

OFFICE OF THE CITY ATTORNEY



5850 West Glendale Avenue, Suite 450  
Glendale, Arizona 85301  
Telephone (623) 930-2930  
Fax (623) 915-2391

June 30, 2009

The Honorable Kenneth Salazar  
Secretary of the Department of Interior  
United States Department of Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Hilary Tomkins  
Solicitor of the Department of Interior  
United States Department of Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Larry EchoHawk  
Assistant Secretary for Indian Affairs  
United States Department of Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Re: Application of the Tohono O'odham Nation to take land in Glendale, Arizona into trust for gaming purposes

Dear Mr. Secretary, Mr. EchoHawk, and Ms. Tomkins:

Paula Hart, Acting Director, Office of Indian Gaming, and Allen Anspach, Western Regional Director of the BIA, will have received my letters informing them that a significant portion of the land that is the subject of the Tohono O'odham Nation's trust application is within the jurisdiction of the City of Glendale. Because this information is critical to the Department's consideration of the Tribe's trust application, I want to provide additional information about this matter.

The Tribe's trust application is based on the Gila Bend Reservation Lands Replacement Act, which requires any replacement land taken into trust be outside of a municipality's boundaries. As my prior correspondence to Secretary Salazar dated March 26, 2009 discussed, the application land does not comply with this specific provision of the Act. The clear intent of this provision is to preclude the replacement land from unduly burdening local government. Moreover, restricting the replacement land from the exterior boundaries of a municipality avoids the replacement becoming embroiled in issues associated with local governmental control and long-term land-use planning.

It is my understanding that the Tribe and the Regional BIA Office has taken a contrary position to that expressed by the City. The Tribe and BIA have errantly relied upon state law in an unjustified attempt to broaden the intended restriction of the Act. It is, however, a well founded legal principal that state law does not control the interpretation of the language of a federal act, *e.g., Hiener v. Mellon*, 304 U.S. 271, 279 (1938), nor did Congress look to state law when enacting the Gila Bend Act. Reliance on state law to interpret the

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Gila Bend Act does not address the City's legal analysis. The City did not at that time suggest that the application land had been annexed into the City. Instead, it was asserted that the land is surrounded by the City and has long been included in its statutorily-required land-use plans. It also can only be serviced by the City for water and wastewater in accordance with the existing adopted regional plan. Those planning aspects and the severe effects to the adjacent communities that would occur with the creation of an Indian reservation for gaming purposes on this commercial parcel are precisely the types of issues that Congress intended to avoid by restricting the replacement land to the exterior boundaries of municipalities. The City mentions state law only to highlight that exterior jurisdictional boundaries are recognized in Arizona law—as they are by the BIA in its policies with respect to Indian reservation boundaries; an inequity that should not be overlooked.

The City remains confident in the correctness of its analysis of the Act. Nevertheless, the City also began to review the history of the application land. It became apparent that this history was important to the trust application. A small area of the land identified in the trust application was annexed into the City in 1977. Additionally, all or portions of the application land have been twice annexed by the City. The first annexation occurred in 1998. For reasons not relevant here, that annexation was later overturned by court order, which is the only mechanism by which a final annexation can be undone.

The second annexation incorporated slightly more than 46 acres of the application land. That annexation became final on December 27, 2001. It was challenged by a lawsuit, but the plaintiff failed to prosecute that action and it was dismissed by the court *sua sponte* on October 9, 2002. To avoid delaying the annexation of other, uncontested land involved in the annexation while the challenge was pending, the City attempted to deannex the land on May 28, 2002 to begin another annexation. Arizona law, however, does not provide for deannexation by the City. As mentioned above, only a court order can overturn an annexation and none was ever issued in this instance. The City's attempted deannexation, therefore, failed and the land has been within the City's jurisdiction since December 27, 2001. This fact was recognized by unanimous vote of the Glendale City Council on June 23, 2009. A copy of the Council's action is attached.

Therefore, while the City's original analysis of the Gila Bend Act's requirements correctly precludes this application land from being taken into trust, the fact that a substantial portion of the application land has in fact been annexed into the City mandates denial of the Tribe's application. Even under the Tribe's and BIA apparent analysis, the trust application cannot be granted.

To avoid any confusion, please understand that the failure of the trust application to meet the corporate-limits requirement of the Gila Bend Act is but one of several legal issues presented by the Tribe's trust application. I have previously forwarded to you the City's Statement of Legal Position outlining the several legal issues with the Tribe's trust application. In short, the Tohono O'odham Nation's attempt to secure non-ancestral land for gaming purposes within the City of Glendale is contrary to federal law.

In addition to being legally unsupportable, the egregious nature of this trust application serves to highlight the significant public policy issues in this area. The Tribe's trust application completely eviscerates the Arizona tribes' commitments to the State and the citizens of Arizona regarding Indian gaming. It places other Arizona tribes at risk by ultimately depriving them of the benefits derived from Indian gaming. It seeks to disenfranchise completely the State and local communities from any input into this decision. It places an

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Indian reservation and Indian gaming within a residential and commercial area that has developed through the investment of hundreds of millions of public and private dollars. It is detrimental to those investments; eliminating a source of public revenue and introducing a competitor for limited consumer dollars whose business is a monopoly and claims exemption from the laws under which the other businesses must operate. It has a devastating impact on the local community; placing a gaming facility across the street from a high school—a school that opened while the Tribe silently held the land in an assumed name—and within two miles of 12,000 homes built and purchased without any anticipation that a reservation with a gaming facility would be built nearby.

Given the obvious importance of this matter to the local community, there is a reasonable expectation that the BIA would desire to engage in an intergovernmental dialog on the legal and policy issues. The City, in fact, accompanied the Gila River Indian Community to meet with the BIA and express our joint concerns and invite this type of dialog. That invitation was to no effect. The BIA chose to forego any communications with the local communities prior to publicly announcing its intention to recommend the land be taken into trust.

Although the regional BIA Office has chosen to clearly disregard the local communities, the legal and policy issues presented by the Tohono O'odham's trust application causes the City to remain absolutely resolute in its opposition. The Tribe's trust application fails in the first instance by not qualifying under the Gila Bend Act and must be denied. Should that not be found to be the case, the additional legal impediments to this trust application, in addition to the effect of this trust application on the local communities, lead to the same conclusion.

Therefore, we continue to ask for the Department to carefully review all aspects of this matter. Should you or your staff have questions, please do not hesitate to contact me at any time.

Sincerely,

A handwritten signature in black ink, appearing to read 'CDT', with a large, stylized flourish extending to the right.

Craig D. Tindall  
City Attorney

CDT:db

Enclosure