

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 08-90

Ability of Federally Recognized Indian Tribes to Conduct Gambling Activities In Tennessee

QUESTION

House Bill 3299 would provide for state recognition by the General Assembly of specific Indian tribes, bands, or groups in Tennessee and would establish a means by which the legislature in the future could give state recognition to other Indian tribes, bands, or groups in Tennessee. If these state recognized tribes, bands, or groups were subsequently recognized as an Indian tribe by the federal government, would these federally recognized tribes have the right to purchase or hold lands entitling them to engage in gambling activities in Tennessee?

OPINION

If one of the Indian tribes, bands, or groups receiving state recognition under House Bill 3299 subsequently gained federal recognition as an Indian tribe, and if land in Tennessee were thereafter acquired by the Secretary of the United States Department of the Interior for the benefit of that tribe, then it is the opinion of this Office that the tribe may be able to conduct gambling activities on that land under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

ANALYSIS

Federal law establishes a mechanism for official recognition of an “Indian tribe,” which is defined as “any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.” 25 C.F.R. § 83.1 and .2 (2007). In order for an Indian tribe to receive recognition by the federal government, it must satisfy extensive federal law requirements set forth under 25 C.F.R. Part 83 (2007). The federal recognition process is administered by the Bureau of Indian Affairs (BIA). State recognition is not a factor considered by the BIA in deciding whether an Indian tribe will receive federal recognition. *See* 25 C.F.R. § 83.7 (2007).

House Bill 3299 would provide for state recognition by the General Assembly of several Indian tribes, bands, or groups in Tennessee. *See* House Bill 3299, § 5. The bill defines an Indian tribe, band, or group and establishes certain requirements that they must meet in order to be considered for recognition by the General Assembly. *Id.*, §§ 3, 4.¹ The bill would also establish

¹There are two section fours in House Bill 3299. This is the first.

an entity called the Confederation of Tennessee Native Tribes, comprised of tribes, bands, or groups identified in the bill. *Id.*, § 4.² Under the bill, the Confederation would review applications for recognition and present tribes, bands, or groups to the General Assembly for recognition. *Id.*

It is this Office's understanding that there are no federally recognized Indian tribes in Tennessee at present or in the past. If in the future, the BIA were to recognize an Indian tribe in Tennessee, and thereafter, the Secretary of the United States Department of the Interior were to acquire land for the benefit of that tribe, then whether the tribe could conduct gambling activities on that land would be governed by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.*

IGRA has been held to reflect Congress' intent to control Indian gaming exclusively, with any state regulation thereof only taking place within IGRA's regulatory framework. *Gaming Corp. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). *See also Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1108-09 (8th Cir. 1999). Congress provided in IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA divides gaming activity into three classes. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class I gaming is "within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter." 25 U.S.C. § 2710(a)(1). Class II gaming generally means "bingo" and "card games"³ played for "prizes, including monetary prizes." 25 U.S.C. § 2703(7). Class II gaming is also within the tribe's jurisdiction but is subject to certain requirements under IGRA. *See* 25 U.S.C. § 2710(a)(2), (b) and (c). Class III gaming means "all forms of gaming that are not class I or class II gaming." 25 U.S.C. § 2703(8). The requirements for Class III gaming include that it be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(C). *See* Tenn. Op. Att'y Gen. No. 01-064 (Apr. 24, 2001); Tenn. Op. Att'y Gen. No. 01-019 (Feb. 7, 2001)

Congress expressly addressed when gaming activity by a federally recognized Indian tribe may occur on lands acquired by the Interior Secretary for the tribe's benefit after IGRA's October 17, 1988, date of passage:

(a) Prohibition on lands acquired in trust by Secretary

²This is the second section four in the bill.

³IGRA establishes further limitations on Class II gaming, including restricting the types of card games allowed. *See, e.g.*, 25 U.S.C. § 2703(7)(A)(ii) and (B).

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless —

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and —

(A) such lands are located in Oklahoma and —

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the state or States within which such Indian tribe is presently located.

25 U.S.C. § 2719(a).

It is this Office's understanding that there is neither a federally recognized Indian tribe reservation in Tennessee at present, nor has there been such a reservation within Tennessee in the past. Thus, the prohibition in 25 U.S.C. § 2719(a) on Indian gaming activity on land acquired after October 17, 1988, would apply unless subject to one of the exceptions in subsection (b). In pertinent part, subsection (b) provides:

(b) Exceptions

(1) Subsection (a) of this section will not apply when —

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the

Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of —

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1).⁴

Because there has been no federally recognized Indian tribe in Tennessee in the past, it is the opinion of this Office that the exception in subsection (b)(1)(B)(iii) would not be applicable. This Office is of the opinion that the exceptions in subsection (b)(1)(A) and (b)(1)(B)(i) and (ii) could apply if the federal government in the future were to recognize an Indian tribe in Tennessee, and if land in this state were thereafter acquired by the Interior Secretary for the benefit of that tribe.⁵ An additional requirement under subsection (b)(1)(A) is the concurrence of the Governor with the Interior Secretary's determination that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(B). If one of these exceptions did apply, then any gaming activity on that land would be governed by IGRA, as outlined above.

⁴There are further exceptions in subsections (b)(2) and (3) but these are applicable only to specific Indian tribes in Wisconsin and Florida. *See* 25 U.S.C. § 2719(b)(2) and (3).

⁵Congress gave the Interior Secretary discretion to acquire land into trust for Indians under 25 U.S.C. § 465. The rules promulgated under 25 C.F.R. Part 151 (2007) set forth the policies and procedures governing the acquisition of land in trust by the Secretary for the benefit of Indian tribes.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GINA J. BARHAM
Deputy Attorney General

SOHNIA W. HONG
Senior Counsel

Requested by:

Honorable Nathan Vaughn
State Representative
Suite 20, Legislative Plaza
Nashville, TN 37243-0102