LETTER OPINION
2002-L-47

August 2, 2002

Mr. Robert W. Harms
Governor's Counsel
Governor's Office
600 East Boulevard Avenue
Bismarck, ND 58505

RE: Gaming on Lake Sakakawea

Dear Mr. Harms:

Thank you for your May 20, 2002, letter in which you ask about a proposal by the Three Affiliated Tribes to conduct gaming on Lake Sakakawea. The Tribe has a casino overlooking the lake but wishes to expand its gaming operation by offering a "casino boat" on the lake. You ask for an opinion on "the Governor's authority to permit Indian gaming on Lake Sakakawea within the exterior boundaries of the reservation." This requires reviewing the Three Affiliated Tribes' existing compact, restrictions placed on the Governor's negotiating authority by N.D.C.C. ch. 54-58, and assessing whether in fact Lake Sakakawea is within the boundaries of the Fort Berthold Indian Reservation.

The Compact

The Tribe's gaming compact contains a provision entitled "Geographic Scope of Compact." It states:

> This compact shall only govern the conduct of Class III games by the Tribe on trust lands within current exterior boundaries of the Fort Berthold Reservation, all in compliance with Section 2719 of the Indian Gaming Regulatory Act. The execution of this Compact shall not in any manner be deemed to have waived the rights of the State pursuant to that section.
>
> The parties agree to discuss at a later date, the possibility of gaming upon waters within the exterior boundaries of the reservation.

Amended Gaming Compact Between the Three Affiliated Tribes and the State of North Dakota, § XXXIII (Oct. 7, 1999) ("1999 Compact"). This provision confines gaming to

"trust lands." Thus, the first issue is whether Lake Sakakawea falls within the term "trust lands."

In Indian law, "trust land" is a term of art with a fairly settled meaning. In general, "trust land" traces its origins to Section 5 of the 1934 Indian Reorganization Act. 25 U.S.C. § 465. The Act allows the Secretary of Interior to acquire land and then hold its title in trust for the benefit of an individual Indian or a tribe. Id. Land acquired or held under 25 U.S.C. § 465 is typically known as "trust land." See e.g., Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1256 (10th Cir. 2001), cert. denied, 122 S.Ct. 807 (2002); United States v. Roberts, 185 F.3d 1125, 1130, 1132 (10th Cir. 1999); United States v. Stands, 105 F.3d 1565, 1572 (8th Cir. 1997). I am unaware of any action by the federal government to hold Lake Sakakawea or its submerged lands in trust for the Three Affiliated Tribes under Section 465.[1] In 1949 the United States did acquire about 156,000 acres of Indian land for the Garrison Dam Project, a subject discussed below, but its acquisition was in fee and was not an acquisition in trust for the Tribes.

Besides Section 465 acquisitions, "trust" is associated with Indian land in another way. When reservation land was originally broken up into allotments and assigned to individual tribal members, the government retained an interest until a certain amount of time passed, usually 25 years, and then the tribal member received fee title. Prior to acquisition of the fee, these lands are sometimes referred to as "trust allotments." E.g., Francis Paul Prucha II The Great Father: The United States Government and the American Indians 668 (1984). But I am unaware of any submerged land under Lake Sakakawea that would still be an allotment held in trust by the government.

In sum, the lake does not constitute "trust lands." Consequently, Lake Sakakawea is not within Section XXXIII of the 1999 Compact governing the geographic location of gaming. Any doubt that the compact contemplates gaming only on land is resolved by Section XXXIII's second paragraph, which states that the parties will at some future date discuss gaming operations on water. There would have been no need for this provision had the compact and its reference to gaming on "trust lands" contemplated gaming on water.

Limitations on the Governor's Negotiating Authority

Because the current compact does not allow the Tribe to conduct gaming on Lake Sakakawea, such gaming could only occur with a compact amendment. In negotiating an amendment the Governor must comply with the restrictions imposed on his negotiating authority by N.D.C.C. ch. 54-58.

[1] In light of this, I do not need to address a more fundamental question, that is, whether Section 465 even applies to bodies of water.

You bring to my attention a particular provision in this chapter, that is, section 54-58-03(5). This subsection prohibits the Governor from allowing any off-reservation gaming. There is, however, an exception. If an off-reservation gaming location was permitted under a compact in effect on August 1, 1997, then such location is grandfathered. The 1992 compact with the Three Affiliated Tribes was in force on August 1, 1997, but it, too, confined gaming to the reservation. Gaming Compact Between the Three Affiliated Tribes and the State of North Dakota, §§ III, XXX (Sept. 29, 1992).

Because the 1992 Compact did not allow off-reservation gaming, the exception in N.D.C.C. § 54-58-03(5) does not apply. The more fundamental question is whether Lake Sakakawea is within or outside of the Fort Berthold Indian Reservation. If it is within, Governor Hoeven could negotiate a compact amendment allowing gaming on Lake Sakakawea. If the lake is not in the reservation, then the Governor's hands are tied by N.D.C.C. § 54-58-03(5).

Lake Sakakawea and Reservation Boundaries

The 1891 Treaty. Determining whether Lake Sakakawea is within the Fort Berthold Reservation requires review of the treaties, executive orders, and statutes dealing with the reservation's boundaries. While there have been a handful of agreements and executive orders that concern the boundaries of the reservation,[2] its final boundaries were "established by the Act of March 3, 1891, 26 Stat. 1032." City of New Town v. United States, 454 F.2d 121, 122 (8th Cir. 1972). The 1891 Act, in essence, diminished the size of the reservation as established by an 1880 Executive Order so that the reservation boundaries are much the same as they appear on current state road maps.[3]

The 1910 Surplus Lands Act. In 1910 Congress opened the reservation to non-Indian homesteaders. This Act is similar to many other acts that opened reservations to non-Indians around the turn of the century. Tracts of reservation land were first allotted to tribal members and the excess, or surplus land, was then made available to non-Indians. Congressional acts opening the reservations to non-Indians are known as Surplus Lands Acts. It has been asserted that the Three Affiliated Tribes'

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[2] Treaty of Fort Laramie at Art. 5 (Sept. 17, 1851), reprinted in, II Indian Affairs Laws and Treaties 594 (Charles J. Kappler ed. 1904); Exec. Order April 12, 1870, reprinted in, I Indian Affairs Laws and Treaties 883 (Charles J. Kappler ed. 1904); Exec. Order July 13, 1880, reprinted in, id. A description of the federal actions affecting the reservation's boundaries is at Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 223-25 (1968).

[3] The 1891 Act is based on an 1886 agreement with the Tribe. The agreement and the Act accepting it are reprinted in I Indian Affairs Laws and Treaties 425-28 (Charles J. Kappler ed. 1904).

1910 Surplus Lands Act diminished the reservation, that is, that much of the land north and east of the Missouri River -- the area opened to homesteaders -- was removed from reservation status. Id. But this position has been rejected. Id. at 126-27. See also Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1297-98 (8th Cir. 1994) (reaffirming City of New Town); United States v. Standish, 3 F.3d 1207, 1209 (8th Cir. 1993) (declining to reexamine City of New Town).

Diminishment under the 1910 Surplus Lands Act is relevant to your question about gaming on Lake Sakakawea because gaming likely would occur near the present casino in the vicinity of New Town. This area was part of the area asserted to have been removed from the reservation by the 1910 Act. The state was not a party to past litigation interpreting the 1910 Act and it is not bound by decisions interpreting it. Even so, were the state to litigate the issue, success is unlikely. A new panel of the Court of Appeals will not overrule City of New Town because one panel does not have the power to overrule another panel. E.g., Duncan Energy, 27 F.3d at 1297. Furthermore, obtaining a hearing before the full Court of Appeals, which could overrule City of New Town, is unlikely, and review by the Supreme Court is remote. It is, therefore, my opinion that until the law governing diminishment changes or new facts arise, the state should adhere to the City of New Town ruling in deciding the question you pose.

The 1949 Takings Act for the Garrison Dam Project. Another and more difficult reservation diminishment issue, however, arises as the result of the federal government's acquisition of land for the Garrison Dam Project. In 1949 the United States acquired about 156,000 acres of tribal and allotted Indian land within the reservation and along both sides of the Missouri River. Act of October 29, 1949, 63 Stat. 1026 ("1949 Taking Act"). The land taken, the Taking Area, was the area considered necessary for operation of Garrison Dam.[4]

It is possible that this acquisition removed the Taking Area from the reservation. Indeed, the Corps of Engineers took this position in the 1970s when questions arose about the scope of tribal authority over Lake Sakakawea. John R. Scalzo, Dist. Counsel, U.S. Corps of Engineers, "Legal Memorandum: Jurisdiction over Former Indian Lands of the Fort Berthold Indian Reservation" 14-15, 80-82 (June 1977); Letter from Lt. Col. Lee W. Tucker, U.S. Corps of Engineers, to Thomas Eagle, Sr., Treasurer, Three Affiliated Tribes 2 (Mar. 19, 1976); Memorandum from E. Manning Seltzer, Chief Counsel, U.S. Corps of Engineers, to District Engineer ¶ 2 (Mar. 19, 1976). The Corps reiterated this position in 1985. Letter from John R. Scalzo, Dist. Counsel, U.S. Corps

[4] The story of the Tribes' struggle to stop Garrison Dam and its negotiations for compensation can be found at Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 239-64 (1968). A summary of this history can be found at Raymond Cross, "Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century," 40 Ariz. L. Rev. 425, 483-90 (1998).

of Engineers, to N.D. Asst. Att'y Gen. Mike Geiermann (Aug. 7, 1985). I do not know if this is still the Corps' position and if it is or ever was shared by other federal agencies. But it does raise the issue and requires consideration of whether the 1949 Taking Act diminished the Fort Berthold Reservation by removing the Taking Area from the reservation.

The law governing reservation diminishment is well-developed because the Supreme Court has considered a number of reservation diminishment and disestablishment cases. Most, if not all of these cases construe Surplus Lands Acts. The 1949 Taking Act is not a Surplus Lands Act. Nonetheless, the Court's analysis would likely apply to the 1949 Act.

The first principle is that Congress has plenary power over Indian affairs. It can, therefore, alter reservation boundaries, even those created by treaty. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). See also Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903). But to do so congressional intent must be clear. Yankton Sioux Tribe, 522 U.S. at 343. Congressional intent is determined by examining the face of the congressional act in question, events surrounding the act's passage, and, to a lesser degree, subsequent treatment of the land. Id. at 344. The most probative evidence, however, is the statutory language. Id.

"Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to [diminish the reservation]." Solem v. Bartlett, 465 U.S. 463, 470 (1984). In Yankton Sioux, the statutory language indicating an intent to diminish stated that the tribe would "'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands'" in the reservation. Yankton Sioux Tribe, 522 U.S. at 344. Similar language has been found sufficient to diminish a reservation and disestablish another. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 597 (1977); DeCoteau v. District County Court, 420 U.S. 425, 439 n.22 (1975).

The language in these cases is not unlike that in the Three Affiliated Tribes' 1949 Taking Act. The Act states that "all right, title and interest of said tribes . . . in and to the land constituting the Taking Area . . . shall vest in the United States . . . ." 1949 Taking Act at § 1. See also id. at § 12 (an additional payment "shall be in full satisfaction of . . . all claims, rights, demands and judgments of said tribes . . ."). This language is not exactly the same as that in the case law finding diminishment, but there is "no particular form of words" required for finding diminishment. Hagen v. Utah, 510 U.S. 399, 411 (1994). See also Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977). Indeed, in Hagen the language indicating an intent to diminish stated that "'all the unallotted lands within said reservation shall be *restored to the public domain*.'" Id. at 412. What is necessary is "language evidencing the present and total surrender of all tribal interests . . . ." Solem, 465 U.S. at 470. The 1949 Taking Act's

conveyance of "all right, title and interest" of the Three Affiliated Tribes seems to meet this standard.

If language conveying a tribe's entire interest is coupled with a provision making a sum certain payment, this "would establish a nearly conclusive presumption that the reservation had been diminished." Hagen v. Utah, 510 U.S. at 411. See also Yankton Sioux Tribe, 522 U.S. at 344 (where cession language and a sum certain payment are present an "'almost insurmountable,' presumption of diminishment arises"); DeCoteau, 420 U.S. at 445. Significantly, the 1949 Taking Act contains an unconditional commitment to compensate the Three Affiliated Tribes for the land taken. It makes a $5,105,625 payment for land taken and an additional $7,500,000 allocation to address matters inadequately covered by the $5,105,625 payment. 1949 Takings Act §§ 2, 12.[5]

Thus, the 1949 Taking Act contains the two elements that the Supreme Court has said create a "nearly conclusive" presumption of diminishment, that is, language conveying the tribe's entire interest in the land and a sum certain payment for these interests. But the 1949 Fort Berthold Taking Act was not the only act by which the United States acquired land for its dam projects on the Missouri River. Although the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 U.S.C. § 460d (1976)), authorized dams on the Missouri River, the Act did not authorize the taking of Indian property. This was done through other legislation.

Besides the 1949 Fort Berthold Taking Act there were six other takings acts involving Indian tribes. Cheyenne River Oahe Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954); Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub. L. No. 85-916, 72 Stat. 1766 (1958); Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958); Big Bend (Lower Brule) Act, Pub. L. No. 87-734, 76 Stat. 698 (1962); and the Big Bend (Crow Creek) Act, Pub. L. No. 87-735, 76 Stat. 704 (1962). Some of these takings acts have been interpreted to determine if they express an intent to diminish. But none has been found to do so.

The first case was United States v. Wounded Knee, 596 F.2d 790, 796 (8th Cir. 1979). The court found that the Big Bend (Crow Creek) Act did not diminish the Crow Creek Reservation. In Lower Brule Tribe v. South Dakota, 711 F.2d 809, 820-21 (8th Cir.

[5] The Act was contingent on consent by a majority of adult tribal members. 1949 Takings Act § 1. Consent was obtained. Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 264 (1968). The tribes obtained additional compensation in the Equitable Compensation Act of 1992, Pub. L. No. 102-575, 106 Stat. 4731 (1992), but land transfer portions of the 1992 Equitable Compensation Act were repealed in 1994. Pub. L. No. 103-211, 108 Stat. 3, 41 (1994). The land transfer issue is in litigation. Three Affiliated Tribes v. West, No. 1:94-CV-01086 (D. D.C.).

1983), the court concluded that neither the Fort Randall (Lower Brule) Act nor the Big Bend (Lower Brule) Act diminished the Lower Brule Reservation.[6]

A full analysis of these decisions is unnecessary, but I will make a few points about their value as precedent, which is questionable. First of all, language in the Taking Acts considered in Wounded Knee and Lower Brule is not the same as the language in the Fort Berthold 1949 Taking Act. For example, the Fort Randall (Lower Brule) Taking Act does not appear to have cession language. It states that payment is made to settle "all claims, rights, and demands of said tribe . . . arising out of construction of the Fort Randall Dam and Reservoir project . . . ." 72 Stat. 1773, § 1 (1958). This is the language quoted by the Eighth Circuit, Lower Brule, 711 F.2d at 819, but it is unlike the Fort Berthold Taking Act which does have cession language. The Three Affiliated Tribes conveyed "all right, title and interest" in the Taking Area. 1949 Taking Act at § 1. Another difference between the Taking Acts is that the Fort Berthold Act does not reserve any mineral interests or grazing rights, while the other Taking Acts do reserve to the tribes these interests. E.g., Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773, §§ 3, 5 (1958); Big Bend (Crow Creek) Act, Pub. L. No. 87-735, 76 Stat. 704, §§ 7, 10 (1962).[7]

In addition, the legislative history of the Missouri River Taking Acts is not the same. For example, the Eighth Circuit relied, in part, on legislative history stating that a "principal purpose" of the Big Bend (Lower Brule) Taking Act was "to provide for the improvement of the social and economic conditions of the members of the Lower Brule Sioux Tribe." Lower Brule, 712 F.2d at 817. The legislative history of the Fort Berthold Taking Act contains just the opposite kind of comments. Within it are numerous statements that inundating Indian land will cause the Three Affiliated Tribes extensive hardships. E.g., H.R. Rep. No. 81-544 at 3, 7 (1949); "Letter from the Secretary of the Interior Transmitting a Report on H.J. Res. 33 . . ." 16-17 (Ctte. on Pub. Lands Doc. No. 1, 1949) (significant disruptions will be caused to all aspects of tribal life); War Dep't Civil Functions Appropriation 1947: Hearing on H.R. 5406 Before the Subcomm. of the Sen. Comm. on Appropriations 339 (Mar. 6, 1946) (Statement of Sen. O'Mahoney) (project "will, in actual fact ruin their reservation").

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[6] In an unpublished decision a District Court found that the Cheyenne River Oahe Act did not diminish the Cheyenne River Reservation. South Dakota v. Ducheneaux, 1990 WL 605077 **11-14 (D .S.D. Aug. 21, 1990), rev'd on other grounds sub nom. South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991), rev'd, 508 U.S. 679 (1993). Though the District Court's diminishment decision wasn't appealed, the Court of Appeals, in dicta, viewed the reservation as undiminished. South Dakota v. Bourland, 949 F.2d 984, 990 (8th Cir. 1991).

[7] The Three Affiliated Tribes had its mineral rights restored in 1984 and grazing privileges granted in 1962. Pub. L. No. 98-602, 98 Stat. 3152 (1984); Pub. L. No. 87-695, 76 Stat. 594 (1962).

The jurisdictional history of the lands taken by the Acts is dissimilar. For example, in Wounded Knee the court noted that the Crow Creek Tribe "has provided the sole regulation of Indians and non-Indians within the taking area." Wounded Knee, 596 F.2d at 795. The Three Affiliated Tribes, however, does not assert jurisdiction over non-Indians on the lake. On the contrary, State Game and Fish Department wardens regularly patrol Lake Sakakawea and enforce state fishing and boating laws. Furthermore, the Department, under agreements with the Corps of Engineers, has developed and manages a number of wildlife management areas and "lake access" facilities within the Taking Area.

The Wounded Knee and Lower Brule decisions are further suspect because the Supreme Court has further developed the law of diminishment. It was not until 1984 that the Supreme Court stated that "an almost insurmountable presumption" of diminishment arises with a conveyance of all tribal interests along with the payment of a sum certain. Solem v. Bartlett, 465 U.S. 463 (1984). The Eighth Circuit did not have the benefit of this clear statement of the law when it decided Wounded Knee and Lower Brule Tribe in 1979 and 1983. Though it is now clear that the presence of a sum certain payment is integral to any diminishment argument, Wounded Knee did not even mention that the Big Bend Taking Act makes a sum certain payment to the Crow Creek Tribe.

Finally, South Dakota v. Bourland, 508 U.S. 679 (1993), casts doubt on some of the reasoning in Lower Brule. In Lower Brule the Eighth Circuit remarked that the continued "Indian control" of the Taken Area would not be inconsistent with the purposes for which the dam and reservoir were constructed. Lower Brule, 711 F.2d at 817-18, 820. It also, in an apparent attempt to distinguish the Fort Randall (Lower Brule) Taking Act from Surplus Lands Acts, noted that the land was taken for a flood control project and not for settlement by non-Indians. Id. at 820. But Bourland states that the 1944 Flood Control Act and the Taking Act there did indeed affect tribal control. Citing the "open-access mandate" of the 1944 Flood Control Act and provisions of the Taking Act, the Court found, unlike the Eighth Circuit, tribal interests in the Taken Area significantly affected. Bourland, 508 U.S. at 691-92. "[W]hen Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." Id. at 692.

In sum, I am unwilling to conclude that the Wounded Knee and Lower Brule decisions foreclose a finding that the 1949 Taking Act diminished the Fort Berthold Reservation.

Conclusion

Because the Three Affiliated Tribes' current gaming compact does not allow gaming on Lake Sakakawea, it could occur only with a compact amendment. In negotiating an

amendment, however, the Governor is prohibited by state law from negotiating one that would allow off-reservation gaming.

This restriction implicates the Tribe's request to expand its gaming operations to Lake Sakakawea because it appears that the 1949 Taking Act may have diminished the Fort Berthold Indian Reservation. In particular, the Act may have removed the Taken Area -- essentially what is today Lake Sakakawea -- from reservation status. A definitive answer to this issue, however, must await a court ruling.

Sincerely,

Wayne Stenehjem
Attorney General

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