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Neutral Testimony on Senate Bill 405

**Presented to the House Committee on Federal and State Affairs
By Steve Phillips, Assistant Attorney General**

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Chair Barker and Members of the Committee:

The Office of the Attorney General offers the following neutral testimony in regard to Senate Bill 405. The OAG respectfully submits that SB405 needs further study.

SB405 authorizes the State Historical Society to deed to the Shawnee Tribe which resides in Oklahoma the historical "Shawnee Indian Cemetery" located in Johnson County. Our concern is that transfer of this cemetery to the Shawnee Tribe could open the door for further casinos on the site or nearby pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

IGRA establishes the jurisdictional framework that governs Indian gaming. It establishes permissions, prohibitions, and a process. The National Indian Gaming Commission (NIGC) authorizes gaming under IGRA. IGRA is complex, and at the risk of oversimplifying, regulated gaming (Class 2 and 3) gaming can only be authorized on "Indian Lands" meaning lands within the boundaries of a reservation or land taken into trust by the federal government for a tribe. 25 USC 2703(4).

IGRA contains a general prohibition on gaming on land taken into trust after 1988. 25 USC 2703. The prohibition does not apply, however, if "the Indian tribe has no 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."

It is our understanding that the Shawnee Tribe does not have a reservation in its current state of Oklahoma.¹ The Shawnee Tribe was not federally recognized in its own right until 2000.

If the cemetery were transferred to the Shawnee Tribe, it is possible or even likely that the Bureau of Indian Affairs/Department of Interior would take the land into trust for the Shawnee Tribe pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* Then the risk is

¹ <https://www.okhistory.org/publications/enc/entry.php?entry=SH019>

that by virtue of having land in trust in Kansas, the Shawnee Tribe would be deemed to be located in Kansas and the NIGC could authorize gaming on the land. This is essentially how the Quapaw Tribe of Oklahoma gained NIGC permission to game on land it acquired in trust in Cherokee County.

So the question remains whether the cemetery is located on what would be deemed to be the Shawnee Tribe's last recognized reservation in Kansas. This is a question what we are unable to answer, but from the cursory inspection of two web sites concerning the cemetery and historical maps, it appears it is on historical Shawnee lands in Kansas.

The status of the land being a cemetery would not necessarily preclude application for a casino on the site. Before the Wyandotte Tribe acquired the Shriner Tract next to the Huron Cemetery in Kansas City, Kansas, at one point they proposed putting an elevated casino over the Huron Cemetery.

Even if the cemetery was not itself a candidate for a casino, trust status of the cemetery might allow the Shawnee Tribe to have additional land adjacent or near to the cemetery put into trust under the Indian Reorganization Act if the Tribe were to purchase such land and the BIA were to deem the cemetery itself a "reservation." (The BIA's interpretation of the Indian Reorganization Act favors grants of trust status to land contiguous with or near reservations.)

Given the legal uncertainty surrounding such a transfer, the OAG suggests that the cemetery not be transferred until further research can be done.

Thank you for your consideration.

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