OFFICE OF THE GOVERNOR

September 9, 2005

Via Facsimile (202) 632-7066 & U.S. Mail

Ms. Penny Coleman
Acting General Counsel
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, D.C. 20005

Re: Big Sandy Band of Western Mono Indians
Indian lands determination

Dear Ms. Coleman:

The Big Sandy Band of Western Mono Indians (Tribe or Big Sandy) has a management contract pending before the National Indian Gaming Commission (NIGC). On April 19, 2005, the Tribe supplemented its documentation with evidence it believes demonstrates the proposed casino site constitutes Indian lands as defined by the Indian Gaming Regulatory Act (IGRA). The Governor's Office of Legal Affairs has reviewed the Tribe's new information and objects to the proposed Indian lands determination because there is a significant dispute over whether the Tribe exercises exclusive jurisdiction over the land. Additionally, there is insufficient evidence to conclude the Tribe has exercised sufficient historic governmental power over the property to qualify it as Indian lands under IGRA. We believe that to accomplish IGRA's purpose, a tribe seeking to game on an individual allotment must provide concrete evidence it has jurisdiction and has exerted governmental authority over the land for a significant period of time, to a point at least predating IGRA's enactment.

I. Tribal History

In the early twentieth century, Congress recognized the need to address the homeless Indian issue in California. It passed a series of appropriation Acts on June 21, 1906 (34 Stat. 325) and April 30, 1908 (35 Stat. 70), which provided money to purchase land for residential and agricultural use for homeless Indians in California. The parcels, which came to be known as

rancherias (*Duncan v. Andrus* (N.D. Cal. 1977) 517 F.Supp. 1, 2), were populated by small extended-family groups, or unrelated groups with no specific tribal or racial affiliation.[1]

The Bureau of Indian Affairs (BIA) reports the United States purchased the Big Sandy Rancheria in 1909 with funds appropriated under the Act of April 30, 1908. (Exh. A, BIA Narrative.) The BIA, however, is unable to locate correspondence directly relating to the actual purchase, although the agency suggests subsequent correspondence indicates the United States purchased land for the use of the San Joaquin or Big Sandy Band of Indians, with title retained by the United States. (*Ibid.*) On February 17, 1965, the United States removed the Rancheria's occupants from the BIA's list of Indians entitled to receive services, pursuant to an asset Distribution Plan enacted under the Rancheria Act of 1958 (Pub.L. No. 85-671 (Aug. 18, 1958) 72 Stat. 619), and terminated the Rancheria. (See Tribe's Apr. 19, 2005 letter to NIGC, Exh. A.) At that time, the Tribe still "had no constitution and bylaws or any other formal type of organization." (*Id.* at p. 2.) In 1983, a federal court restored the Tribe's recognition. (See *San Joaquin or Big Sandy Band of Indians v. Watt* (N.D. Cal., Mar. 28, 1983, No. C-80-3787-MHP (Tribe's Apr. 19, 2005 letter to NIGC, Exh. B); 49 Fed.Reg. 1140-02.) Big Sandy is currently on the BIA's list of federally recognized Indian tribes. (68 Fed.Reg. 68180.)

It is our understanding that as of 1999 the United States held 128.83 acres in trust for the Tribe and individual Tribal members, and such property is located within the Tribe's approximately 280-acre Rancheria in Auberry, California. The Tribe and individuals[2] own the remaining parcels within the Rancheria in fee.

In 1999, the Tribe and State entered into a Tribal-State Gaming Compact to conduct class III gaming under IGRA. (See 65 Fed.Reg. 31189-01.) The Tribe currently conducts class II and class III gaming at the Mono Wind Casino, located within the Rancheria.

On February 11, 2000, the Tribe adopted its first formal Constitution. (Exh. B, Big Sandy Const.) Article I defines the Tribe's territorial jurisdiction:

> The territorial jurisdiction of the tribe shall extend to all those lands as shown on the map of Fresno County Tract No. 2060 recorded at pages 89, 90 and 91 in volume 22 of the plats, Fresno County Records, and to such other lands as may be hereafter acquired by or for the tribe.

(*Id.* at art. I.) This description identifies the Tribe's existing Rancheria boundaries. The Tribe, however, represents it amended its Constitution on March 28, 2005, to expand the territorial jurisdiction provision to include "all Indian country (as now defined by 18 U.S.C. § 1151) held by or for the benefit of the Tribe or any member of the Tribe, wherever located." (Tribe's Apr. 19, 2005 letter to NIGC at p. 12.)

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[1] RG 75 Reno Indian Agency Annual Narrative and Statistical Reports 1912-1924, box 6, folder "Annual Narrative Reports 1923 Reno Ind. A.," 1-31.

[2] The State does not know whether the individual fee owners are members, Indians, or non-Indians.

On June 12, 2004, the Tribe enacted a resolution purportedly "Affirming Tribal Government Jurisdiction Over Indian Lands of the Tribe." (Tribe's Apr. 19, 2005 letter to NIGC, Exh. P.) The resolution claims to "affirm" that the Tribe exercises "governmental power" over all the Tribe's Indian lands,

> including all land within the limits of its Rancheria, all land held in trust by the United States for the benefit of the Tribe or an individual Tribal member and all land held by the Tribe or an individual Tribal member subject to restriction by the United States against alienation whether within or exterior to the Rancheria.

(*Ibid.*) The resolution further states the Tribe "has historically provided, and continues to provide, Tribal governmental services and programs" to its lands. (*Ibid.*) To provide notice to others that the Tribe exercises "governmental authority" over such lands, the resolution requires a "No Trespassing" sign to be placed on or near the perimeter of all off-reservation allotments. (*Ibid.*)

On December 30, 2004, the Tribe adopted a "Tribal Jurisdiction and Government Services Ordinance." (Tribe's Apr. 19, 2005 letter to NIGC, Exh. R.) The ordinance states that

> Pursuant to custom and tradition, the tribal government has historically provided for the general welfare of Tribal Members and well-being of the Tribe and its lands and natural resources by extending all jurisdictions, laws, resolutions, ordinances, and customs and traditions of the Tribe (a) to all Indian Lands . . . of the Tribe or any Tribal Member within or exterior to the Rancheria, and (b) to all Tribal Members, whether located within or exterior to the Rancheria.

(*Id.* at art. 1, ¶ D.) The ordinance further suggests that according to "custom and tradition," the Tribe has "historically" administered "social, health, housing and maintenance, welfare, transportation, food-delivery, charity, environmental, security, and other tribal government services and programs" to all aforementioned lands and members. (*Id.* at ¶ E.) The ordinance was intended to acknowledge and approve into Tribal law the Tribe's "longstanding practice . . . to extend and apply tribal jurisdiction over, and provide tribal government services and programs to," its lands and members. (*Id.* at art. 2.) The ordinance defines "Indian Lands" to have the same meaning as the phrase is used in Title 25 United States Code section 2703, with some additional minimum standards.[3] (*Id.* at art. 3, ¶ A.)

Recently, the Tribe and Sherrill Anne McCabe, a Tribal member and individual Indian allottee, executed and submitted for BIA approval a lease agreement granting possession of McCabe's allotted property to the Tribe for gaming purposes. The McCabe Allotment is the parcel on which the Tribe seeks an Indian lands determination.

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[3] To the extent the ordinance purports to expand the meaning of "Indian lands," the definition found in IGRA controls this analysis.

II. McCabe Allotment Title History

From the early nineteenth century, many individual Indians acquired land through the allotment process.[4] The Indian General Allotment Act of 1887, commonly known as the Dawes Act, authorized the United States to issue land patents to individual Indian allottees. (Act of Feb. 8, 1887, 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381.) An Indian allotment "may either be a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment)" (*Yankton Sioux Tribe v. Gaffey* (8th Cir. 1999) 188 F.3d 1010, 1022), although the distinction is irrelevant for jurisdictional purposes (*United States v. Stands* (8th Cir. 1997) 105 F.3d 1565, 1572). Congress ultimately repudiated the allotment practice in the Indian Reorganization Act of 1934 (IRA). (25 U.S.C. § 461.) IRA application, however, depended upon tribal consent (see 25 U.S.C. § 478), and the BIA reports the Tribe rejected the IRA in 1935.

The McCabe Allotment is a 40.82-acre trust allotment patented by the federal government to Mary McCabe in 1920, subject to a restriction against alienation for 25 years. (Exh. C.) The property is located about 12 miles from the Tribe's existing Rancheria in Fresno County. While the federal patent did not issue until 1920, Mary McCabe died in approximately 1916. (Exh. D.) Nonetheless, in 1922, Mary McCabe's interest in the allotment passed intestate equally to her son, Frank McCabe, and husband, Robert Lewis. (*Ibid.*) Federal documents suggest Robert Lewis was an "unallotted Chickchansie," most likely from the Picayune Rancheria of Chuckchansi Indians in nearby Coarsegold. (Exh. E.) Upon Robert Lewis' death in 1943, his interest in the allotment passed to Frank McCabe, making Frank McCabe the sole beneficial owner. (*Ibid.*) In 1970, Frank McCabe's son, Lester McCabe, inherited exclusive beneficial interest in the allotment. (Exh. F.) In 1979, Lester McCabe deeded the allotment to his daughter, Sherrill Ann McCabe, who is the current sole beneficial owner. (Exh. G.)

The McCabe Allotment is located in the Sierra Nevada foothills and is currently undeveloped. It is landlocked without paved access to a main road. The immediately surrounding properties are also undeveloped pasture owned by Table Mountain Rancheria, Sierra Foothills Conservancy, Bull Pine Investors and QBS, LLC.[5] (Exh. H.) As we discuss more thoroughly below, Table Mountain Rancheria claims it has ancestral ties to the McCabe Allotment, which conflict with Big Sandy's claims to the parcel.

III. Applicable Law

An Indian tribe may engage in gaming under IGRA only on "Indian lands within such tribe's jurisdiction." (25 U.S.C. § 2710(b).) IGRA explicitly defines "Indian lands" to include

(A) all lands within the limits of any Indian reservation; and

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[4] For a comprehensive discussion of the allotment program, see the Indian law treatise by Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 130-143, 612-632.

[5] Apparently, QBS, LLC is a subsidiary of Caesars Entertainment, LLC.

> (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 regulations further clarify the "Indian lands" definition:

> (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;

Using these standards, we believe the McCabe Allotment is not Indian land over which the Tribe can exercise exclusive governmental power. Even if the Tribe may exercise governmental power over the allotment, we do not believe it has sufficiently demonstrated that it does so presently, or for a historically significant time period.

IV. The McCabe Allotment Fails to Qualify as Big Sandy's Indian Lands For IGRA Purposes Because the Tribe Does Not Exercise Exclusive Jurisdiction Over the Parcel

"A necessary prelude to the exercise of governmental power is the existence of jurisdiction." (*Miami Tribe of Oklahoma v. United States* (D. Kan. 1996) 927 F.Supp. 1419, 1422, affd. *Kansas v. United States* (10th Cir. 2001) 249 F.3d 1213, 1229; see 25 U.S.C. § 2710(b).) IGRA defines "Indian lands" to include land outside the exterior boundaries of a reservation or rancheria held by the United States in trust or restricted status for a tribe or individual member and subject to the tribe's "governmental power." (25 U.S.C. § 2703(4).) The Tribe insists the McCabe Allotment is Indian land within its jurisdiction because all Indian allotments constitute "Indian country," and tribes possess jurisdiction within "Indian country." (Tribe's Apr. 19, 2005 letter to NIGC at pp. 7-10.) It is true that tribal jurisdiction is generally limited to "Indian country," which may include off-reservation allotments (18 U.S.C. § 1151); however, the statutory definition of Indian country relied upon by the Tribe is distinct from IGRA's Indian lands definition.

The Tribe relies primarily upon the Indian country definition found in Title 18 United States Code section 1151 to include "all Indian allotments, the Indian titles to which have not been extinguished . . . ." (Tribe's Apr. 19, 2005 letter to NIGC at p. 8, citing 18 U.S.C. § 1151(3).) As the NIGC previously determined, IGRA's Indian lands definition is distinct from Indian country as defined in other statutes. Indeed, in a September 25, 1996, memorandum from

the Department of the Interior, Office of the Solicitor, to Indian Gaming Management Staff regarding the Sampson Johns Allotment—which is attached to the Tribe's April 19, 2005, letter to the NIGC as Exhibit L (Sampson Johns memo)—the NIGC found that "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.'" (Sampson Johns memo, p. 4.) Thus, the Tribe's Indian country analysis is misplaced.

The McCabe Allotment presents special circumstances that rebut any presumption in favor of Big Sandy Tribal jurisdiction.

A. The 1983 Judicial Order

In 1983, the Tribe and the United States entered into a stipulated judgment to restore federally recognized Indian status to Big Sandy members and their heirs, et cetera, who participated in the Rancheria's asset Distribution Plan. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. B.) The judgment also restored land within the Rancheria's exterior boundaries as Indian country. It specifically states:

> The exterior boundaries of the Big Sandy Rancheria, encompassing all parcels shown on the Map of Fresno County Tract No. 2060 recorded at pages 89, 90 and 91 in volume 22 of Plats, Fresno County Records, except for Parcel 26 of said Tract, which was sold under the Rancheria's Distribution Plan, are reestablished, as is the status of said lands as Indian country within the meaning of 18 U.S.C. § 1151.

(*Id.* at p. 2, ¶ 5.)

Notably, the court did not invest the Tribe with jurisdiction over off-Rancheria trust or allotted lands beneficially owned by individual members. Instead, the judgment carefully limits land within the Tribe's former Rancheria boundaries as fitting within the statutory definition of Indian country. Moreover, rancherias are lands, not governments, held in trust by the United States for homeless Indians with no specific tribal affiliation. Thus, the Tribe's recent Constitutional amendment purporting to expand the Tribe's territorial jurisdiction to include "all Indian country (as now defined by 18 U.S.C. § 1151) held by or for the benefit of the Tribe or any member of the Tribe, *wherever located*," does not appear to be a valid extension of Tribal jurisdiction beyond the court's judgment, which simply reestablished the Rancheria boundaries. (See Tribe's Apr. 19, 2005 letter to NIGC at p. 12, italics added.)[6]

Even though the McCabe Allotment is currently held in trust for a Tribal member, additional considerations weigh against finding the parcel exclusively within Big Sandy's jurisdiction.

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[6] The Tribe's failure to exclude Parcel 26 from its Constitution's territorial jurisdiction description (see Big Sandy Const., art. I) also appears to contradict the judgment excluding that parcel from reestablishment as Indian country within the Rancheria boundaries.

B. Table Mountain's Claim to the McCabe Allotment Precludes a Determination That the Property is Big Sandy's Indian Lands

The Tribe maintains it exercises jurisdiction over the McCabe Allotment because the beneficial owner is a Tribal member and has been continuously since it was allotted to Mary McCabe in 1920. (Tribe's Apr. 19, 2005 letter to NIGC at p. 10.) Table Mountain contends differently.

Table Mountain has informed the State and the NIGC that it will object to the proposed land determination because of its ancestral, cultural and archeological ties to the property. (See Table Mountain's May 26, 2005, letter to NIGC.) Table Mountain's exterior Rancheria boundary is about one mile from the McCabe Allotment and Table Mountain owns in fee several parcels totaling about 265 acres that are near or adjacent to the allotment. (Exh. H.) Table Mountain claims Frank McCabe is listed on its 1916 base roll and enrolled members occupied the allotment until the United States terminated the Table Mountain Rancheria in the 1960s. Table Mountain also insists the subject parcel contains sacred burial plots and many invaluable archeological sites, which have been independently verified by a recent university study. Additionally, Table Mountain maintains it has jurisdiction and asserts governmental power over the allotment, although the State does not know to what extent. In any event, there is a clear factual dispute about whether Big Sandy or Table Mountain has jurisdiction over the parcel.

The State does not, by this response, endorse Table Mountain's contentions but defers to the Tribe for substantiation of its claims. At a minimum, however, we believe that the claims merit investigation and federal resolution before the NIGC can find the parcel is Big Sandy's Indian lands.

Case law indicates the federal agency or court that ultimately settles the dispute must consider the parcel's jurisdictional history. In *State of Rhode Island v. Narragansett Indian Tribe* (1st Cir. 1994) 19 F.3d 685, the First Circuit held in a case involving an Indian lands determination under Title 25 United States Code section 2703(4)(B), that a "historical perspective is also relevant to the 'having jurisdiction' inquiry. A 'longstanding assumption of jurisdiction . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset . . . .'" (*Id.* at p. 703, fn. 18, quoting *Rosebud Sioux Tribe v. Kneip* (1977) 430 U.S. 584, 604-605.) Thus, Table Mountain's historical claims to the McCabe Allotment must be considered before a determination is made on Big Sandy's request.

An Indian lands determination on the McCabe Allotment raises federal policy issues that necessarily interpret the histories of the Big Sandy and Table Mountain tribes. It is inherently contradictory for two federally recognized sovereigns to exercise jurisdiction over the same property, absent explicit congressional authorization. (See *Williams v. Clark* (9th Cir. 1984) 742 F.2d 549, 555; *Native American Church of North America v. Navajo Tribal Council* (10th Cir. 1959) 272 F.2d 131, 133 ["Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive"].) Indeed, the NIGC has twice

previously suggested an Indian tribe may conduct gaming on Indian lands where it "was *undisputedly* the *only* tribe exercising jurisdiction over the land . . . ." (Exh. I, Jun. 30, 2005, Indian lands determination for Buena Vista Rancheria of Me-Wuk Indians, p. 7, citing Memorandum to NIGC Acting General Counsel Re: Tribal jurisdiction over gaming on fee land at White Earth Reservation, dated Mar. 14, 2005, italics added; see also *id.* at p. 12 ["Because the Tribe is *undisputedly* the only tribe that exercises jurisdiction over the Rancheria, the Tribe meets IGRA's requirements that it be the tribe with jurisdiction over the Indian lands at issue." (Italics added.)].)

At this point, Table Mountain's jurisdictional and historical claim to the McCabe Allotment precludes a finding that the property is Big Sandy's Indian lands.

C. It is Uncertain Whether Each Successive Beneficial Owner of the McCabe Allotment was a Big Sandy Member

The Tribe's principal argument for jurisdictional authority is that the McCabe Allotment has continuously been held in trust for the benefit of a Big Sandy member since 1920. (Tribe's Apr. 19, 2005 letter to NIGC at p. 10.) Because the jurisdictional inquiry must contain a historical perspective of the property, it is important in this instance to review the allotment's title history to help clarify the sovereignty dispute between Big Sandy and Table Mountain.

> [A]djudicating the question of whether a tract of land constitutes "Indian lands" for Indian gaming purposes is "conceptually quite distinct" from adjudicating title to that land. One inquiry has little to do with the other as land status and land title "'are not congruent concepts' in Indian law." [*Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475] (quoting *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1097 (10th Cir. 1985) (en banc) (Seymour, J., concurring)). A determination that a tract of land does or does not qualify as "Indian lands" within the meaning of IGRA in no way affects title to the land. Such a determination "would merely clarify sovereignty over the land in question." *Navajo Tribe*, 809 F.2d at 1475 n.29.

(*Kansas v. United States*, *supra*, 249 F.3d at p. 1225.)

To assist the NIGC or any other federal agency tasked with resolving the competing land claims at issue here, we identify some aspects of the issue of Tribal membership of the McCabe Allotment's successive beneficial owners.

Mary McCabe. While Mary McCabe is identified on the original federal trust patent as "a Mono Indian" (Exh. C), it is unclear whether she was a Big Sandy member. This omission is critical given the existence of at least two other bands of Mono Indians in the area; namely the North Fork Rancheria and Cold Springs Rancheria. The Tribe asserts its oral history confirms Mary McCabe was a member but does not offer any supporting declaration.

Frank McCabe. Frank McCabe is formally listed as a distributee in the Distribution Plan that effected the Tribe's termination in 1965. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. A, p. 6.) According to the Tribe's Constitution, all distributees or dependent members of distributees identified in the 1965 Distribution Plan are members. (Big Sandy Const., art. II, § 1(a).) Frank McCabe's status as a distributee, however, does not conclusively establish any significant heirship to Big Sandy bloodlines. Indeed, to qualify as a distributee under the 1965 Distribution Plan, one need not have been a Big Sandy member, or claim any Mono Indian heritage. Instead, distribution was available to "'[a]ll Indian families who have continuously resided on the Big Sandy Rancheria for the two (2) year period immediately prior to May 1, 1963.'" (Tribe's Apr. 19, 2005 letter to NIGC, Exh. A, p. 2.) Thus, any Indian from any tribe who happened to live on the Rancheria for the established two-year period would have qualified for Big Sandy asset distribution and subsequent membership once the Rancheria's termination was reversed. Indeed, Table Mountain reports Frank McCabe married a Big Sandy member and at some point moved onto the Big Sandy Rancheria, which likely explains his presence there and consequential eligibility for asset distribution.

Frank McCabe is also purportedly identified in the BIA's "1933 California Rollbook," with an identification number and residence in Auberry. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. F.) The Rollbook, however, does not confirm he was a Big Sandy member. (*Ibid.*) The Tribe also claims he was once a member of its business committee (*id.* at Exh. G), but the supporting document is largely illegible and it is unclear which tribe is referenced, including whether it is even a Mono Indian tribe. The Tribe also offers a member's declaration claiming Frank McCabe was a member. (*Id.* at Exh. I.) Nonetheless, Table Mountain likewise contends Frank McCabe was a member of that tribe.

Robert Lewis. As indicated, Robert Lewis was not a Big Sandy member, but possibly a Chuckchansi member, perhaps from the nearby Picayune Rancheria of Chuckchansi Indians.

Lester McCabe. The Tribe asserts it did not always maintain formal enrollment records but Tribal history indicates Lester McCabe was a member. (Tribe's Apr. 19, 2005 letter to NIGC, at p. 5, fn. 3.) Moreover, the Tribal member professing knowledge about Tribal membership history—including Frank McCabe's membership—provides no information about Frank's son, Lester. In any event, the Tribe offers a "Grant Deed to Restricted Indian Land Special Form," which identifies Lester McCabe as a Mono Indian but not specifically as a Big Sandy member. (*Id.* at Exh. J.) Similarly, Lester McCabe's Index and Heirship Card, issued by the BIA, identifies him as a Mono Indian, son of Frank McCabe, and exclusive owner of an allotment from Frank McCabe originally owned by Mary McCabe, but again there is no indication he was a Big Sandy member. (*Id.* at Exh. K.)

The foregoing suggests the tribal affiliation of each successive beneficial owner of the McCabe Allotment is uncertain. Accordingly, Big Sandy's assertion of exclusive jurisdiction over the McCabe Allotment because of the parcel's title history appears tenuous in need of federal clarification.

V. The Tribe Has Failed to Sufficiently Demonstrate it Exercises Governmental Power Over the McCabe Allotment

"In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger the Gaming Act." (*State of Rhode Island v. Narragansett Indian Tribe, supra*, 19 F.3d at pp. 702-703; see 25 U.S.C. § 2703(4)(B).) We believe that even if the Tribe has exclusive jurisdiction over the McCabe Allotment, it has not adequately demonstrated that it exercises governmental power over the property in a sufficient manner, or for a historically significant time period.

The term "governmental power" is not defined. One of the few courts to address the issue has held that governmental power over off-reservation allotments may be demonstrated by evidence showing: (1) whether the area is developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement is provided by the tribe or the state; and (5) other indicia as to who exercises governmental power over the area. (*Cheyenne River Sioux Tribe v. South Dakota* (D.S.D. 1993) 830 F.Supp. 523, 528, affd. (8th Cir. 1993) 3 F.3d 273, 279.)

The Tribe argues the Solicitor for the Department of the Interior does not consider it necessary for a tribe to demonstrate that it *actually* exercised governmental power over a tract of Indian land, but instead considers it sufficient that the tribe *can* exercise governmental power if it chooses to do so; to the extent a tribe *actually* exercises such power simply weighs in favor of finding the property to be Indian lands under IGRA. (Sampson Johns memo, p. 6.) Controlling case law is to the contrary.

In *State of Rhode Island v. Narragansett Indian Tribe, supra*, 19 F.3d at p. 703, the court held, "Meeting [the governmental power] requirement does not depend upon the Tribe's theoretical authority, but upon the presence of *concrete manifestations* of that authority. Consequently, an inquiring court must assay the *jurisdictional history* of the [lands in issue]. [Fn. omitted.] *Cf., e.g., DeCoteau v. District County Court*, 420 U.S. 425, 442, 95 S.Ct. 1082, 1091, 43 L.Ed.2d 300 (1975)." (Italics added.) In this instance, the Tribe's evidence of governmental power fails to rise to the level of a "concrete manifestation" of that authority for any historically significant time period.

In June 2004, the Tribe claimed for the first time by official resolution that it has historically provided governmental services to allotments located off its Rancheria and owned or occupied by Tribal members. (See Tribe's Apr. 19, 2005 letter to NIGC, Exh. P.) The resolution, however, fails to articulate how far back into history the Tribe's alleged exercise of governmental power actually reached.

In an attempt to establish some measurable proof of historic governmental power over the McCabe Allotment, the Tribe asserts its members previously used the property—and various surrounding parcels—for hunting rabbits, deer and other animals, and gathering wild

mushrooms, acorns and downed wood. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. I.) This assertion fails to describe when or for how long the hunting and gathering occurred.

The Tribe also asserts Frank McCabe lived on the allotment and maintained a house and ranch animals during his residency. (Tribe's Apr. 19, 2005 letter to NIGC, Exhs. I & M.) It appears Frank McCabe's house may have burned down in or around 1960, after which he may have moved to the Rancheria. (*Id.* at Exh. I.) The Tribe claims its members regularly visited and inspected the allotment for trespassers, squatters and any damage to or removal of objects from the land. Apparently, Frank McCabe was concerned about and protective of his land. (*Ibid.*) The evidence, however, does not specify when or how frequently the visits occurred, what the "visits" or "inspections" entailed, whether the members inspected the entire allotment, or more importantly, whether they did so on the Tribe's behalf or with any Tribal governmental power or objective, or whether they did so based on platonic friendship with the beneficial owner. Nonetheless, evidence of Frank McCabe's concern for his property does not equate to a tribal governmental concern or exercise of governmental power over the property.

Nor does the Tribe offer any evidence that Frank McCabe was the only Indian living, or to have ever lived, on the allotment since it was patented to Mary McCabe in 1920. As indicated, Table Mountain reports its members lived on the allotment until the 1960s. While one Big Sandy Tribal member claims he recently became employed as a Tribal security officer and in that capacity he frequently visits and inspects various off-Rancheria allotments owned or occupied by Tribal members, including the McCabe Allotment (Tribe's Apr. 19, 2005 letter to NIGC, Exh. I), there is no indication when he began inspecting the McCabe Allotment as a Tribal official, whether he inspected the entire allotment, or what his "inspection" entailed or discovered. Thus, it is unclear when, if ever, the Tribe actually enforced its laws on the land to exclude non-Tribal members.

The Tribe also offers several conclusive declarations from Tribal members suggesting the Tribe provides governmental services and benefits, including inspection by Tribal patrol officers, sign placement, fence repair, maintenance, monitoring for unauthorized grazing and general supervision. (Tribe's Apr. 19, 2005 letter to NIGC, Exhs. M-O.) The current beneficial owner also acknowledges the Tribe has governmental authority over the allotment and exercises the authority as needed (*id.* at Exh. M), although it is unclear how, when, or to what extent the Tribe has actually exercised such authority. The Tribe further asserts a recent inspection by a Tribal employee revealed evidence of unauthorized cattle grazing on the allotment and the Tribe subsequently sealed off any entries through which the cattle may have gained access. (*Id.* at Exh. O.) The declarations, however, are phrased in such a way that it is impossible to ascertain when the events occurred, how long the Tribe has provided the alleged governmental services, or in what manner the Tribe has enforced its laws specifically on the McCabe Allotment.

Furthermore, while "No Trespassing" signs are to be posted in plain view on all the Tribe's "off-reservation individually owned restricted fee allotments and off-reservation allotments held by the United States in trust of the benefit of the Tribe or any Tribal member," declaring the property to be under Tribal jurisdiction (*id.* at Exh. P), there is no evidence such a

sign exists on the McCabe Allotment or, if so, who installed it, where it is located, or how long it has been there. The Tribe also purportedly requires nonmembers to obtain a permit to enter restricted trust lands, including the McCabe Allotment (*id.* at Exhs. O & Q), but there is no evidence indicating the requirement is routinely enforced.

On this record, we do not feel that the Tribe has provided concrete evidence that it has historically asserted governmental power over the McCabe Allotment. (See *State of Rhode Island v. Narragansett Indian Tribe, supra*, 19 F.3d at p. 703.) Although the Tribe has reportedly been active since 1909, it may have asserted jurisdictional authority and governmental power over off-Rancheria land only within the last 14 months. Indeed, the 1965 Distribution Plan clearly states the Tribe "has had no constitution and bylaws or any other formal type of organization." (Tribe's Apr. 19, 2005, letter to NIGC, Exh. A, p. 2.) The Tribe's first formal Constitution adopted only five years ago did not specify the Tribe's jurisdiction or governmental power extended beyond the Rancheria boundaries. (Big Sandy Const., art. I.) Thus, it appears difficult for the Tribe to contend it actually exercised governmental power over the McCabe Allotment before 1965, or even 2000. Moreover, the Tribe's recent legislative acts do not provide concrete proof that the Tribe actually exercised historic governmental power over the McCabe Allotment.

VI. To the Extent IGRA Requires a Tribe to Demonstrate it Has Exercised Governmental Power Over Claimed Indian Lands For a Historically Significant Time Period, Big Sandy Fails to Meet This Requirement

The Indian lands definition in section 2703(4)(B) includes "any lands title to which *is* either held in trust" for "any Indian tribe or individual . . . *and* over which an Indian tribe *exercises* governmental power." (25 U.S.C. § 2703(4)(B), italics added.) The italicized words indicate this is a temporal definition as of IGRA's enactment and that section 2719(b)(1)(A) is the sole means by which an Indian tribe may game on after-acquired land, or land on which it asserts jurisdiction and governmental power after October 17, 1988.

Our interpretation of section 2703(4)(B) to include a temporal limitation is consistent with a previous memorandum from the Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary of Indian Affairs, regarding an Indian lands determination concerning "restored lands." Upon reconsideration, the Department concluded that interpreting

> 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 and restored lands.

(Exh. J, Confederated Tribes memo, p. 4.) The Department specifically referenced IGRA's effective date, October 17, 1988, as an inherent temporal limitation for establishing reservation

boundaries within which gaming could be conducted. (*Ibid.* ["IGRA provides certain temporal (i.e., the October 17, 1988 limitation for reservation boundaries) . . . limitations"].)

Although restored lands are not at issue here, the interpretation of IGRA to include temporal limitations applies with equal force to the requisite exercise of governmental power under section 2703(4)(B) before a parcel may be found to be Indian lands for gaming purposes. Any other construction would produce a result that is at odds with IGRA's purpose and Federal Indian law policy of promoting tribal economic development, tribal self-sufficiency, and strong tribal government. (See 25 U.S.C. §§ 2701(4), 2702(1).) Interpreting the governmental power provision without temporal standards would encourage tribes and investors to stretch IGRA's boundaries, and give certain tribes an unintended advantage over tribes who are bound by IGRA's after-acquired lands provisions. We do not believe such a result was intended when IGRA was enacted.

Thank you for considering our views on this important matter.

Sincerely,

Stephanie Shimazu

STEPHANIE K. SHIMAZU
Deputy Legal Affairs Secretary

Enclosures: Exhibit List
Attachments

cc: Chairperson Connie Lewis, Big Sandy Band of Western Mono Indians
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