STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

June 4, 2002

The Honorable Mike Thompson
Member of Congress
119 Cannon House Office Building
Washington, D.C. 20515

Re: Dry Creek Rancheria

Dear Congressman Thompson:

I write in response to your letter of May 23, 2002, which concerns the status of the Dry Creek Rancheria, located in Sonoma County, and in particular asks whether the Rancheria is a permissible site for tribal gaming activities. As you are no doubt aware, Indian gaming is governed by the Indian Gaming Regulatory Act of 1988, Pub. L. 100-497; 25 U.S.C. § 2701 et seq. ("IGRA") and, in the case of Class III gaming, is also governed by the terms of a tribal-state compact negotiated pursuant to IGRA. The position taken by this office on behalf of the State in litigation over related issues conforms to the following understanding of the law.

IGRA identifies "Indian lands" upon which gaming may be conducted as follows:

(A) all lands within the limits of any Indian reservation; and

(B) any lands, title to which is either held in trust by the United States for the benefit of any Indian tribe or individual, or held by any Indian tribe or individual, subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(25 U.S.C. § 2703(4).)

The tribal-state compact entered into by the Dry Creek Rancheria of Pomo Indians ("the Tribe") and other federally-recognized tribes within the State of California also limits the construction of tribal gaming facilities to "Indian lands" as defined by IGRA. (Compact, § 4.2.) If the Rancheria is held by the United States in fee rather than in trust for the Indians of the Rancheria, the property is not a site eligible for the conduct of gaming under IGRA.

In 1864, Congress passed an Act to provide for the better organization of Indian Affairs in California, 13 Stat. 39 (1864) ("the Four Reservations Act"), which, among other things, authorized the President to set apart, "at his discretion, *not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations*, which shall be of suitable extent for the accommodation of the Indians of [California], and shall be located as remote from white settlements as may be found practicable, having due regard for the purposes for which they are intended." (Four Reservations Act, 13 Stat. at 40, italics added.) The effect of the Four Reservations Act was to place a clear numerical limit upon the Executive Branch's authority to create Indian reservations in California.[1] After passage of the Four Reservations Act, the United States made no further effort to negotiate treaties with California's Indian tribes and, on March 3, 1871, its authority to do so was revoked by Congress. (Act of March 3, 1871, 16 Stat. 566; 25 U.S.C. § 71.)

In 1891, however, Congress provided for the creation of a limited number of additional California reservations in the Mission Indians Relief Act which provided, in relevant part, for selection by federal commissioners of "a reservation for each band or village of the Mission Indians residing within [California], which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements." (Mission Indians Relief Act, 26 Stat. 712.) The Mission Indians Relief Act, and other Congressional acts that have subsequently authorized establishment of additional reservations for specific California Indian

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1. Although the complicated history of Indian country in California is beyond the scope of this letter, it is pertinent to note that the California Act of Admission made no provision for reservation by the United States of any Indian land rights and so, on the admission of California to the Union on equal footing with the original states, all public lands not disposed of by Act of Congress passed to the State of California. (California Act of Admission, 9 Stat. 452 (1850).) Eager to reduce hostilities between Indians and the European settlers who began their inundation of California during the gold rush, Congress appropriated $25,000 for the President to appoint three commissioners to study the "California situation and negotiate treaties with the various Indian tribes in California." (Act of September 30, 1850, 9 Stat. 544, 558 (1850).) Over the ensuing 18 months, Commissioners Barbour, McKee and Wozencraft met with individuals whom they then believed to be 402 "Indian chiefs and headmen" and negotiated a series of 18 treaties—none of which was ever ratified by Congress, largely due to pressure from the new Californians, including then-Governor McDougal. (See Flushman and Barbieri, *Aboriginal Title: The Special Case of California*, (1986) 17 Pac. L.J. 391, 403-04.) The negotiation of these treaties, the resultant removal of California Indians from their lands, and the subsequent failure of Congress to ratify these treaties resulted in homelessness for most of California's Indians. Over the years, there have been several attempts to compensate California Indians for the confiscation of their lands. (See, e.g., *Indians of California v. United States*, 98 Ct. Cl. 583 (1942).)

tribes, have, by way of Congressional exceptions to the Four Reservations Act, increased the number of reservations in California. (See generally *St. Marie v. United States*, 108 F.2d 876 (9th Cir. 1940).) For example, the Auburn Indian Restoration Act (108 Stat. 4533 (1994), 25 U.S.C. § 1300*i*-2(c)) restored the Auburn Indian Rancheria to federally-recognized status and explicitly provided that land conveyed to the United States in trust for the Tribe "shall be part of the Tribe's reservation."

In contrast, the Dry Creek Rancheria was not established as a reservation pursuant to an Act of Congress, but was instead set aside for Indian use by the Secretary of the Interior on June 1, 1915, following purchase of the land under the authority of the Acts of June 21, 1906 (34 Stat. 325, 333), and April 30, 1908 (35 Stat. 70, 76-77). These Acts did not create new reservations, but instead provided for the purchase of "lands" and related improvements for Indians not then living on reservations in the state. By 1930, more than 100 such parcels of land in California were set aside for Indian use by executive order, comprising approximately 632,000 acres, located primarily in regions of desert, mountains and grazing lands that were, and often remain, remote and ill-suited to agriculture. (Stewart, *Litigation and its Effects*, in 8 Handbook of North American Indians, 705, 707 (R. Heizer, ed., Smithsonian 1978).) Of these parcels, some have subsequently been "declared" reservations under the authority of the Indian Reorganization Act of 1934, 48 Stat. 985, § 7; 25 U.S.C. § 467. The Dry Creek Rancheria, however, is not one of them. Accordingly, it is not a "reservation."

If the Dry Creek Rancheria, which is not a reservation, is held in fee by the United States, it is not trust land and is not currently eligible for gaming, unless it is subject to a restriction against alienation.[2] Since 1934, the Indian Reorganization Act of 1934 has also provided the Secretary of the Interior with authority to acquire land for Indian tribes and for individual Indians. All land acquired under the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . . ." (25 U.S.C. § 465.) Presumably, if the Bureau of Indian Affairs considers the land to be held in fee by the United States, it has never issued a trust patent under the authority of the Indian Reorganization Act. It would then, presumably, not be held in trust and is, accordingly, not eligible for gaming.

While the Dry Creek Rancheria's fee status is significant, in that IGRA would prohibit the Tribe from using the property for gaming purposes, IGRA also provides a procedure by which the land may become gaming-eligible. Title 25, United States Code section 2719, illustrates Congress' concern for balancing the public policy interests of the states against the interests of Indian tribes in the expansion of gaming. Section 2719 generally prohibits gaming on lands acquired in trust after the effective date of IGRA, but provides a number of meaningful

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2. It is our understanding that there is no restriction against the alienation of the Dry Creek Rancheria. However, this office has not conducted a title search of the property to confirm that this is so.

exceptions to this rule. Potentially applicable here is the so-called "consultation and consent" procedure, under which gaming on recently-acquired trust lands may be conducted provided:

> [T]he Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

(25 U.S.C. § 2719(b)(1)(A).)

In conclusion, if the Dry Creek Rancheria is indeed held in fee by the United States, it is not currently eligible for gaming. The Tribe, however, is entitled to seek to have the Rancheria made eligible for gaming through the process of consultation and consent provided for by 25 U.S.C. § 2719(b)(1)(A). We have not, however, received any notification from the Bureau of Indian Affairs that the Tribe has submitted an application to have the Rancheria accepted into trust.

I trust that the foregoing adequately addresses your questions. Thank you for your letter.

Sincerely,

BILL LOCKYER
Attorney General