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THE **FICTION** of "OFF-RESERVATION" INDIAN CASINOS

By Butch Cranford – CA

Yes, you read the title correctly, there is no such thing as "off-reservation Indian casinos." In October 1988 Congress passed the Indian Gaming Regulatory Act (IGRA) to regulate gambling on "Indian lands." However, since 1988 Indian casinos have sprung up in a host of approved "off-reservation" non-Indian land locations in violation of the IGRA. A search of the text of the IGRA reveals the term "off-reservation" is not found in the Act. How then is it possible for Indian casinos to be built and operated "off-reservation" in violation of the IGRA?

It is possible only through the nefarious efforts of a corrupt deep state bureaucracy in place for decades at the Department of Interior (DOI), Bureau of Indian Affairs (BIA), and National Indian Gaming Commission (HIGC) to not comply with the clear language of the IGRA. This article includes several sections of the IGRA and lengthy portions of two gaming lands opinions which are required to expose and understand to what extent the DOI, BIA, and NIGC have gone to approve Indian casinos on lands not eligible pursuant to the plain clear language of the IGRA.

Since "off-reservation" is not included in the IGRA, one has to look elsewhere for the alleged "authority" for "fictional off-reservation" casinos. I discovered what I believe is the genesis for "off-reservation" casinos while doing research related to a proposed "off-reservation" casino in my hometown of Plymouth, California. A fiction filled 2006 restored lands opinion for the landless Ione Band authored by Assoc. Solicitor Carl Artman caused me to review the lands opinions on the NIGC website from oldest to most recent.

At the time of my review, the oldest opinion on the NIGC website was an opinion for the Blackfeet tribe in Montana dated December 3, 1990. The reason for the Blackfeet opinion was a question which arose during negotiation for a compact as to whether "fee lands owned by a non-Indian within the boundaries of the reservation" were eligible for gaming pursuant to the IGRA.

It was the position of the State of Montana that fee lands owned by a non-Indian were not eligible for gaming as defined at 25 U.S.C.§2703 of the IGRA. The question and Montana's position was forwarded to the Office of the Solicitor (SOL) for resolution. The response from the SOL was surprising. It was the position of the SOL that fee land owned by a non-Indian within the boundaries of a reservation was eligible for gaming based on his interpretation of the definition of Indian lands in the IGRA. The definition of Indian lands in the IGRA at 25 U.S.C. §2703 follows:

4) The term **"Indian lands"** means –

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

(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.

Hopefully, you noticed the word "boundaries" is not included in the definition of Indian lands. Rather, the IGRA uses "limits of any Indian reservation" to partially define Indian lands. Is there a difference between the "limits" and "boundaries" of a reservation? Yes, there is a difference and there is a reason Congress used "limits" and not "boundaries" to define Indian lands in the IGRA.

In the late 19th Century, Congress passed legislation to allow excess reservation lands not claimed by tribes and individual Indians pursuant to the Dawes Act to be claimed and owned by non-Indians. The result was what is today known as "checkerboard" reservations where fee land owned by non-Indians is randomly located within the "boundaries" of a reservation giving a map of ownership a "checkerboard" appearance. This was the situation in Montana. While the "boundaries" of the original reservation were not changed, the area of the reservation within the "boundaries" was "limited" to the lands not owned by non-Indians. I believe this is why Congress used "limits" in the definition of Indian lands in the IGRA and not "boundaries."

This history is well known within the Dept. of Interior (DOI), the Bureau of Indian Affairs (BIA), the SOL, and the NIGC and there should not have been any question whether fee land owned by a non-Indian was eligible for gaming pursuant to the IGRA. Fee lands owned by a non-Indian are clearly not within the "limits" of the reservation but are within the reservation "boundaries." Not only are they not within the "limits" of the reservation they (fee lands) are not held in trust as required by the (b) portion of the definition. So how did the SOL manage to conclude that fee land owned by non-Indians within the boundaries of a Montana reservation was eligible for gaming?

The seemingly impossible answer is in the Blackfeet opinion where the SOL informs.

The underlined word "and" is apparently being read by the State to apply the Act to only those lands which are held in trust within the reservation, which would exclude fee lands within the reservation. I disagree with the State's opinion." Section20(a) of the Act, 25 U.S.C.§2719, undermines the State's argument. Section 20 (a) provides that lands acquired by the Secretary in trust for a tribe after the date of the Act cannot have gaming regulated by the Act conducted thereon unless such lands are located within or contiguous to the boundaries of the reservation. Section 20(b)(1) says that 20(a) does not apply when the Secretary, after proper consultation, determines that a gaming establishment would be in the best interests of the tribe, and so on, with the concurrence of the state governor. (emphasis added)

Although the definition of Indian lands does not mention the word "boundaries," it does include "all lands within the limits of any Indian reservation," and §20(a)(1) does allow lands "contiguous to the boundaries of the reservation" to be considered. In other words, the word "limits" may have been further defined by the use of the word "boundaries." (emphasis added)

Not exactly, a careful reading shows §20(a) does not undermine the State's argument as it is totally unrelated to §2703's definition of Indian lands. Section 20(a) & (b) limits what **trust** lands acquired after October 17, 1988 are eligible for Indian gaming as Indian land is defined at 25 U.S.C. §2703. Section 20(a) & (b) have absolutely nothing to do with fee land and the question of whether non-Indian owned fee land within an existing reservation is eligible for Indian gaming. It is clear 20(a) deals with Prohibition on lands acquired in **trust** by the Secretary. The Secretary was delegated authority to acquire **trust** land for Indians in Section 5 of the 1934 IRA.
Section 20(2) & 20(b) (25 U.S.C. §2719) are included below with what the SOL did not include in his opinion **bolded.**

Sec. 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on **lands acquired in trust** by Secretary

Except as provided in subsection(b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct.17, 1988] unless—

(1) such lands are located within or contiguous to the boundaries of the reservation **of the Indian tribe on the date of enactment of this Act [enacted Oct 17, 1988; or**

(2) the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct 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.

(b) Exceptions.

(1) Subsection (a) 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 acknowledgement process, or

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

After reading the entirety of Section 20, it should be clear nothing in Section 20(a) changes the definition of Indian lands in §2703 and how the use of the word "boundaries" furthers the definition of "limits" is not explained.

Based on the history of reservations, the Dawes Act, and Congressional disbursement of excess reservation lands it is clear where the boundaries of the reservation are and it is clear from title records where the limits of the reservation are. The area of the reservation is "limited" by non-Indian owned fee land while the boundaries of the reservation are unchanged. Boundaries is used in Section 2719 to define one specific instance where gaming would be allowed on lands acquired in trust by the Secretary after October 17, 1988—nothing more. In fact in the example offered by the SOL it should be clear the "within or contiguous to the boundaries" exception implies and actually requires "fee" land within the "boundaries" of the reservation not within the "limits" of the reservation and have to be acquired in trust to be eligible for Indian gaming.

As you read there are a number of other instances described in Section 20(a) where gaming would be allowed on land acquired in trust after October 17, 1988. Section 20(b) defines and describes four additional exceptions for lands acquired in trust after October 17, 1988. Section 20(a)&(b) apply only to lands acquired in **trust** after October 17, 1988 and not to trust lands or "limited" reservations or non-Indian fee land existing on October 17, 1988.

The SOL misuses a selected and edited portion of the first of the Section 20(b) exceptions to support his fictional opinion that the State of Montana's reading of 25 U.S.C.§2703 is wrong. The Section 20(b) exception alluded to by the SOL applies to trust lands acquired after October 17, 1988 which is not the question at

issue in Montana. It is obvious non-Indian owned fee lands are not newly acquired trust lands. This attempt to justify Indian gaming on land not eligible is just a load of bureaucratic BS from the SOL to direct attention away from the clear and explicit definition of Indian lands in §2703. If non-Indian fee lands were eligible for Indian gaming you would expect to find "fee" and "non-Indian" in the definition at §2703 but neither are included in the definition of Indian lands. The opinion for the Blackfeet is a fictional farce and is no longer included on the NIGC website.

However, the Office of the Solicitor was not finished with its attempt to change the definition of Indian lands in §2703. A September 2, 1992 opinion for the Red Lake Band of Minnesota was issued in response to a question from the Band whether the tribe could operate a casino on fee land within the reservation. Similar to the question in Montana but responded to by the SOL with an even more farcical opinion authored by Penny J. Coleman and this is the first use of the term "off-reservation" I discovered. Ms. Coleman would eventually become General Cousel at the NIGC.

Ms. Coleman includes the entirety of the definition of Indian lands in the IGRA, 25 U.S.C. §2703(4) in the opinion and then includes the following:

The question raised by the definition is whether the lands defition requires that the reservation lands must be held in trust or restricted status with the exercise of tribal governmental control over the land.
Ms. Coleman creates a question which simply did not exist. The definition at §2703(4) is clear that lands eligible for gaming are all lands within the limits of the reservation AND held in trust or restricted fee. One definition with two criteria to be met.

Ms. Coleman then reviewed the National Gaming Commission (NIGC) regulations and conferred with the NIGC on this matter. The NIGC regulations provide at 25 C.F.R. §502.12 that "Indian lands means: (a) Land within the limits of an Indian reservation; OR (2) Land over which the tribe exercises governmental control and that is either (1) Held in trust … or Held in restricted fee….

She next claims, "The regulations clarify by use of the term "OR" rather than "AND" that the term Indian lands has two separate definitions which are not dependent on each other. NIGC staff confirmed that the Indian lands definition establishes two separate definitions of Indian lands. Therefore tribal gaming may be conducted on fee lands within the reservation."

Like the Blackfeet opinion in Montana this opinion is farcical bureaucratic BS. To begin, the definition of Indian lands enacted by Congress at §2703 raises no question as claimed by Coleman. Secondly, if a question is raised why did she not confer with Congress about her fictional question? Instead Coleman confers with the NIGC whose operating revenues come from operating Indian casinos and more Indian casinos means more revenue for the NIGC. As part of her conferring with the NIGC she claims the definition of Indian lands according to the NIGC regulations at 25 C.F.R.§502.12 clarifies the definition by creating two separate definitions for Indian lands. In a later face to face meeting with Ms. Coleman, I asked about the change of AND to OR and she informed me that AND & OR mean the same thing. An absurdity on its face. If they meant the same thing there would be no need to change the IGRA with the NIGC regulation. More bureaucratic hogwash.

She next concurs in the NIGC's regulatory "interpretation" and informs that "Any other interpretation would be unnecessarily restrictive in other circumstances. Arguably such an interpretation could limit all gaming to lands on reservations. Restricting gaming to reservations was not contemplated by the Act as is evidenced by Section 20 of the IGRA which governs acquisitions for **off-reservation** gaming, **(emphasis added)**

Ms. Coleman is guilty of a seriously misleading opinion at best or an outright lie at worst. I believe it is a lie. Section 20 of the IGRA (25 U.S.C.§2719) does not govern acquisitions for off-reservation gaming. Off-reservation gaming is a fiction created by Ms. Coleman and other unethical corrupt bureaucrats at the DOI, BIA,SOL and NIGC.

Contrary to Ms. Coleman's claim, Section §2719 governs "Gaming on lands acquired after October 17, 1988" and does not govern acquisitions for "off-reservation" gaming.

A further review of §2719(a) reveals "reservation" is included four times indicating in every instance that lands acquired after October 17, 1988 needed to be within a reservation or contiguous to a reservation boundary to be eligible.

Continuing on to §2719(b). The four exceptions defined there all require the acquisition of trust land for a tribe and in one instance those lands would be an initial reservation. At Section 5 of the 1934 IRA the Secretary of Interior has authority to acquire trust lands for Indians. Any trust land acquired after October 17, 1988 not within the "limits" of a reservation or contiguous to a reservation "boundary" would not be eligible for gaming unless the Secretary exercised his authority in Section 7 of the IRA to proclaim a new reservation on lands acquired pursuant to any authority conferred by this Act; such as the authority for the Secretary to acquire land for Indians in Section 5.

Nowhere in the IGRA is there any language that "fee" land is eligible for Indian gaming no matter its ownership or location. Remarkably, the very federal bureaucrats responsible for assuring the IGRA is complied with are responsible for opinions wherein the IGRA is ignored. Not only ignored but changed with regulations and supported with farcical opinions which are no longer available on the NIGC website. Yes, both of the lands opinions creating "fictional" off-reservation casinos have been removed from the NIGC website.

While this might seem to be an insignificant matter, it is not. It is just one of many such unethical actions I have discovered employed by the DOI, BIA, and NIGC since 2003. If this were a one time event it might be considered an anomaly but my 19 years of experience with these agencies has revealed the unethical corrupt bureaucrats in these agencies engage in this kind of unlawful activity routinely on a regular as needed basis and will continue to do so until they ae held to account. That is my objective and goal in challenging an illegal fee to trust in my community and NCIP's still successful challenge to the alleged off-reservation casino proposed by the Ione Band would not have been possible without my 15 year association with CERA.

Challenging an unConstitutional out of control corrupt Federal Indian Policy (FIP) is CERA's mission and goal. With limited resources CERA continues to provide cutting edge Amicus briefs to the Supreme Court in selected lawsuits where the unConstitutional policies of Federal Indian Policy are at issue. CERA continues to be a source of information and expertise for communities where FIP is out of control.

Additional information on CERA and how to support CERA is available at www.citizensalliance.org. Any financial support you can provide CERA in 2022 will be greatly appreciated.

If you would like an electronic copy of the Blackfeet and/or Red Lake opinions no longer available on the NIGC website please contact me at bcranford4588@att.net and I will gladly provide electronic copies.

A Message from CERA/CERF Treasurer Curt Knoke

Donors! You are absolutely the greatest! Over the past years your past generosity has been wonderful. CERA and CERF are the ONLY two national organizations that are working diligently to level the playing field by making all US citizens equal. What a concept! Sadly our elected representatives are unwilling to risk their cushy positions by tackling the "Indian issue," so it is up to us to educate the highest court in the land on specific aspects of the law. We have been doing this successfully for many years by having our legal counsel submit amicus briefs (Friend of the Court briefs) to the U.S. Supreme Court for consideration for specific cases involving Indian law.

Our goal is to eventually do away with the Indian Reorganization Act. In many respects the IRA has been a travesty for not only the tribal populations living on reservations but the IRA has adversely affected non-Indians living on and around reservations.

So we are asking you once again to open your hearts and wallets and not only continue your membership for another year but to give over and above that $35 annual membership fee and give some serious dollars to help us chip away at Federal Indian Policy as we know it.

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