

Memorandum

To: Nathan Nogelmeier, City Administrator for the City of Fairway

From: Richard A. Cook

Re: Shawnee Indian Mission Historic Site

Date: January 9, 2023
Updated January 24, 2023

BACKGROUND

The Shawnee Tribe¹ has proposed legislation in Kansas that would convey from the State to the Tribe ownership of the Shawnee Indian Mission Historic Site (the "Site") located in Fairway, Kansas. The Site is currently owned by the State of Kansas (through the Kansas State Historical Society) and is operated by the City of Fairway with private support from the Shawnee Indian Mission Foundation. To alleviate concerns about the possibility of the Site being acquired by the Tribe for the purpose of establishing casino gaming, the Tribe has proposed that any legislation directing a conveyance of the Site to the Tribe could include a requirement or restriction that the Site may not be operated as a casino.

If fee title to the Site were conveyed to the Tribe from the State of Kansas², it is possible the Tribe could then seek to establish both civil and criminal jurisdiction over the Site by seeking to establish tribal sovereign authority under the Indian Reorganization Act ("IRA"). Furthermore, the Tribe could also seek to establish gaming operations pursuant to the Indian Gaming Regulatory Act ("IGRA"). Such actions by the Tribe could call into question the validity and/or enforceability of any legislative prohibition or private restrictions on gaming operations placed on the Site.

QUESTIONS PRESENTED

QUESTION: Can the Tribe establish tribal sovereignty by simply acquiring fee title to the Site?

BRIEF ANSWER: It is possible. Generally speaking, the Tribe cannot establish tribal sovereignty over the Site by mere acquisition of fee title to the Site³. Reunification of the fee and aboriginal title cannot serve as a basis for the Tribe to assert sovereignty over the land and extinguish Kansas's civil regulatory

¹ The United States government formally recognizes three Shawnee tribes, all of which are located in Oklahoma. For purposes of this memo, reference to the "Shawnee" or the "Tribe" refers to the Shawnee Tribe led by Chief Ben Barnes, located at 29 S. Highway 69A, Miami, Oklahoma 74354.

² Note, this memorandum focuses the potential impact of state legislative action concerning ownership of the Site. However, it is possible that the Tribe could instead seek federal legislation to gain control of the Site.

³ *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005). *Sherrill* is the controlling precedent with regard to issues of civil, rather than criminal, jurisdiction in territory that has long been understood as non-Indian, but has come to be considered Indian territory.

jurisdiction. However, once the Tribe acquires fee title, the Tribe could seek to gain sovereignty over the Site through compliance with the procedures set forth in the IRA.⁴ Under the IRA, the U.S. government may acquire non-Indian land (by voluntary transfer) and convert it to Indian land by taking the land into trust for the benefit of the Tribe. In so doing, the U.S. government partially removes the land from the jurisdiction of the state, which can make certain activities, such as casino gambling, possible on such land under the IGRA (as explained in more detail below). It also makes the land exempt from state property taxes and some other state taxes. A similar process was used to establish the 7th Street Casino in Kansas City, Kansas⁵ and the CrossWinds Casino in Park City, Kansas⁶ (both operated by the Wyandotte Tribe); and more recently, a proposed casino in Cherokee County, Kansas (to be operated by the Quapaw Tribe)⁷.

Furthermore, upon review of the Shawnee Tribe Constitution, it is clear the Tribe may seek to immediately assert a claim the Mission land as sovereign territory and thus, not subject to state and local jurisdiction. Article II of the Shawnee Constitution states as follows:

“The sovereign authority and jurisdiction of the Shawnee Tribe shall extend to all the territory now or ever known as SHAWNEE LANDS, which includes...the original Shawnee Reservation within the boundaries of the Kansas Territory, now known as the State of Kansas; all Indian lands beneficially owned by the current and future members of the Shawnee Tribe; all lands which may be acquired by the Shawnee Tribe for its land base; and all Indian Country of the Shawnee Tribe and its members as now or hereafter defined by federal law...Unless otherwise modified by Tribal Resolution or Law, the Shawnee Tribe shall exercise all inherent attributes of sovereignty, exclusive civil jurisdiction, criminal jurisdiction where applicable, and governmental powers over the lands identified in this ARTICLE II.”⁸

In addition, on August 3, 2020, the Shawnee Tribal Council passed a non-binding resolution declaring the Mission site a sacred site. In that resolution, the Tribe states, “WHEREAS, the Shawnee Tribe is imbued with all inherent attributes of sovereignty, having exclusive civil and governmental jurisdiction over its lands...” The resolution further states, “WHEREAS, the mission of the Shawnee Tribe is to exercise its unrestricted right to self-government and promote the well-being of Tribal members.” Finally, the resolution concludes, “WHEREAS, the mission of the Shawnee Tribe is to exercise its unrestricted right to self-government and promote the well-being of Tribal members.” These documents show the Tribe's intent to exercise sovereignty over all land owned by the Tribe, thereby eliminating or proscribing

⁴ Section 5 of the IRA (25 U.S.C. § 5108) authorizes the Secretary of the Interior “in his discretion” to acquire and take into trust for Indian tribes “any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.” The Secretary may take land into trust for these purposes, without the consent of the State. Similarly, Congress passed the Shawnee Tribe Status Act of 2000, Title VII of Public Law 106-568, 114 Stat. 2913 (the “Shawnee Status Act”), which affirmed the Shawnee Tribe's status as an independent tribal entity and provided for the Shawnee to have land acquired in trust for its benefit pursuant to the IRA. Shawnee Status Act, Sec. 704 and 707, 114 Stat. 2914-2916. Under the Shawnee Status Act, jurisdiction over any trust or restricted land rests with the Shawnee. Shawnee Status Act, Sec. 708, 114 Stat. 2916.

⁵ In 1984, Congress passed legislation which provided that the Secretary of the Interior take into trust real property for the benefit of the Wyandotte Nation, using funds reserved by Congress. In 1996, the Wyandotte Nation purchased a property in Kansas City, Kansas, and the tract was placed into trust for the benefit of the Wyandotte Nation. Today, the land is still held in trust, with sovereign status, and the Wyandotte Nation operates the 7th Street Casino on this tract.

⁶ <https://www.knuw.org/business/2021-03-02/despite-state-lawsuit-new-tribal-casino-opens-in-park-city>

⁷ https://www.koamnewsnow.com/news/downstream-casino-to-expand-into-choke-county-ks/article_cc0e1494-8356-544d-ba94-f964b6082e39.html

⁸ See [https://shawnee.municipalcodeonline.com/book?type=Laws#name=CONSTITUTION_\(Rev_2022\)](https://shawnee.municipalcodeonline.com/book?type=Laws#name=CONSTITUTION_(Rev_2022))

any civil and most criminal jurisdiction of state and local authorities (as explained in further detail below).⁹

QUESTION: If the Shawnee Tribe does acquire fee title to the Site and does establish sovereignty under the IRA, what is the impact on state and local jurisdiction over the Site?

BRIEF ANSWER: If the Tribe seeks to acquire the Site pursuant to the IRA, it is possible that both civil and criminal State and local jurisdiction could be extinguished. However, it is more likely that the Kansas and federal governments would have concurrent criminal jurisdiction for crimes committed by non-Indians against Indians at the Site.¹⁰

QUESTION: Can the Tribe operate a casino on the Site through the IGRA?

BRIEF ANSWER: If the Site is placed into trust for the Tribe and the Tribe desires to operate a casino thereon, then IGRA would apply.¹¹ IGRA establishes the jurisdictional framework that governs Indian gaming. It establishes permissions, prohibitions, and a process for the establishment of tribal gaming operations on tribal land. Gaming can only be authorized on "Indian Lands"—i.e., lands within the boundaries of a reservation or land taken into trust by the federal government for a tribe.¹² If the Tribe were to obtain federal approval for casino operations under IGRA, the State may be precluded from enforcing some state regulatory laws related to casino gaming.

QUESTION: Would a deed restriction or restrictive covenant prohibiting use of the Site be an effective private mechanism for limiting use of the Site for gaming operations?

BRIEF ANSWER: No. A private use restriction or restrictive covenant prohibiting casino gaming on the Site would not guarantee the Site could not be used for gaming. A private use restriction is an interest in real property. As such, the restriction could be extinguished by exercise of eminent domain by the Tribal government. As sovereign nations, Indian tribes may take private property without consent provided just compensation is paid to the owner.¹³ A restrictive covenant is an interest in real property and, similar to any other interest in real property, such as fee title, an easement or a lease, may be taken through the exercise of eminent domain. In addition, any attempt to enforce a private restrictive covenant could introduce complicated choice of law issues (federal, state or tribal law) and enforcement challenges (i.e., in general, courts strictly construe restrictive covenants in favor of the free, unrestricted use of the land). Furthermore, enforcement of any such restriction could be a challenge as the applicable law (state or tribal law) and the proper venue for any lawsuit to enforce the use restriction (federal, state or tribal court) would be at issue.

RAC:jea

⁹ Land reserved for a tribe, pursuant to a treaty, which has not been diminished or disestablished, qualifies as Indian country within the meaning of the Indian Gaming Regulatory Act (IGRA). *Cayuga Nation v. Tanner*, 6 F.4th 361, 378 (2021) (interpreting *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020))

¹⁰ See *Oklahoma v. Castro-Huerta*, No. 21-429, 2022 WL 2334307 (2022).

¹¹ IGRA contains a prohibition on gaming on land taken into trust after 1988 (25 U.S.C. § 2719); however, the prohibition does not apply for any tribe that did not have its own reservation on October 17, 1988 and "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." The Tribe does not have a reservation in its current state of Oklahoma (the Tribe was not federally recognized in its own right until 2000). As such, this prohibition under IGRA would not apply in the case of a conveyance to the Tribe.

¹² 25 U.S.C. § 2703(4).

¹³ *Dennison v. Tucson Gas and Electric Co.*, No. A-CV-12-74 (Navajo Nation Ct. App., Dec. 23, 1974). 2 ILR 52 #4