions of section 2710 and purport to allow gaming based only on the requirements of section 2719. None of the regulations require that the tribe have rightful jurisdiction. The Subpart B exceptions do not require that any state concurrence, and the Subpart C Secretarial determination requires Gubernatorial concurrence but fails to require concurrence of the Legislature.

The proposed regulations further fail as a practical matter to protect communities adequately. They fail to require public notice and afford the general public opportunity to comment at a public hearing.

For all these reasons, the regulations fail to cure the problem of reservation shopping.

COMMENTS ON SPECIFIC PASSAGES AND REGULATIONS

Preamble

The Preamble contains a sub-part entitled "Federalism (Executive Order 13132)" which purports to evaluate whether the proposed rule would have "significant Federalism implications." The proposed rule answers in the negative, but this is not true. The proposed rule implicates fundamental federalism issues and raises the issue whether the federal government by taking title to private lands governed by state law and placing them in trust for a tribe can unilaterally divest the state of jurisdiction and confer jurisdiction over gambling on itself and the tribe. At the very least, states should be consulted regarding this issue.

Subpart A – General Provisions

292.1 Purpose of the part

This section states that the part sets forth the procedures the DOI will use to determine whether class II or class III gaming can occur on land acquired in trust for an Indian tribe after October 17, 1988. However, the rule omits a fundamental part of the requirements, namely the requirements for jurisdiction set forth in section 2710 of IGRA.

292.2 Definitions [Regulations are quoted, and comments are indented.]

"*Appropriate State and Local Officials* means the Governor of the State and appropriate officials of units of local government within 25 miles of the site of the proposed gaming establishment."

> The definition of Appropriate State Officials improperly excludes state Legislators. State legislators are often active in these issues, especially state legislators from the area, and if the state has primary jurisdiction over the land, the Legislature must be requested to cede jurisdiction to the Federal government. State legislators should be included in the definition.
>
> Further, the 25 mile radius is too tight. Casinos usually draw customers from a wider area, and have effects on a wider community. In California, Indian casinos advertise extensively beyond the 25 mile radius. Cache Creek Casino advertises on radio, television, and billboards in the San Francisco Bay Area, up to 90 miles away. So does Thunder Valley, 115 miles from San Francisco. Indian casinos have also sought compacts that extend rights far beyond the 25 mile radius. Agua Caliente in California recently negotiated a compact with Governor Schwarzenegger which defines the tribes core geographic market as Riverside, San Bernardino, Los Angeles and San Diego

counties, and gives the tribes rights if the state allows Class III gaming under state law within that market. The boundaries are at least 130 miles from the casino. Communities within potential areas to be effected by a compact should be part of the consultation process when a request is made to game on newly acquired lands.

We suggest that for purposes of receiving comments, there be no geographic limit. Rather, comments from any person who makes a reasonable argument that they will be negatively impacted by the proposed casino should be considered. The BIA can judge the weight to give the comments. For purposes of giving notice, the boundary should include the entire area from which the casino would be expected to draw customers. In all events, we suggest that the radius should never be smaller than 35 miles. In this regard, the Lytton compact negotiated by Governor Schwarzenegger would allow the Lytton exclusive rights to an area 35 miles in radius.

"*Federal recognition or Federally recognized* means the recognition by the Secretary that an Indian tribe has a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians...and evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary...."

The term "government-to-government relationship" is vague and uncertain, and itself needs to be defined. A corporation has a corporate governance. Similarly, an association of peoples, whether incorporated or not, might have a governance. That type of government is not the type of quasi-state government which should qualify for a "government-to-government relationship." It is not a territorial sovereignty. The fact that a tribe is considered eligible for special programs and services, does not mean that the tribe has a quasi-state government that includes territorial sovereignty.

This definition also has a grammatical error. The word "and" before "evidenced" should be "as."

"*Land claim* means any claim by an Indian tribe: (1) Arising from a Federal common law, statutory or treaty-based restraint against alienation of Indian land; and (2) Made against an individual person or entity (either private, public, or governmental)."

A claim to mere title to land (including beneficial title) is different than a claim to sovereignty over the same land. The definitions should distinguish between the two different types of claims.

"*Legislative termination* means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe [and/or its members] access to or eligibility for government services."

The first part of this definition is improper because it fails to require that there was a government-to-government relationship with a sovereign Indian tribe which was terminated. For example, many if not most of the rancherias created in California in the early 1900s and then terminated in the 1950s, had no tribal structure and no sovereignty. On those rancherias, there was no government and the California Rancheria Act did not terminate a relationship with a tribe. In this regard, the Senate Report which accompanied the Act noted that at many of the rancherias, there was no organized Indian government. Senate Report No. 1874, 85th Congress, 2nd Session.

The second part of the definition is altogether improper. Passage of legislation that denies a tribe or its member access to or eligibility for "government services" does not mean that the tribe or members previously had rightful sovereignty over land.

"*Reservation* means that area of land which has been set aside...for the use of the tribe...."

Under this definition, land that constitutes a reservation would not necessarily be under the jurisdiction of the tribe. It might have been made a reservation after the state was admitted to the union, and without state cession of its jurisdiction. Therefore, under section 2710, gambling would not be allowed.

"*Surrounding community* means local governments and nearby Indian tribes located within 25 miles of the site of proposed gaming establishments."

This definition is far too limited in at least two respects. First, the restriction of the definition to local governments is improper. The statute requires the Secretary to make a determination that the proposed casino will not be detrimental to the surrounding community. The community will include all the residents, businesses, and community groups and associations that exist within the area. The local government may provide important insights into impacts but cannot speak for all these people, businesses, and groups, and reliance on local government is improper. The regulation should define community in a broad fashion, consistent with its usage by Congress.

In particular, the surrounding community should include the competitive gaming enterprises which already exist, and an evaluation of the detriments on the community would include an evaluation in impacts on competing businesses in the community. IGRA made clear that impacts on existing gaming businesses were to be considered.

Section 2710(d)(7)(B)(iii)(I). The definition should specify that surrounding community includes the competing gambling interests in the community.

The regulation is too limited in a second way. As discussed under the definition of appropriate local officials" above, the limitation of the community to 25 miles of the proposed casino is too tight. As noted above, compacts in California have granted tribes rights to exclusivity over at least 130 miles. Thus, the community should be defined that whole area. We do not think the area over which the BIA will evaluate detriment should be limited by an arbitrary boundary. Rather, we suggest that if someone makes an argument that the proposed casino will be a detriment, the BIA should evaluate the claim, and distance and geography will become factors in the evaluation.

292.3 When can a tribe conduct gaming activities on trust lands?

This section sets forth two alternate situations when tribes can conduct gaming activities. One is when the land meets one of the exceptions to the general rule. The other is when the Secretary makes the required determination. This regulation omits a requirement that will apply in both situations, that the tribe have jurisdiction over the land. As discussed above, this is required under section 2710, and the regulation should include this requirement.

Subpart B – Exceptions to Prohibition on Gaming on After-Acquired Trust Lands

The main problem with the exceptions covered in subpart B – the settlement of a land claim exception, the initial reservation exception, and the restored land exception – is what is not discussed. None of the proposed regulations require any input from the state or any input from the community. The regulations assume that the Federal government can and should operate unilaterally. Enactment of these regulations would violate statutory and constitutional law, and would be bad policy. The community and the state government should be heard in all cases.

292.4 What criteria must trust land meet for gaming to be allowed under the exceptions listed in 25 USC 2719(a) of IGRA?

This section parallels section 2719 of IGRA, except that the statute is worded in the negative and the regulation is worded in the positive, which creates a serious glitch. The statute specifies when gaming may not occur. The regulation, on the other hand, specifies when gaming will "be allowed" on trust lands. This reversal creates a problem. The statute does not preclude the existence of other requirements, such as those under section 2710, requiring that the tribe have jurisdiction over the land, but the regulation does preclude the existence of other requirements and is therefore inconsistent with the statute.

292.5 What must be demonstrated to meet the "settlement of a land claim" exception?

This section spells out two separate ways to satisfy the statutory exception for lands taken into trust as part of a settlement of a land claim. However, again, whereas the statute specifies an instance when the general prohibition on gaming on after-acquired lands will not occur, the regulation attempts to go beyond this, and specify when gaming may be conducted. This ignores the fact that another section of the code, section 2710, contains a separate requirement, namely, that the tribe must have jurisdiction over the land on which gaming is to be conducted.

The first alternative merely requires that the settlement relates to a claim filed in court. However, it fails to set forth and define any regulatory process to determine the merits of the claim.

292.6 What must be demonstrated to meet the "initial reservation" exception?

This regulation states the requirements that must be satisfied to qualify for the initial reservation exception to the general rule prohibiting gaming on after-acquired lands, but again it varies from the statute. The statute is worded in the negative as an exception to the general prohibition against gaming on after-acquired land. The proposed regulation, however, goes well beyond that and purports to detail the only requirements for allowing gaming on the land. The problem is that the regulation ignores other requirements in IGRA, specifically section 2710, requiring that the tribe have rightful jurisdiction over the land on which gaming is to be conducted.

292.7 What must be demonstrated to meet the "restored lands" exception?

This regulation outlines the requirements that must be satisfied to qualify for the restored lands exception to the general rule prohibiting gaming on after-acquired lands, but like the prior regulations, varies from the statutes by failing to require that the tribe must have rightful jurisdiction over the land. The statute is worded as an exception to the general prohibition against gaming on after-acquired land, but the regulation goes well beyond that by specifying when gaming can occur. The problem is that the regulation ignores section 2710 which requires that the tribe have rightful jurisdiction over the land on which gaming will occur.

292.8 How does a tribe qualify as having been Federally recognized?

The regulation would specify five alternative criteria any of which would demonstrate prior Federal recognition of the tribe. As defined, Federal recognition is akin to a "government-to-government relationship." However, the regulation fails to distinguish between treatment of a group of Indians as an association of people and treatment of them as a tribe with a quasi-state government. Some groups of Indians are no more like a government than is the Rotary Club, and the criteria fails to clearly require a showing of territorial sovereignty.

The first criteria is entrance into treaty negotiations. However, this does not even require that the executive branch signed the treaty, let alone that Congress ratified it, and thus in itself does not evidence recognition.

The second criteria is that the DOI determined that the tribe could organize under the Indian Reorganization Act. However, that Act was passed after states were formed and never contemplated ousting states of jurisdiction where the state held such. At one hearing, Senate Committee Chairman Wheeler raised the issue and stated, "Certainly the Indians should not be given the power to set up customs with reference to morals which are contrary to the laws of some particular State...." Hearings on S.2755 and S.3645 Before the Committee on Indian Affairs, 73rd Congress, 2nd Session, April 30, 1934, p. 178.

A third criteria is existence of Congressional legislation specific to or including the tribe indicating that a government-to-government relationship existed. This is vague and would be subject to considerable disagreement about whether legislation indicated a government-to-government relationship. Further, Congressional legislation does not mean that the Indian group had rightful jurisdiction over any land.

The fourth criteria is that the United States once acquired land for the tribe's benefit, but again acquisition of land by the federal government does not mean the group had rightful jurisdiction over the land.

The fifth criteria is a miscellaneous category, but it does not require demonstration of rightful sovereignty.

In all these criteria, the regulation needs to require a showing of rightful Indian sovereignty. These issues are novel. When tribal recognition meant qualification for welfare-type programs, recognition did not have the type of profound effects on communities that it now can have. Now, interests need to be balanced, and existing communities with settled expectations need to be protected from the turmoil that can result from the introduction of gambling. See *City of Sherrill v. Oneida Indian Community*, 544 U.S. 197 (2005)

292.9 How does a tribe show that it lost its government-to-government relationship?

This section states two alternative criteria for demonstrating loss of a "government-to-government relationship." However, neither alternative requires the tribe to show that the loss was through no fault of their own. In this regard, Indian groups in California asked for possession of their rancheria lands in the 1950s, and this was finally granted in the California Rancheria Act. These rancheria lands has been purchased by the federal government near settled areas, where individual Indians could find employment, and the lands were not tribal in nature.

Further, distribution of lands was accompanied by termination of any guardianship relationship between the government and the particular distributees. In the 1980s, after substantial governmental benefits became available to Indian tribes, descendants of rancheria residents then asked to rescind the termination of their relationship so they could qualify for these benefits. However, even if they had some right to recognition for the purpose of receiving government benefits and services, they had no right to establishment of new Indian lands, exempt from state laws, especially lands in urban areas.

292.10 How does a tribe qualify as having been restored to Federal recognition?

This section details three alternative methods to demonstrate restoration of Federal recognition. Each one of the three methods concerns a separate one of the three branches of government.

Subsection (a) requires a showing of Congressional legislation recognizing, acknowledging, or restoring government-to-government relations. As noted above, the term "government-to-government relationship" is vague, and does not necessarily constitute rightful sovereignty over any land. In such a case, the relationship would not justify treatment of the Indian land as being under Indian jurisdiction.

Subsection (c) concerning judicial action, allows either a judicial determination or a court-approved stipulated entry of judgment. The allowance of a stipulated judgment is contrary to statutory law, which states, "Indian tribes may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe'; or by a decision of the United States court." Pub.L. No. 103-454, §103(3), 108 Stat. 4791. See also *Cherokee Nation v. Norton, et al.,* 383 F.3d 1074 (10th Cir. 2004). A judicial determination requires findings of fact by a neutral decision maker. That is not required with a court-approved stipulated entry of judgment. If the BIA enters into a stipulation without requiring the tribe to satisfy the tests in part 83 of the CFR, there is no basis for the settlement and such a stipulation should not serve as a basis for considering the tribe to be restored for the purpose of having lands on which it can game. We further note that subsection (c)(1) makes no sense in the context of a judicial determination. In that context, subsection (c)(1) requires that the judicial determination be entered into by the United States, but parties do not enter into judicial determinations.

292.11 What are "restored lands?"

The proposed regulation sets forth three criteria that must be satisfied for land to be considered restored lands, but the regulation contains a structural ambiguity. The conjunctions are not clear. It requires a or b and c. It could be read as requiring (a or b) and c. Or it could be read as requiring a or (b and c). This should be clarified.

In either event, subsection (a), which considers land as restored if there is legislation that requires or authorizes the Secretary to take land into trust within a specific geographical area, is improper. This criteria looks solely to Congressional action and would completely ignore any rights or role of the state government. This contravenes the Constitution, section 2710 of IGRA, and good policy. Congress is not allowed and should not be allowed unilaterally to determine where gaming will occur in a state. The state's rights in this regard was the very basis for upholding a challenge to the state's allowance of gaming on Indian lands. In response to an equal protection challenge to California's grant of monopoly rights over casino gaming to Indians, the Ninth Circuit upheld the law based on the importance of the state's police power to control vice activities, including the right to control the location of such activities. The court wrote:

> When enacting substantive regulations or prohibitions of vice activities, the interests implicated lie "at the heart of the state's police power." [cite omitted] With regard to these activities, a state is free to enact legislation that accords different treatment to different localities, and even to different establishments within the same locality, so long as that differentiation is tied to a legitimate interest in the health, safety, or welfare of its citizens. The state may make such distinctions ... between different areas....
> *Artichoke Joe's v. Norton*, 353 F.3d 712, 740 (2003)

This regulation would intrude on the state's police power to determine location of gambling, and at least in the case of California, would allow gaming in urban areas and along transportation corridors where voters did not intend to allow it and do not want it.

Subsection (b), requiring that the tribe have a modern connection and a significant historical connection to the land and that there be a temporal connection between the Tribe's restoration and the acquisition date of the land, attempts to restrict the phenomenon of reservation shopping. However, it still would allow the federal government to act unilaterally in divesting a state of jurisdiction and in vesting jurisdiction in an Indian tribe. This is not consistent with Constitutional or statutory law.

Restored lands should be marked by three characteristics, parallel to the three characteristics of restored tribes. These factors would be: the tribe (1) must have once, since possession of the land by the United States, occupied lands over which it exercised sovereignty, (2) must have lost that sovereignty through no fault of its own, and (3) must have regained that sovereignty in a timely way that does not disturb settled expectations of residents.

Many Indian groups who are descendants of California rancherias have tried to qualify for the "restored lands" exception. However, most rancherias were not considered to be sovereign Indian lands when they existed, but were largely treated as under state jurisdiction. Indian

groups, and their investors, now claiming jurisdiction are trying to rewrite history and to obtain extraordinary privileges for which they do not qualify.

The courts have already expressed skepticism on the legality of this reservation shopping. In *Artichoke Joe's v. Norton*, 353 F.3d at 735, ft 16, the Ninth Circuit wrote, "We need not and do not decide whether lands that are purchased specifically for the purpose of conducting Class III gaming purposes are 'Indian lands' within the meaning of IGRA."

The Oneida repurchased lands within their reservation in New York state, but in the *City of Sherrill* case, the Supreme Court held that the tribe did not regain sovereignty over those land in part due to the intervening time and the settled expectations of governments and residents in the area. Similarly, here, it is not enough that the Federal government take land into trust, and proclaim the land a reservation. If the state has jurisdiction, unilateral actions by the Federal government cannot deprive the state of that jurisdiction. This regulation needs to make clear these requirements.

292.12 How does a tribe establish its connection to the land?

This regulation contains separate subsections on modern connection, significant historical connection and temporal connection.

The proposed regulation would find a modern connection to the land if a majority of the tribe's members reside within 50 miles of the land or if the tribe's government headquarters are located within 25 miles of the land. This is improper. A tribe cannot have sovereignty over land unless the tribe resides on the land. Indian sovereignty is not based on ownership alone. The fact that the land is used by the Indians is not enough. The fact that tribal members live nearby or that a tribe's headquarters is near by is not sufficient to qualify for sovereignty.

The proposed regulation contains two alternatives to satisfy the requirement that there be a historical connection to the land. First, if the land is be located within the boundaries of the tribe's last reservation reserved "by a ratified or unratified treaty." The finding of a historical connection without a ratified treaty is improper. An unratified treaty does not constitute a recognition of Indian sovereignty over the land. In 1851, the BIA negotiated a number of treaties with Indian tribes around the state. However, those treaties were opposed by the State of California, which felt that too much land was being allocated to small Indian groups, and Congress, in the face of the opposition, refused to ratify the treaties. Those treaties cannot serve as evidence of recognition of Indian sovereignty over any lands. To the contrary, the failure to ratify the treaties means that legally, the State possessed full primary jurisdiction over such lands.

Historical connection alternatively can be established by significant documented historical connections, especially if documented by official records of the BIA or the DOI or some other Federal agencies. However, again, the Federal government cannot unilaterally create Indian lands. Historical connections, while enough to establish some rights to possession for purposes of residency, are not sufficient to establish rights to sovereignty.

The proposed regulation would establish temporal connection over any land that is the first "acquired" since the tribe was restored to Federal recognition and all lands for which applications are submitted into trust within 25 years of being recognized. This regulation would not protect against violating the reasonable expectations of people.

Subpart C – Secretarial Determination and Governor's Concurrence

This subpart has significant substantive and procedural defects. Substantively, the subpart makes little sense. It allows tribes which have no historical connection to a location (and thus no sovereignty) and which do not qualify under the exceptions for settlement, initial reservation, and restored lands to operate a casino at the location. Procedurally, the subpart ignores state legislatures despite the fact that in those cases where cession of state jurisdiction is necessary, legislative approval is required. Further, it ignores the public. It provides for limited input from local government but provides no public hearing and not even public notice. Thus detrimental to the community is measured without the input of the community itself.

292.13 When can a tribe conduct gaming activities on lands that do not qualify under one of the exceptions?

This proposed regulation sets forth four requirements to obtain a favorable secretarial determination. However, the regulation is inconsistent with the underlying statute. The statute establishes an exception to the general prohibition on gaming on after-acquired lands. This does not preclude the possibility of other restrictions on gaming. The regulation, on the other hand, specifies when gaming will be allowed on trust lands. Thus, section 2719 does not preclude application of the restrictions in section 2710, but the regulation does.

[No comments on 292.14 through 292.17]

292.18 What information must an application contain on detrimental impacts to the surrounding community?

This regulation details six subjects on which information about the casino's expected impacts must be submitted. However, only three are really categories of impacts, environmental impacts,

social impacts, and economic impacts. The other three are about mitigation of impacts or negation of their existence. They are the costs of impacts and sources of revenue to mitigate them, proposed programs for compulsive gamblers, and other information that there would be no impacts. At least two categories of impacts are missing: increase in crime and impacts on existing gaming in the community.

The study on likely increases in criminal activity should evaluate both expected increase in crime at the site, and expected increase in crime in the community. In this regard, commuter casinos (where the gamblers live within the local community) generate much more crime in the community than do tourist casinos, and so this becomes a very important factor at the sites that are the usual targets of reservation shopping. The study should include an evaluation of the ability of law enforcement in the surrounding community to handle the potential increase in criminal activity.

The regulation should also require a specific study on the impacts of the proposed casino on existing gaming establishments in the surrounding community and on local governments which obtain revenues from these existing businesses. IGRA allows a state to take into account the possible adverse economic impacts on existing gaming activities when negotiating a compact. Section 2710(d)(7)(B)(iii)(I). That factor that should be considered in this context. In the event the tribe intended to operate solely class II gaming (as do the Lytton), evaluation of impacts on existing gaming activities in the community could only happen under this section. This factor would include impacts on owners and employees of existing facilities, impacts on the host city, and general impacts on the service area of the facility. These factors could be subsumed in the study of economic impacts, but a separate study is really needed. The economic study focuses on the proposed casino. The study of impacts on competition would focus on the other gaming facilities.

292.19 How will the Regional Director conduct the consultation process?

The proposed regulation would limit the consultation process in a number of significant ways. First, notice of a tribe's request for a determination is improperly limited to "state and local officials" within 25 miles of the proposed site. This is not adequate. As noted above, compacts have considered a tribe's service area to be much larger. One compact in California would define the area to extend 130 miles from the casino. Another would provide a tribe exclusive rights to game within a 35 mile area. In such cases, a limitation set by the BIA of 25 miles would be artificial and unrealistic.

Second, as noted above, the definition appears to omit state legislators.

Third, there is no requirement to provide notice to the general public. Under the proposed regulation, no notice would be given to residents, homeowners, businesses, or community groups and associations. Not even people living next door to the proposed casino would get notice. This is not proper. Notice should be provided all these people. Further, the proponent should be required to publish notice in the major newspapers circulated in the surrounding community. Significant efforts should occur to solicit comments from the people that would be most affected by the facility. The tribe should also be required to post its impact studies on one or more websites. Currently, many EIS' are already posted on websites. This is very feasible and provides easy access to the public to considerable information.

The proposed regulation uses the term "consultation comments," but this term is unclear. Does this refer to all comments received from any source or just those comments from "appropriate State and local officials?" A subsection is needed which requires the Regional Director to compile all comments submitted on the project from any source, including not only local government and the governor, but all residents, businesses, and others within a wide area.

292.20 What information must the consultation letter include?

The consultation letter (and the published notice) should specify the studies that have been completed, including one on crime and another on impacts on existing gaming, and the website address or addresses where the studies can be viewed.

292.21 How will the Secretary evaluate a proposed gaming establishment?

This regulation would require the Secretary to consider information submitted by the tribe under 292.17 and 292.18, and comments from officials. However, there is no provision clearly requiring the Secretary to consider comments from residents, landowners, businesses, or community groups in the area, and that omission is improper. As noted above, a subsection should be added to 292.19 to require the Regional Director to compile all comments received so that the reference to "documentation received under §292.19" will be clear.

Further, the proposed regulation does not contemplate any independent research. While under IGRA, the BIA is to consult with local government, that should be merely one part of BIA's evaluation. The Secretary should perform a diligent investigation to determine impacts.

[No comments on 292.22 through 292.24.]

* * *

We appreciate the hard work of the BIA in drafting these regulations, but we remain skeptical whether the problem of "reservation shopping" can be cured simply by regulation and without some adjustment to IGRA. At the very least, such regulations must acknowledge the sovereignty of the state and the limits on Indian sovereignty with respect to lands under state jurisdiction purchased now for Indian use, and must provide more voice to the community.

Thank you for your consideration of these comments.

Sincerely,

Alan Titus

Enc.

1 253/12

5—1100

REFER IN REPLY TO THE FOLLOWING:

ADDRESS ONLY THE COMMISSIONER OF INDIAN AFFAIRS

Education-
Law & Order
24692-1912
P L H

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

JUN 19 1912

Jurisdiction.

Rec'd JUN 26 1912

Mr. Thomas B. Wilson,

Supt. Round Valley School.

Sir:

The Office is in receipt of your letter of March 2, 1912, wherein you ask to be advised what action you should take relative to one Fox Burns breaking into the school house at Laytonville, California.

Inasmuch as the lands occupied by these Indians were purchased from private individuals while same were under the jurisdiction of the State of California, said jurisdiction would continue until such a time as the State ceded its police jurisdiction. It is not believed that the State did cede jurisdiction and, if the facts in your possession bear out this assumption, you should call the theft in question to the attention of the proper State authorities for prosecution.

Respectfully,

Assistant Commissioner.

6-HMS-10

File