MEMORAMDUM
>
> To: Assistant Secretary Indian Affairs
>
> From: Associate Solicitor, Division of Indian Affairs
>
> Date: December 5, 2001
>
> Subject: Confederated Tribes of Coos, Lower Umpqua &
> Siuslaw Indians v. Babbitt, 116 F.Supp.2d 155 (D.D.C. 2000) in regard
> to proposed gaming on the Hatch Tract in Lane County, Oregon.
>
> Introduction
>
> This memorandum is in response to the above referenced
> decision in Confederated Tribes in which the court remanded this case
> to the Department for further consideration of the Department¹s
> interpretation of 25 U.S.C. § 2719(b)(1)(B)(iii). Section
> 2719(b)(1)(B)(iii) exempts land taken into trust as part of ³the
> restoration of lands for an Indian tribe that is restored to Federal
> recognition.² This section is part of an overall statutory scheme set
> forth in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et. seq.
> (IGRA), that prohibits gaming on land acquired into trust after
> October 17, 1988 unless certain exemptions are met.
>
> We have carefully reviewed the Administrative Record in
> Confederated Tribes, the court¹s opinion, and additional materials
> submitted by counsel for the Tribes. In addition, we have taken into
> consideration the decision issued on August 31, 2001 by the National
> Indian Gaming Commission
> (NIGC) to Judge Hillman entitled ³Whether the Turtle Creek Casino site that is
> held in trust by the United States for the benefit of the Grand Traverse Band
> of Ottawa and Chippewa Indians is exempt from the Indian Gaming Regulatory
> Act¹s general prohibition on lands acquired after October 17, 1988.² (GTB
> Decision).
>
> After careful consideration, we conclude that the Hatch
> Tract falls within the requirements of § 2719(b)(1)(B)(iii), the
> restored lands exception to the prohibition to gaming on lands
> acquired after October 17, 1988. It must be noted, however, that this
> opinion will only address the unique factual and legal circumstances
> related to the Confederated Tribes.
>
> Background
>
> On October 19, 1999, Solicitor John Leshy issued an
> opinion regarding whether the ³Hatch Tract is exempt from the general
> prohibition against gaming on land acquired into trust after October
> 17, 1988, as set forth in the Indian Gaming Regulatory Act, 25 U.S.C.
> §§ 2702 et. seq. (IGRA).² At issue here are two tracts of land the
> Hatch Tract and the Peterman Tract. The Peterman tract is a
> contiguous driveway to the Hatch tract. [1] Congress, in 1998, added
> the Peterman tract to the Tribe¹s statutory reservation. The
> Department took the Hatch tract into trust for the tribes in 1998.
>

> In the 1999 opinion, we examined two exceptions to IGRA¹s
> requirement for a two-part determination and the Governor¹s
> concurrence for off-reservation gaming. The two exceptions we
> analyzed were the restored lands for restored tribes and the
> contiguous land exception.[2] We found that the Hatch Tract met
> neither exception. In the opinion the Solicitor
> concluded:
>
> We believe that ³restored lands² under section 20(b)(1)(B)(iii)
> include only those lands that are available to a restored tribe as
> part of its restoration to federal recognition. The statue that
> restores the Tribe¹s Federal recognition status must also provided for
> the restoration of land, and the particular parcel in question must
> fall within the terms of the land restoration provision. Here, the
> Confederated Tribes were restored to Federal recognition pursuant to
> their Restoration Act of 1984 and Congress specifically described the
> parcels to be acquired. The only lands which constitute :restored:
> lands for the Confederate Tribes are those parcels in section 7.
>
> October 19, 1999 Memorandum from the Solicitor to the Assistant
> Secretary Indian Affairs at 3.
>
> On September 24, 1999, the Tribes filed suit in the U.S.
> District Court for the District of Columbia challenging the
> Department¹s decision to deny certification for the Hatch Tract.[3]
> The parties thereafter filed cross-motions for summary judgment.
>
> On September 29, 2000, the court ruled in the Department¹s
> favor on three of four claims. However, the district court also ruled
> that the Department had adopted an unduly narrow interpretation of the
> ³restored lands² exception in § 2719(b)(1)(B)(iii) and remanded that
> single issue for further administrative review. Confederated Tribes
> of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F.Supp.2d 155
> (D.D.C. 2000).
>
> In pertinent part, the court disagreed that the technical meaning of
> the term ³restoration of lands² included only those lands were
> available to a restored tribe as part of its legislative restoration
> to Federal recognition by Congress. Instead, the court found that the
> plain meaning of ³restoration of lands² could be construed as those
> lands that place a tribe back its position prior to termination. Id.
> at 163. The court also found that the Department¹s requirement for
> specific legislative direction regarding restored lands sought ³to
> graft procedural and temporal limitation onto section
> 2719(b)(1)(B)(iii).² Id. The court also rejected our argument that
> giving the statutory language this plain, broad, reading would result
> in opening the door to permitting gaming on any after-acquired tribal
> lands. Id. Given the various possible meanings of the section, the
> court concluded that we had applied ³an unduly restrictive analysis²
> and that we should consider on remand the application of the
> Indian-favoring canons of construction and the particular factual
> circumstances surrounding the Hatch Tract. Id. However, the court
> did agree with Judge Hillman in Grand Traverse Band of Ottawa and Chippewa Indians v.
United States Attorney, 46 F. Supp.2d 689 (W.D. Mich.
> 1999) that ³the term Œrestoration¹ may be read in numerous ways to place
> belatedly restored tribes in a comparable position to earlier recognized

> tribes while simultaneously limiting after-acquired property in some
> fashion.² Id. at 164, quoting Grand Traverse at 700.
>
> Legal Analysis
>
> Lands that are taken into trust as part of the
> ³restoration of lands for an Indian tribe that is restored to Federal
> recognition² are exempt from the prohibition against gaming on lands
> acquired into trust after October 17, 1988. 25 U.S.C. §
> 2719(b)(1)(B)(iii). This section requires a two-pronged analysis.
> First, the tribe must be ³restored² within the meaning of IGRA.
> Second, the land to be acquired must be ³restored² within the meaning
> of IGRA.
>
> At issue here is the Department¹s interpretation of
> ³restored² as applied to land in the context of 25 U.S.C. §
> 2719(b)(1)(B)(iii). Two district courts have opined that the
> Department¹s interpretation of this subsection is too narrow. The
> court in Confederated Tribes found that the Department failed to apply
> the canons of construction that ³statutes are to be construed
> liberally in favor of the Indians, with ambiguous provisions
> interpreted to their benefit.² Id. at 158, citing Muscogee (Creek)
> Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (further internal citations
> omitted.)
>
> The Department has issued several opinions regarding the
> application of § 2719(b)(1)(B)(iii) to specific facts.[4] Since that
> time two courts and the NIGC have issued decisions analyzing the
> restored lands exception. In addition, none of the Department¹s
> previous opinions have included an analysis of the Indian canons of
> construction. In this opinion, we will re-examine our interpretation
> of IGRA in light of the foregoing. By applying the Indian canons of
> construction along with the Department¹s expertise in interpreting the
> statute it is charged with implementing, we find that the Hatch Tract
> constitutes restored lands.
>
> 1. The restored lands exception within §
> 2719(b)(1)(B)(iii) is ambiguous.
>
> Before reaching any of the canons of construction, we must
> decide whether ³the restoration of lands for an Indian tribe that is
> restored to Federal recognition² is ambiguous. If ³Congress has
> directly spoken to the precise question at issue,² then the Department
> must yield to the plain meaning of the text. Chevron U.S.A. Inc. v.
> Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).
> However, if the provision is ambiguous, then the Department can apply
> the Indian canons of construction as well as our expertise in
> interpreting IGRA, to determine the proper application of the restored
> lands provision.[5]
>
> In Confederated Tribes the court found that §
> 2719(b)(1)(B)(iii) is ambiguous.[6] The court found that ³part of the
> ambiguity of the provision stems from the use of the phrase: ³that is
> restored to federal recognition.² Id. at 162. The court opined that
> the question boils down to whether the word ³restored² in the phrase
> ³Indian tribe that is restored² is intended as a verb (that is, the

> activity of restoring, in which case the timing should be limited to
> the congressional action) or as a noun (sic.) (that is, the state of
> being restored, in which case the timing should extend to completion
> of the land restoration process whether through later legislative or
> administrative action). Id. Thus the court found that ³the varying
> possibilities highlight the ambiguity of § 2719(b)(1)(B)(iii).² Id.
>
> The courts in both Confederated Tribes and Grand Traverse
> Band found that the terms ³restore² has no independent legal
> significance in either IGRA or in other Acts. Confederated at 162-163
> and Grand Traverse at 696. Nor does the plain meaning resolve the
> matter. Merriam-Webster¹s Collegiate Dictionary at 999 (10th ed.
> 1999) (the word restored is generally understood as ³to bring back to
> or put back into a former or original state²). The Grand Traverse
> court held that the language of the ³restoration of lands² exception
> ³implies a process rather than a specific transaction, and most
> assuredly does not limit restoration to a single event.² Id. at 701. As explained by the
> court: ³Congressional use of the words appears to have occurred in a
> descriptive sense only, in conjunction with action taken by Congress to
> accomplish a purpose consistent with the ordinary meaning of the words. In no
> sense has a proprietary use of Œrestore¹ or Œrestoration¹ been shown to have
> occurred.² Id. at 698.
>
> Thus, we believe that § 2719(b)(1)(B)(iii) is ambiguous
> and has no independent specific legal significance.[7]
>
> 2. Indian Canon of Construction
>
> The Indian canons of construction provide that ³statutes are to be
> construed liberally in favor of the Indians, with ambiguous provisions
> interpreted to their benefit Š² Montana v. Blackfeet Tribe of
> Indians, 471 U.S. 759, 766 (1985). This cannon is rooted in the
> unique trust relationship between the United States and Indian tribes,
> and Congress¹s obligation to act on behalf of these ³dependent and
> sometimes exploited Indian nations.² Albuquerque Indian Rights v.
> Lujan, 930 F.2d 49, 58 (D.C. Cir. 1991) (citing Seminole Nation v.
> United States, 316 U.S. 286, 296-97 (1942).[8] In the D.C. Circuit,
> where this case is being litigated, the Court in Coos cited Muscogee
> (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988) which
> provides that ³statutes are to be construed liberally in favor of the
> Indians, with ambiguous provisions interpreted to their benefit.² Id.
> at 1444-45, Coos at 116 F.Supp.2d 155, 157.
>
> 3. Department¹s interpretation of §
> 2719(b)(1)(B)(iii)
>
> Both the court in Confederated Tribes and Grand Traverse applied the
> dictionary definition to ³restored.² Confederated Tribes at 162,
> Grand Traverse at 696. The dictionary definition of ³restore² is:
> (1) to give back (as something lost or taken away):return . . . 2: to
> put or bring back (as into existence or use) . . . 3: to bring back
> or put back into former or original state . . . . Webster¹s Third New
> International Dictionary, p. 1936 (G. & C. Merriam Co. 1976).
>
> We believe, however, that to apply dictionary definition to the
> restored land provision without temporal or geographic limitations

> would give restored tribes an unintended advantage over tribes who are
> bound to the limitations in IGRA that prohibit gaming on lands
> acquired after October 17, 1988. Moreover, we believe that, in
> examining the overall statutory scheme of IGRA, Congress intended some
> limitations on gaming on restored lands.
>
> Because there is no legislative history regarding § 2719, one must
> look elsewhere to glean some indication of the Congress¹ view
> regarding off-reservation gaming. IGRA was enacted in the wake of
> California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)
> which held that the State of California had no authority under Public
> Law 280 to enforce its bingo and card game statues on Indian
> reservations because such laws are regulatory and not prohibitory.
> For three years prior to that decision, bills had been introduced in
> Congress aimed at regulating gaming on Indian reservations. None of
> these bills passed because no agreement could be reached on the kinds
> of games tribes should be permitted to operate.
>
> Congress did hear testimony as part of the previously failed bills.
> Rep. Bereuter of Nebraska, who had introduced one of the failed bills,
> testified that he did not believe that it was ³good public policy² to
> establish Indian gaming operations on lands that were not contiguous
> to a reservation against the wishes of the directly affected political
> subdivisions. Indian Gambling Control Act, Part II, Hearings before
> the House Interior and Insular Affairs Committee, 99th Cong., 1st
> Sess. 20, 21 (1985) (H.R. 3130 Testimony.) Rep. Bereuter considered
> it inappropriate for the Secretary to put new lands into trust for
> gaming because to do so would circumvent State law enforcement and
> result in lost revenues to State and local governments. Id. Thus,
> when IGRA was introduced, it was with a backdrop of political pressure
> to limit off-reservation gambling without the concurrence of directly
> affected political subdivisions. It must be noted, however, that as
> enacted IGRA differed from previous bills.
>
> As one compelling manifestation of the prevailing congressional will,
> the enacted § 2719 includes a requirement that gaming on most
> off-reservation, newly acquired lands must be subjected to the
> two-part determination if § 2719(b)(1)(A), i.e., the Department must
> find that gaming on newly acquired land is in the best interest of the
> tribe and its members and not detrimental to the surrounding
> community, and then the tribe must receive the Governor¹s concurrence.
> As with the previous failed bills, Congress intended to give the
> Department and the local political community a voice in deciding
> whether to allow gaming. More importantly, it gave the Governor of
> the State a veto. However, unlike the failed Indian gaming bills, IGRA
> contains exceptions to this provision.
>
> Section 2719(b)(1)(B) contains three exceptions to the high political
> hurdle of a Governor¹s veto.[9] These three exceptions are: (i) the
> settlement of a land claim; (ii) the initial reservation of an Indian
> tribe acknowledged by the Secretary under the Federal acknowledgment
> process;[10] and (iii) the restoration of lands for and Indian tribe
> that is restored to Federal recognition. Clearly, one compelling
> reason for providing such exemptions is to provide all tribes with at
> least one opportunity for the economic advantages of gaming without
> having to seek the Governor¹s concurrence. If Congress had limited

> gaming on lands within known reservation boundaries, then newly
> acknowledged tribes or tribes that settled land claims would have been
> denied the opportunities that IGRA provides.
>
> In enacting the restored lands for restored tribes exception, Congress
> could have enacted an exception for tribes that had been
> congressionally or legislatively recognized. Moreover, it could have
> limited the definition of restored lands to former reservation
> boundaries as it did in § 2719(a)(2)(A)(ii). Congress did neither.
> Instead it enacted a broad, albeit ambiguous section, that exempts
> restored lands for restored tribes.
>
> However, because IGRA provides certain temporal (i.e., the October 17,
> 1988 limitation for reservation boundaries) and geographic limitations
> (i.e., land within or contiguous to the tribe¹s reservation) we cannot
> view § 2719(b)(1)(B)(iii) to allow gaming on after-acquired lands with
> no limitations. Consequently, we do not use a dictionary definition
> of restored to include all land ³restored.² It also seems clear that
> restored land does not mean any aboriginal land that the restored
> tribe ever occupied. Tribes that were not terminated and thereby not
> capable of being ³restored,² lost vast amount of land and were forced
> to move all over the country such that their reservations on October
> 17, 1988, are vastly different than their aboriginal land.
>
> We agree with Judge Hillman¹s finding in Grand Traverse that §
> 2719(b)(1)(B)(iii) could be read ³in numerous ways to place belatedly
> restored tribes in a comparable position to earlier recognized tribes
> while simultaneously limiting after-acquired property in some
> fashion.² Grand Traverse at 700. However, because this opinion is
> related solely to the Confederated Tribes, we will not opine as to the
> possible temporal or geographic or other limitations of the restored
> land subsection.[11]
>
> Further, applying the Indian canons of construction to
> assist us in determining the scope of § 2719(b)(1)(B)(iii) means not
> only that we may draw all applicable inferences in favor of the
> Tribes, but also that we should not apply the canon such that it
> benefits a certain group of tribes to the disadvantage of other
> tribes. Confederated Tribes of Chehalis v. State of Washington, 96
> F.2d 334 (9th Cir. 1996).[12]
>
> Analysis of Hatch Tract
>
> The Tribes of Coos, Lower Umpqua & Siuslaw Indians (now
> the ³Confederated Tribes²) were terminated by the Western Oregon
> Termination Act of 1954. Congress restored the Confederated Tribes on
> October 17, 1984, 25 U.S.C. § 714 et seq. (1998).
>
> 1. Background of the acquisition of the Hatch Tract
>
> The Department took the Hatch Tract into trust in January
> 1998.[13] The tract is about 98 acres and is the site of a former
> Siuslaw village and its adjacent to an important Indian cemetery which
> contains the remains of tribal ancestors.
>
> After the court¹s ruling, the Tribes supplemented the

> record with ³The Hatch Tract: A Traditional Siuslaw Village Within
> the Siletz Reservation, 1855-75.² December 4, 2000, Dr. Stephen Dow
> Beckham (³Beckham Supplemental Report²). In his report, Dr. Beckham
> writes:
>
> The Hatch tract was first identified as a ³Suislaw Village² by Capt.
> John F. Reynolds of the U.S. Army in July 1856. The site, known as
> Ka¹aich, was the location of the ceremonial lodge of the Earth Lodge
> Cult, a version of the Ghost Dance, in 1877. A part of the Ka¹aich
> was issued to Jesse Martin, a Coos Indian, as an allotment in 1892,
> pursuant to the allotment agreement with the Indians of the Siletz
> Reservation resolved that year. Another portion of the Ka¹aich, the
> site of the tribal cemetery, was allotted to Tom Johnson, a Lower
> Umpqua India. These are non-taxed Indian properties. The heirs Jesse
> Martin¹s granddaughter, Hattie (Martin) Hatch, sold that allotment to
> the Confederated Tribes in 1995. The heir of Tom Johnson, Elizabeth
> Anne (Macy) Campbell, a tribal member, retains a portion of that
> non-taxed allotment, including the tribal cemetery. The Peterman
> tract, another portion of the Tom Johnson allotment, was deeded to the
> United States in 1947 to provide a right-of-way into the tribal
> cemetery. The Bureau of Indian Affairs affirmed the trust status of
> the Peterman tract in 1997.
>
> Id. at page ³i²
>
> Dr. Beckham¹s report finds that in 1859 the Coos and Lower
> Umpqua wanted to remain where they were located instead of moving to
> the newly created Siletz Reservation. Id. at 9-13.
>
> In March 1998, the attorney for the Confederated tribes
> wrote to the Portland Area Director discussing the history of the
> acquisition of the Hatch Tract and the tract itself.
>
> According to counsel for the Confederated Tribes, sometime
> in 1996 the Tribes began to search for a site for a gaming operation
> with the assistance of its counsel, Mr. Whittlesey, and tribal
> historian Dr. Beckham. Dr. Beckham and Mr. Whittlesey considered
> on-reservation gaming in the Empire section of Coos Bay, Oregon.
> However, the Coquille Tribe operated a close-by casino in North Bend.
> In March 1998 counsel for the Confederated Tribes wrote of the Hatch
> Tract:
>
> Independent of the project being handled by Dr. Beckham and me, the
> Confederated Tribes were given the opportunity to acquire the Hatch
> Tract approximately two years ago. This tract was a public domain
> allotment which was deeded to the ancestor of a tribal member and
> which had never been on the Oregon or Lane County tax rolls. The
> tract was adjacent to the old Indian cemetery just east of Florence in
> Lane County, and more importantly, was known to encompass the site of
> an old Siuslaw Indian village.
>
> The land was owned by the heirs of Hattie Hatch and had been occupied
> until only a few years ago by a tribal member who had recently died.
> The family had a desire to see the site transferred to tribal
> ownership and the price agreed upon was considered very attractive
> from the Confederated Tribes¹ viewpoint. (The land was acquired and

> accepted into trust for the Confederated Tribes in early March 1998.)
>
> March 23, 1998 Letter to Stan Speaks, Portland Area Director, BIA from
> Dennis J. Whittlesey.
>
> The Hatch Tract was taken into trust for historical,
> cultural, and economic self-sufficiency. At the time of the land
> being taken into trust, the tribes were not considering it for gaming
> purposes.[14] The Tribes decided to focus on the Hatch tract for its
> planned gaming operation because they were concerned that two casinos
> could not be operated at a profit in the Coos Bay area and the
> Coquille casino was already established. The Confederated Tribes
> wanted to maximize their economic development opportunities.
>
> 2. Historical significance of the Hatch Tract to the
> Confederated Tribes
>
> As part of the previous litigation, the Tribes submitted
> an affidavit from its historian, Dr. Stephen Dow Beckham. Dr. Beckham
> is a Professor of History at Lewis & Clark College in Portland,
> Oregon. In addition, as previously noted, the Tribes supplemented the
> record with the Beckham Supplemental Report.
>
> According to Dr. Beckham¹s Affidavit, the Hatch tract is
> historically significant to the Confederated Tribes. Dr. Beckham
> testifies in his affidavit:
>
> I have also researched the Hatch Tract at the western side of the
> confluence of the North Fork with the main Siuslaw River, land lying
> in Sections 25 and 26. This property was confirmed in July 1856, by
> Captain John F. Reynolds of the U.S. Army as the site of a large
> Indian village and was so denominated on his map of a reconnaissance
> from Umpqua River to Cape Perpetua. In 1892, Jesse Martin, a Coos
> Indian, secured this property as Fourth Section Allotment under the
> provisions of the General Allotment Act of 1887. The land passed
> successively to his son, Ike Martin, and his granddaughter, Hattie
> (Martin) Hatch. In 1997 the heirs of Hattie Hatch own(ed) the
> allotment. The land is deemed ³non-taxed Indian land² by Lane County
> and there is no record that his land has ever left Indian tenure or
> been subject of taxation.
>
> December 17, 1997 Affidavit of Stephen Dow Beckman.
>
> The Beckham Supplemental Report reinforces that the Hatch
> Tract was the site of an aboriginal village. In addition, the report
> shows that the Hatch Tract was within the boundaries of the Siletz
> reservation created on November 5, 1855 by President Franklin Pierce.
> Also, the Hatch Tract remained within the reservation boundaries when
> it was reduced by Executive Order in December 20, 1865. Id. (Recall
> that in 1862 the Coos, Lower, Umpqua, and Siuslaw Indians were removed
> to the Siletz Reservation. Id. at 9-13.)
>
> Also, the Peterman Tract is contiguous to the Hatch Tract.
> While the court agreed with the Department¹s view that the Peterman
> Tract was not part of the reservation as of October 17, 1988, the
> history of the Peterman tract sheds light on the history of the Hatch

> Tract. In the Administrative Record is the Bill of Sale dated June
> 24, 1944. A.R. 00128. This Bill of Sale for Allotment No. 113 which
> was owned by Mr. Johnson. This bill of sale reserves 12 acres of the
> Allotment for use as ³Indian burial and cemetery ground.² Id. In
> 1945 the Superintendent wrote to the Commissioner of Indian Affairs
> that ³we do not see how we can keep faith with the Indians of the
> area, who from time immemorial have used this land for burial grounds,
> if we do not see that an instrument is executed at the time of the
> sale to insure them of the continued use of their cemetery.² A.R.
> 00138. The remaining portions of the Allotment were sold. Id.
>
> Thus, near the time of termination, the BIA recognized the
> significance of the cemetery site and reserved it and a right-of way
> to it. In addition, in 1943, the Grand Ronde-Siletz Agency reported in
> its fiscal year report that ³a second community building should be
> built for the Indian people centered around the town of Florence.
> There are about fifteen families in this area. However, suitable land
> for the construction of such a community building must first be made
> available.² Id. at 00121.
>
> In addition, on October 14, 1998, Congress amended the
> Restoration Act through a technical correction bill. Pub. L. No.
> 105-256. This bill added the Peterman tract to section 7, the
> Establishment of the Reservation. Id. § 5. However, this bill did not
> add the Hatch Tract.
>
> 3. Hatch Tract is restored land
>
> At issue is whether the Hatch Tract meets the exception
> found in § 2719(b)(1(B)(iii) for restored lands for restored tribes.
> There is no question that the Confederated Tribes are a restored
> tribe. The only question here is whether the Hatch Tract constitutes
> ³restored lands.²
>
> We agree with NIGC¹s interpretation in its GTB Decision
> that:
>
> Congress likely did not intend to substantially undercut the general
> prohibition on gaming on lands acquired after IGRA¹s passage.
> Although Congress did not limit the definition of restored lands to
> former reservation boundaries as it did, for example, in section
> 2719(a)(2)(B), we believe the phrase ³restoration of lands² is a
> difficult hurdle and may not necessarily be extended, for example, to
> any lands that the tribe conceivably once occupied throughout its
> history.
>
> Id. at 15.
>
> The Confederated Tribes were restored by Congress to
> Federal recognition in 1984, well before IGRA was enacted. The
> Restoration Act established a reservation for the Tribes, see § 713f
> and § 714e. However, since this was prior to the passage of IGRA, the
> Tribes¹ future economic development. The court in the Coos decision
> found that Department¹s requirement for specific legislative direction
> regarding restored lands sought ³to graft a procedural and temporal

> limitation onto section 2719(b)(1)(B)(iii).[2] Id. Thus, we believe
> that it is a reasonable interpretation that since the Restoration Act
> was passed prior to the passage of IGRA, that the land identified in
> the Restoration Act may not be the only land that meets the restored
> lands provision.[15]
>
> Congress, in restoring the Tribes, also wanted to make
> sure that the boundaries of the reservation did not limit who would
> receive Federal services. The Restoration Act included a provision
> for services for members of the Confederated Tribes located in several
> counties. The Act provides
> that:
>
> Notwithstanding any provision to the contrary in any law establishing
> such services and benefits, eligibility of the Tribe and its members
> for such Federal services and benefits shall become effective upon
> passage of this subchapter without regard to the existence of a
> reservation for the Tribe or the residence of the members of the Tribe
> on a reservation for such members who reside in the following counties
> or Oregon: Coos, Lane, Lincoln, Douglas, and Curry.
>
> 25 U.S.C. § 714a. Thus members living on the Hatch tract, located in
> Lane County, were eligible for Federal services.
>
> The next question is whether there is a temporal and/or a
> geographic nexus between the restoration of the Confederated Tribes
> and the Hatch Tract. We believe that the land has a geographic nexus
> to the Tribes. We do not believe that the Tribes are seeking to game
> on far-flung land. Another consideration is that the tract was a
> public domain allotment which was deeded to the ancestor of a tribal
> member and which has never been on Oregon or Lane County tax rolls.
> The local community has known for years that this land is closely tied
> to the Tribes. There is also a modern nexus under the Restoration Act
> because the member, Hattie Hatch who occupied the land until her
> death, was eligible for services since she lived in the [3]service area[2]
> defined by 25 U.S.C. § 714a.
>
> Moreover, Congress believes that land contiguous to the
> Hatch Tract, the Peterson Tract, should be part of the Tribes[1]
> reservation. While it could be argued that since Congress only
> restored the Peterson Tract, it suggests that Congress did not intend
> the Hatch Tract to be considered restored lands we have no indication
> that Congress ever considered and decided against the Hatch Tract as
> part of its technical amendments. Therefore, even if the technical
> amendment was intended only as a clear indication of Congressional
> intent that the Federal government should view the Peterson Tract as
> restored lands, it does not preclude the conclusion that the Hatch
> Tract is restored land especially when viewed in light of weight of
> the other significant evidence.
>
> Also, we find it significant that near the time of
> termination the Tribes had a presence in the area and the BIA was
> considering building community buildings. While we cannot say that
> this land would have been part of the Tribes[1] land base had it not
> been terminated, it does appear that it meets the geographic
> limitations we believe are implicit in a reasonable interpretation of

> § 2719(b)(1)(B)(iii).
>
> For the temporal nexus, the Tribes were restored in 1984
> and the Hatch Tract was taken into trust in 1998. The acquisition of
> the lands into trust 14 years after the Tribes[1] restoration is a
> significant period of time. In considering whether this is a
> sufficient temporal nexus, however, several factors must be
> considered.
>
> One consideration is that Congress allowed 14 years to
> elapse before restoring the Peterson Tract o the Tribe. Thus, in this
> particular instance, without some relevant attenuation, the mere
> passage of time should not be determinative. Also, it is not improper
> for the Department to take account of the practical effect of the
> passage of the restored lands exception. For instance, it will often
> be the case that newly restored tribes will, out of practical
> necessity, take some time to acquire land.[16] The Department
> recognizes, as Congress surely did, that newly restored tribes do not
> have readily available funds for land acquisition, that land is not
> always available, and the process of land acquisition is time
> consuming. Another consideration is that the Tribes acquired the land
> as soon as it was available upon the death of the owner. Thus, the
> Tribes quickly acquired the land as soon as it was available and
> within a reasonable amount of time after being restored.[17]
>
> Based on all of the foregoing, we believe that it is a
> reasonable interpretation of 25 U.S.C. § 2719(b)(1)(B)(iii) that the
> Hatch Tract constitutes restored lands for a restored tribe.
>
> Conclusion
>
> We have considered the fact that the Confederated Tribes
> were recognized before IGRA was enacted and that it is seeking to game
> on land which has been historically tied to the Tribes and has a close
> geographic proximity to the Tribes. Thus, applying the Indian canons
> of construction and our expertise in IGRA we find that the Hatch Tract
> is restored land.
>
>
> ---
> --
>
> [1] See attached map.
>
>
> [2] The court rejected Confederated Tribes[1] alternative argument that
> the Hatch Tract qualified for the exception for lands contiguous to
> the boundaries of the reservation on October 17, 1988. The court did
> not remand this issue to the Department; therefore, we have no need to
> address it in this opinion.
>
>
> [3] The Tribes[1] complaint raised four claims for relief under the APA:
> (1) the Hatch Tract qualifies for gaming under § 2719(a)(1)
> (contiguous lands);
> (2) the Hatch Tract qualifies for gaming under § 2719(b)(1)(B)(iii) (restored

> lands for restored tribes); (3) the Assistant Secretary¹s decision deviated
> from prior agency practice without reasoned explanation; and (4) the Assistant
> Secretary¹s decision was arbitrary and capricious because it was made without
> considering certain pertinent materials relating to the relevant history of
> the Hatch Tract.
>
>
> [4] See Memorandum dated August 5, 1999, from Associate Solicitor
> Indian Affairs to Director, Indian Gaming Management Staff concerning
> the Little Traverse Bay Bands of Odawa Indians; Letter dated August 3,
> 1998, from the Solicitor, U.S. Department of the Interior, to the
> Congressman Vic Fazio concerning the Mechoopda Tribe of the Chino
> Rancheria; Memorandum dated March 16, 1998, from Associate Solicitor
> Indian affairs to Acting Director, Indian Gaming Management Staff
> concerning the Little River Bank of Ottawa Indians; Memorandum dated
> November 12, 1997, from Associate Solicitor Indian Affairs to Deputy
> Commission for Indian Affairs concerning the Little Traverse Bay Bands
> of Odawa Indians; Memorandum dated September 19, 1997, from Solicitor,
> U.S. Department of the Interior to the Secretary, U.S. Department of
> the Interior concerning the Okagon Band of Potawatomi Indians; Letter
> dated March 14, 1995, from Assistant Secretary Indian Affairs to
> Delores Pigsley, Chairman of the Confederated Tribe of Siletz Indians
> concerning ³restored land² and Tribal-State Compact approval¹
> Memorandum dated March 6, 1995, from the Regional Solicitor, Pacific
> Northwest Region, to Director, Indian Gaming Management Staff,
> concerning the Confederated Tribe of Siletz Indians: Memorandum dated
> February 1, 1994, from Associate Solicitor Indian Affairs to Deputy
> Director for Legislative and Intergovernmental Affairs concerning the
> ³restored land² exception for the Confederated Tribes of the Grand
> Ronde Community of Indians; Letter dated October 15, 1993, from
> Assistant Secretary Indian Affairs to Mark Mercier, Chairman of the
> Confederated Tribes of the Grand Ronde Community of Indians,
> concerning ³restored land² and the Tribal-State Company disapproval;
> Memorandum dated September 27, 1993, from the Associated Solicitor
> Indian Affairs to Pacific Northwest Region Assistant Regional
> Director. Confederated Tribes Administrative Record at 00178-00214.
>
>
> [5] In its analysis in the GTB decision, the NIGC found §
> 2719(b)(1)(B)(iii) to be ambiguous. Id. at 12.
>
>
> [6] In Grand Traverse the court found the Department should give the
> term ³restored² its plain, dictionary meaning. Id. at 696. However,
> the court said that even if the ³government¹s definition could be
> considered plausible, a conclusion I reject, the Band¹s construction
> should be given preference. Id. at 700. The court then cited Bryant
> v. Itasca County, 426 U.S. 373 (1976) holding that ambiguities in a
> statute dealing with Indians should be construed to their benefit.
>
>
> [7] The Department recognizes, as the NIGC recognized in its GTB
> Decision, that since we are not proceeding through formal
> administrative adjudication or formal rulemaking, this opinion is not
> entitled to the fullest measure of deference. See United States v.
> Mead Corp. 121 U.S. 2164 (2001). GTB Decision at 7. Nevertheless, we

> have tried to exercise care, experience and informed judgment,
> including reviewing materials submitted by the Tribes and the NIGC.
> Moreover, the Department has used it expertise in the area of Indian
> lands and Indian gaming in reviewing this question.
>
>
> [8] The circuits are in conflict regarding the application of the
> canons of construction. In the 9th Circuit the court has declined to
> apply the Indian canons of construction in light of the competing
> deference given to an agency charged with the statute¹s administration
> pursuant to Chevron USA, Inc., 47 U.S. at 842-44. Chugach Alaska
> Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990), Seldovia Native Ass¹n v.
> Lujan, 904 F.2d 1335, 1342 (9th Cir. 1990) and Haynes v. United
> States, 891 F.2d 235, 238-39 (1989). However, the 10th Circuit, takes
> a different view finding that the canon of construction trumps the
> agency¹s interpretation of a statute. See, Ramah Navajo Chapter of
> the Navajo Nation v. Lujan, 112 F.3d 1455 (10th Cir. 1997).
>
>
> [9] We should not ignore that the Department¹s regulations for taking
> land into trust, 25 C.F.R. Part 151, provide for notice to the state
> and local government. Thus, while the Governor does not have a veto,
> the local community still has an opportunity for involvement while the
> land is being considered for trust status.
>
>
> [10] However, as Judge Hillman points out, there can be situations
> like Grand Traverse in which a tribe restored through the
> acknowledgment process can still be considered restored for purposes
> of § 2719(b)(1)(B)(iii). Grand Traverse at 699.
>
>
> [11] We believe that the better approach is for the Department to
> engage in Notice and Comment Rulemaking to determine the factors it
> will consider in determining whether other parcels of land meets the
> restored land exception.
>
>
> [12] We also note that the court in Confederated Tribes and the court
> in Grand Traverse recognize that the more expansive interpretation of
> § 2719(b)(1)(B)(iii) would benefit restored tribes vis-à-vis other
> tribes. Confederated at 164, Grand Traverse at 700.
>
>
> [13] As noted by the court, the Hatch Tract is formally described as
> two portions of Government Lots 1 and 2 in Section 25 and portions of
> the E1/2NE1/4 and Lot 1 in Section 26, township 18 South, Range 12,
> West, Willamette Meridian, contain 98.165 acres more or less.
>
>
> [14] In Mr. Whittlesey¹s letter of March 23, 1998, he says that while
> he and Dr. Beckham were considering it, they had not provided their
> report to the tribal council until after the land was taken into
> trust. Id. at 2-4.
>
>

> [15] Since we only have before us a tribe who was restored prior to
> IGRA, we are not opining whether a tribe restored after the enactment
> of IGRA is limited to the land identified in the legislation restoring
> the tribe.
>
>
> [16] In the proposed revisions to the regulations governing the
> Acquisition of Title to Land into Trust, 25 C.F.R. § 151, the
> Department considered 25 years as a reasonable period of time to
> acquire land in the proposed Tribal Land Acquisition Area. While the
> Department withdrew these regulations on unrelated grounds, this is an
> indication of a reasonable time to acquire restored lands.
>
>
> [17] While not before us, we may apply a narrower temporal connection
> if a tribe already has a gaming establishment and is seeking to
> expand.