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October 4, 2007

VIA FEDERAL EXPRESS AND EMAIL

Jeffrey C. Nelson, Esq.
Senior Attorney
National Indian Gaming Commission
1441 L Street NW
Suite 9100
Washington, D.C. 20005

RE: Proposed Gaming by Prairie Band Potawatomi Nation in DeKalb County, Illinois

Dear Mr. Nelson:

This firm represents the DeKalb County Taxpayers Against the Casino ("DCTAC") as special Indian law counsel. This letter, together with the September 26, 2007 letter of Peter Dordal and the enclosures to it including "An Ethno-Historical Evaluation of Land-Holdings at Shabbona's Grove, DeKalb County, Illinois" by James T. Lynch, Historic Consulting and Research Services LLC ("Lynch Report"), previously delivered to you, constitute the initial comments of DCTAC in connection with the legal analysis being conducted by your office to determine whether the Prairie Band Potawatomi Nation ("Tribe") may conduct Class II gaming pursuant to the Indian Gaming Regulatory Act ("IGRA") on a site owned by the Tribe near the Village of Shabbona in DeKalb County, Illinois.

Whether an Indian tribe may engage in Class II gaming on a particular site depends on (1) whether that site qualifies as "Indian lands" and, if so, (2) whether such "Indian lands" are "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1).

The term "Indian lands" is defined in 25 U.S.C. § 2703(4) and means:

> (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 the Indian tribe exercises governmental power.

It is our understanding that the Tribe's proposed gaming site was purchased in fee on the open market from a non-Indian owner in 2006. The site has been subject to real property taxation, zoning, and non-Indian governmental jurisdiction for many years.

It is the position of DCTAC that the site in question does not qualify as "Indian lands" and, further, that it is not "within [the Tribe's] jurisdiction."

Reservation

For purposes of IGRA, the term "reservation" refers to land set aside by the federal government for the occupation of Indian tribes. Sac and Fox Nation v. Norton, 240 F.3d 1250, 1266 (10th Cir. 2001).[1] Whether a reservation exists in the first instance, depends on the intent of the federal government. If a reservation once existed, whether that reservation has been disestablished or diminished depends on the intent of the federal government.[2] Determining the intent of the federal government regarding the existence, disestablishment or diminishment of an Indian reservation is affected by a number of factors including: the language of the treaty or treaties involved; the events surrounding the negotiation and enactment of the treaties; the contemporaneous understanding of the treaty's effect; the treatment of the affected area by the federal, state, and local governments and by the tribe over time; the manner in which the Bureau of Indian Affairs and state and local authorities dealt with the lands; whether non-Indian settlers occupied the lands; whether the area has long since lost its Indian character; and the subsequent demographic history of the area. *See,* Solem v. Bartlett, 465 U.S. 463 (1984) (the foregoing principles were applied in the context of the surplus land acts regarding whether the reservation had been diminished). *See also,* City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) (tribe may not unilaterally revive its ancient sovereignty by purchasing the title to land last possessed and governed by tribe approximately two centuries ago); Cass County v.

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1 Following the 10th Circuit's decision in Sac and Fox Nation, Congress has clarified that while the decision remains good law, "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the Secretary of the Interior on October 17, 1988 ...." Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 134, 115 Stat. 414, 443 (2001). As the term is undefined by IGRA, a different definition of "reservation" as to a specific area of land is not precluded by this decision. Under any definition, the Tribe's proposed gaming site is not within the limits of an Indian reservation.

2 Prior to 1871, the federal government extinguished Indian title, and disestablished or diminished Indian reservations, through treaties with the tribes. Beginning in 1871, the United States abandoned the practice of treaty-making with the tribes and disestablished or diminished reservation lands by federal statute or agreements subject to approval by both houses of Congress, rather than through treaties. *See* Indian Appropriations Bill, Mar. 3, 1871, 16 Stat. 566 (..."That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged as an independent nation, tribe or power with whom the United States may contract by treaty....."). The determinative actions of the federal government regarding the Tribe and the lands in question took place prior to 1871.

Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113-114 (1998) (tribe's "repurchase" of land does not restore reservation status).

The Lynch Report persuasively demonstrates that the site was never intended as a reservation for the Tribe's alleged predecessors in interest, was not understood to be an Indian reservation, and was not treated as an Indian reservation. Indeed, the Tribe abandoned the lands in 1837 as a result of the terms agreed upon in the 1833 Chicago Treaty; and the Senate denied Shabenay's request to establish title and a reservation at Shabbona's Grove in that 1833 Treaty. (Lynch Report at pp. 33-44) (The Tribe agreed, "[b]y this Treaty my Children, you cede to your great father all your lands between Lake Michigan and the Mississippi River. You have made no reservations, You agree to remove." Lynch Report at fn. 41. *See also*, Treaty with the Chippewa, etc. at Chicago, Sept. 26, 1833, 7 Stat. 431, proclaimed Feb. 21, 1835, Arts. 1 and 2). The original draft of the treaty contained a provision for chief Shabenay, permitting, "... a grant in fee simple to him, his heirs and assigns forever ...," which was stricken by the Senate. (Lynch Report at p. 35). Neither Shabenay nor the Tribe received any land in Illinois pursuant to the 1833 Chicago Treaty. Thereafter, the United States sold the land. The Tribe has not possessed or governed the site or the surrounding area for approximately 170 years. As Peter Dordal's September 26 letter shows, the area has since been settled and developed by non-Indians, has been governed by the State and local governments and long ago lost its Indian character. Census information for 2000 (census.gov) shows that DeKalb County is 0.2% American Indian and Alaskan Native alone and the Village of Shabbona is 0.1% (one individual) American Indian and Alaskan Native alone, overwhelmingly non-Indian.[3]

The Tribe has a reservation – it is located in Kansas. Since the mid-19th century, the Tribe's reservation has been in Kansas pursuant to treaties with the United States. The Tribe currently conducts both Class III and Class II gaming on its Kansas lands. See, www.pbpindiantribe.com/gaming5.htm, www.pbpindiantribe.com/enterpri.htm. At least one federal court of appeals has concluded that Congress did not intend tribes to have more than one reservation for gaming purposes. Sac and Fox Nation, 240 F.3d at 1267. The fact that the Tribe's reservation is in Kansas supports the conclusion that the proposed Shabbona, Illinois site is not "Indian lands" for purposes of IGRA.[4]

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[3] Earlier census data are consistent with the conclusion that the population of DeKalb County has long been overwhelmingly non-Indian. DeKalb County Indian population in 1900, 1910 and 1920 was 0 (total County population was 31,339 in 1920). *See*, http://www2.census.gov/prod2/decennial/documents/41084484v3ch03.pdf, at pp. 247, 252.

[4] Since the title to the Tribe's proposed gaming site is not held in trust by the United States or held by the Tribe subject to restriction against alienation, and since the Tribe does not exercise governmental power over it, the site is not "Indian lands" under 25 U.S.C. § 2703(4)(B).

Within the Tribe's Jurisdiction

Even if the site qualified as a "reservation" and thus as "Indian lands" (which it does not), in order for the Tribe to engage in, license and regulate Class II gaming on the site, it must be "within such tribe's jurisdiction... ." 25 U.S.C. § 2710(b)(1). The legal, governmental, social and demographic history and current status of the site (discussed above and presented in detail in the Lynch Report and Peter Dordal's September 26, 2007 letter and enclosures) show that the site is not within the Tribe's jurisdiction. The site is not within the Tribe's jurisdiction and has not been since the 1830's (if ever). Jurisdiction over the site and the surrounding area has been exercised by the State of Illinois, the County of DeKalb, and the Village and Township of Shabbona for approximately 170 years. The settled expectation in the community is that it will remain so.

In such circumstances, the Tribe may not unilaterally exercise or revive jurisdiction over the site, or assert immunity from State and local jurisdiction. *See* City of Sherrill, 544 U.S. at 203, 214; Cayuga Indian Nation v. Village of Union Springs, 390 F. Supp.2d 203, 206 (N.D.N.Y. 2005) ("The Supreme Court's strong language in City of Sherrill regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.").

Unextinguished Indian Title

In a letter dated January 18, 2001 to Honorable J. Dennis Hastert, Speaker of the U.S. House of Representative and to the Honorable George H. Ryan, Governor of the State of Illinois, Department of the Interior Solicitor John D. Leshy advised that "we have determined that the Prairie Band has a credible claim for unextinguished Indian title to this land." Even if the Tribe has a credible claim to unextinguished Indian title to the site, that claim would not bring the site within the definition of "Indian lands" so as to permit the Tribe to engage in the Class II gaming in DeKalb County. The Lynch Report demonstrates that the Tribe's claim to unextinguished Indian title is without merit. Furthermore, recent cases applying the City of Sherrill decision have held that possessory Indian land claims such as that asserted by the Tribe in its claim of unextinguished aboriginal title are disruptive and are barred by the same concepts of federal Indian law and federal equity practice (including laches, acquiescence and impossibility) that the Supreme Court applied to the Oneida Indian Nation of New York. Cayuga Indian Nation of New York v. Pataki, 413 F.2d 266 (2d Cir. 2005), cert. denied, 126 S. Ct. 2021, 2022 (2006); Shinnecock Indian Nation v. New York, No. 05-2887, 2006 WL 3501099, 2006 U.S. Dist. LEXIS 87516 (E.D.N.Y. Nov. 28, 2006); Oneida Indian Nation of New York v. New York, ____ F. Supp.2d ____, 2007 WL 1500489, 2007 U.S. Dist. LEXIS 36940 (N.D.N.Y. May 21, 2007).

Conclusion

The National Indian Gaming Commission's legal analysis must be based on a complete factual, historical and ethno-historical review of the circumstances regarding the Tribe's proposed gaming site. DCTAC's comments, including the Lynch Report, Peter Dordal's September 26, letter and enclosures, and this letter compel the conclusion that the site owned by the Tribe near the Village of Shabbona, Illinois is not "Indian lands" "within the Tribe's jurisdiction" within the meaning of IGRA and, therefore, that the Tribe may not conduct Class II gaming on that site.

We understand that you will be receiving comments from the Tribe, the State of Illinois, DeKalb County, and the Township of Shabbona and that comments responding to those comments are due by November 5, 2007. DCTAC intends to submit responding comments by November 5, 2007.

Thank you for your consideration.

Very truly yours,

David M. Schraver

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DMS/tsj

cc: Peter L. Dordal, Chairman, DeKalb County Taxpayers Against the Casino