KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

110 WEST A STREET, SUITE 1100
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 645-2001
Telephone: (619) 645-3075
Facsimile: (619) 645-2012
E-Mail: Randy.Pinal@doj.ca.gov

April 12, 2011

Via e-mail John.Rydzik@bia.gov & U.S. Mail

John Rydzik
Regional Environmental Scientist
U.S. Department of the Interior
Bureau of Indian Affairs, Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Re: DEIS Comments, Big Sandy Band of Western Mono Indians' Casino and Resort Project

Dear Mr. Rydzik:

On request from the California Governor's Office, we have reviewed and submit on behalf of the State of California the following comments on the Draft Environmental Impact Statement (DEIS) for the Big Sandy Band of Western Mono Indians' (Tribe) Casino and Resort Project (Project) dated December 2010, prepared by the Bureau of Indian Affairs (BIA). Thank you for extending the period to comment on the DEIS. Preliminarily, we note that the land where the proposed Project is located does not qualify as the Tribe's Indian lands under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., and even if it did, the Project, as currently proposed, would violate the Tribe's class III gaming compact with California (Compact). Notwithstanding these defects, we are concerned that the material submitted in the DEIS does not permit a reasonably objective evaluation of all of the Project's potential environmental impacts, both within and outside the rancheria boundaries, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., and the Compact.

The Tribe currently operates a class III gaming facility on trust land located within the Tribe's 280-acre rancheria in Fresno County. (Ex. 1 at 2.) The Tribe proposes to construct and operate a gaming, hotel and entertainment facility on about 40.82 acres of allotted Indian land held by the United States in trust for the beneficial interest of Sherill Anne McCabe (McCabe Allotment), an individual Tribal member. (DEIS at 1-1, 3.5-12.) The McCabe Allotment is located about twelve miles from the Tribe's rancheria boundaries. (Ex. 1 at 4.) The DEIS is a joint document for use by the BIA to comply with NEPA in its evaluation of a proposed lease agreement between the Tribe and Ms. McCabe, and by the Tribe to comply with its

environmental review requirements under the Compact. (DEIS at 1-1 to 1-2, 1-5.) The lease agreement would grant use of the McCabe Allotment to the Tribe for development of a casino and related facilities. (*Id.* at 1-2.) The proposed Project would include construction of a gaming and entertainment facility with a gaming floor, restaurant and lounge facilities, a 2,000-seat entertainment hall, a nine-story, 300-room hotel and conference center, a seven-level parking garage for 3,000 passenger vehicles and twelve busses, a water and wastewater treatment plant, and a water supply system. (*Id.* at 1-1, 2-6 to 2-9, 2-14.) The proposed buildings, not including the parking garage, would total about 532,000 square feet of floor space. (*Id.*) The DEIS indicates the Tribe would manage the facility, which would operate twenty-four hours a day, seven days a week, and attract about 2.2 million "gamers" annually. (*Id.* at 1-2.)

I. The McCabe Allotment Does Not Qualify as the Tribe's Indian Lands Under IGRA

The State previously submitted comments to the National Indian Gaming Commission's (NIGC) General Counsel explaining why the McCabe Allotment does not qualify as the Tribe's Indian lands under IGRA. The State's comments are attached hereto as **Exhibit 1** and incorporated herein by this reference. In short, the State believes the record evidence suggests the Tribe does not exercise exclusive jurisdiction over the McCabe Allotment,[1] and that question must be definitively resolved by the Department of the Interior before the BIA considers the lease agreement between the Tribe and Ms. McCabe. (Ex. 1 at 5-9.) More importantly, the Tribe has failed to demonstrate it exercises governmental power over the McCabe Allotment, and if it has, that it has done so for an historically significant time period, or at least to a time predating IGRA's enactment. (*Id.* at 10-13.)

NIGC staff counsel prepared a memorandum rejecting the State's contentions. The opinion is attached hereto as **Exhibit 2** and incorporated herein by this reference. The NIGC attorney's conclusions are factually inaccurate and unsupported by law.

Preliminarily, we note that an Indian tribe may engage in class II and class III gaming under IGRA only on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). IGRA explicitly defines "Indian lands" to include

> (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.

[1] Indeed, the DEIS acknowledges the McCabe Allotment "has historically been used by Big Sandy and Table Mountain tribal members for hunting and gathering activities." (DEIS at 3.5-12.)

25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 501.12.

First, the NIGC's attorney erred in finding the Tribe possesses jurisdiction over the McCabe Allotment. (Ex. 2 at 4-5.) Staff counsel erroneously relied upon the definition of "Indian country" in 18 U.S.C. § 1151 as the basis for the jurisdictional analysis. While tribal jurisdiction is generally limited to "Indian country," which may include off-reservation individual allotments, *see* 18 U.S.C. § 1151, the statutory definition of "Indian country" is distinct from IGRA's "Indian lands" definition in 25 U.S.C. § 2703(4). The Department of the Interior, Office of the Solicitor (Solicitor), agrees. *See Opinion of the Solicitor, Sampson Johns Allotment* (Sept. 26, 1996) at 4 ("IGRA's use of the phrase 'Indian lands' rather than 'Indian country' indicates that IGRA's jurisdictional reach is not precisely equivalent to statutes which refer to 'Indian country'") (attached hereto as **Exhibit 3**).

Staff counsel also failed to give historical perspective to his jurisdictional analysis. In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) (*Narragansett*), the First Circuit held in a case involving an Indian lands determination under IGRA, that "[a]n historical perspective is . . . relevant to the 'having jurisdiction' inquiry. A 'longstanding assumption of jurisdiction . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset . . . .'" *Id.* at 703 n.18 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)).

In addition, the opinion omits entirely any discussion about Table Mountain Rancheria's claims to the McCabe Allotment. *See Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1218 (D. Kan. 1998) (overturning NIGC Indian lands determination that failed to address facts submitted by tribe). The nearby Table Mountain Rancheria apparently owns in fee much of the property adjacent to the McCabe Allotment (DEIS at 1-1), and claims it has ancestral, cultural and archeological ties to the allotment, which conflict with the Tribe's claims to the parcel (Ex. 1 at 7-8). It is also uncertain whether each successive beneficial owner of the McCabe Allotment was a Tribal member. (*Id.* at 8-9.) This uncertainty and Table Mountain Rancheria's competing claim to the property necessarily create a factual dispute about which tribe has jurisdiction, and raises federal policy issues which the Department of the Interior must resolve by reasoned explanation before determining a particular tribe may conduct gaming on the subject parcel. That has not happened here and the absence of such a determination is particularly problematic because it is inherently contradictory for two federally recognized sovereigns to exercise jurisdiction over the same property, absent explicit congressional authorization. *See* 25 U.S.C. § 2710(b)(1) (authorizing Indian gaming only on "Indian lands within *such tribe's* jurisdiction" (emphasis added)); *Williams v. Clark*, 742 F.2d 549, 555 (9th Cir. 1984). Indeed, the NIGC has twice previously suggested an Indian tribe may conduct gaming on Indian lands where it "was *undisputedly* the *only* tribe exercising jurisdiction over the land." *NIGC Indian Lands Determination for Buena Vista Rancheria of Me-Wuk Indians* (Jun. 30, 2005) at 7 (citing *Memo to NIGC Acting General Counsel Re: Tribal Jurisdiction Over Gaming on Fee Land at White Earth Reservation* (Mar. 14, 2005) (emphasis added)); *see also id.*

at 12 ("Because the Tribe is undisputedly the only tribe that exercises jurisdiction over the Rancheria, the Tribe meets IGRA's requirements that it be the tribe with jurisdiction over the Indian lands at issue." (Emphasis added.)). Therefore, the NIGC attorney's jurisdictional analysis conflicts with controlling case law and previous opinions by the NIGC and Solicitor, and therefore should not control here.

The second principal error in the NIGC counsel's opinion is the finding that the Tribe exercises governmental power over the McCabe Allotment. (Ex. 2 at 5-6.) Similar to the jurisdictional component of an Indian lands determination under IGRA, the *Narragansett* court plainly stated that meeting the exercise-of-governmental-power criterion "does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the . . . lands." *Narragansett*, 19 F.3d at 703 (n. & citation omitted). Thus, the NIGC attorney's assertion that, "At least since prior to the enactment of IGRA, the Tribe had the authority to exercise jurisdiction" (Ex. 2 at 6 n.5), is irrelevant, as the courts clearly require more than mere theoretical authority.

Additionally, the record evidence fails to demonstrate concrete manifestations that the Tribe exercised governmental power over the McCabe Allotment, and there is no evidence that it has done so for an historically significant time period. The State maintains the plain language of IGRA's Indian lands definition requires the Tribe to have exercised governmental power over the property since IGRA's enactment on October 17, 1988, otherwise the land is ineligible for gaming and the only means by which an Indian tribe may conduct off-reservation gaming on newly acquired land is under the exceptions specified in 25 U.S.C. § 2719. (Ex. 1 at 12-13.)

The NIGC attorney relied upon the Tribe's March 2005 Constitutional amendment as evidence that it has jurisdiction over any off-reservation allotment beneficially owned by an individual Tribal member. (Ex. 2 at 5.) But there is no evidence that the Tribe exercised jurisdiction or governmental power over the property to a point at least predating IGRA's enactment, or even under an arguably lesser standard of an historically significant time period, particularly where the Tribe amended its Constitution in 2005 purporting to expand its jurisdictional authority just one month before it asked the NIGC to find the McCabe Allotment constituted its Indian lands. Indeed, none of the evidence cited by the NIGC attorney as proof that the Tribe provided governmental services to the allotment references a time period when such activities purportedly occurred. Thus, counsel completely ignored the requirement that concrete manifestations of governmental power over the allotment must be analyzed in historical context, and there is no evidence to support such a conclusion.

The NIGC attorney's conclusion that the Tribe exercises jurisdiction and governmental power over the McCabe Allotment is inconsistent with decisional law and not supported by the record. Congress did not intend the standard to be so low that after IGRA's enactment a tribal government could simply assert jurisdiction over an individual member's off-reservation allotment in exchange for a lucrative land lease, and the tribe would immediately obtain

jurisdiction over the land for gaming purposes. Such a construction would allow unchecked off-reservation gaming in complete disregard for IGRA's prohibition of gaming on newly acquired land. Therefore, the NIGC attorney's memorandum is not entitled to any weight here.[2]

II. As Currently Proposed, the Project Would Violate the Compact

Even if the McCabe Allotment constitutes the Tribe's Indian lands, which it does not, then each Project alternative described in the DEIS, except the "No Action" alternative, would violate the Compact because parts of the Project development would occur on fee land located outside the Tribe's rancheria boundaries, and there is no indication that the Tribe would discontinue operating class III Gaming Devices at its current Gaming Facility. (*See* DEIS at 1-1, 2-3 to 2-17.)

A. Access Road and Water Storage Tank Located on Fee Land

As described in the DEIS, the Tribe proposes to build a 2,000-foot long private access road across Tribal-owned fee land connecting Millerton Road to the otherwise landlocked McCabe Allotment, with a 400,000-gallon water tank located on the same fee parcel. (DEIS at 2-7 to 2-8, 2-11.)

IGRA permits a tribe to conduct class II or class III gaming only on Indian lands located within the tribe's jurisdiction, 25 U.S.C. § 2710(b)(1), and a tribe may only conduct class III gaming in conformance with, among other things, a tribal-state compact, 25 U.S.C. § 2710(d)(1)(C). Here, the Compact limits the Tribe's authorized Gaming Facilities to those located on "Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." (Compact § 4.2.) The Compact broadly defines a Gaming Facility as follows:

> "Gaming Facility" or "Facility" means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained (but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and *areas*, including parking lots and walkways, a *principal purpose of which is to serve the activities of the Gaming Operation*, provided that nothing herein prevents the conduct of Class III gaming (as defined under IGRA) therein.

(Compact § 2.8 (emphasis added).)

According to the DEIS, there is no existing access road and the new access road would be built exclusively to service the Gaming Facility. (DEIS 2-7 to 2-8.) Without the new road the

[2] Neither the NIGC nor the BIA has taken a position on the NIGC attorney's memorandum.

McCabe Allotment, located twelve miles outside the Tribe's rancheria boundaries, is landlocked and inaccessible. (*Id.* at 3.1-5 ("the portion of the project area on trust/allotment land has no public access"). Indeed, the DEIS describes the intersection of Millerton Road and the proposed access road as the "facility entrance" and the "entrance to the property." (*Id.* at 2-7.) Because the road's only purpose would be to serve the activities of the Gaming Operation, it is an "area" that falls within the Compact definition of a Gaming Facility, which otherwise must be located on the Tribe's Indian lands to avoid a Compact violation.[3]

Similarly, the water storage tank to be located on the same fee parcel has a single purpose of serving the activities of the Gaming Operation (DEIS at 2-11), and its construction and operation in the manner proposed in the DEIS would constitute a breach of Compact. In addition, the Reduced Project identifies a 250,000-gallon water storage tank that would be constructed near the water source on private property located about eight miles from the McCabe Allotment. (*Id.* at 2-15 to 2-16.) Although the DEIS is unclear, and we assume for purposes of this analysis that the "private property" referenced is not the Tribe's trust land, if the tank were to be built principally to serve the activities of the Gaming Operation, then it, too, would qualify as part of the Gaming Facility, and otherwise must be located on the Tribe's Indian lands to comply with the law.

B. Number of Gaming Devices

According to the DEIS, the Tribe's first and third alternatives include the operation of 2,000 "slot machines"[4] in the new facility. (DEIS at 2-8, 2-15.) But the Compact limits the Tribe to 2,000 Gaming Devices (Compact § 4.3.2.2(a)), and the Tribe reports that it currently operates 330 Gaming Devices at its Gaming Facility located within the rancheria boundaries. Nothing in the DEIS indicates the Tribe intends to close or cease Gaming Operations at the current Gaming Facility. The Tribe would be in breach of the Compact if it operated 2,000 class III Gaming Devices at the proposed site and continued class III Gaming Operations at the current Gaming Facility. Without further clarification, the BIA should not approve a lease premised upon a Project that would result in a Compact violation.

The Tribe's second alternative, the Reduced Project, provides for the operation of 1,500 slot machines. (DEIS at 2-14.) Thus, the second alternative, and all remaining alternatives that do not contemplate class III gaming, may be in compliance with the Compact's Gaming Device

---

[3] The DEIS also acknowledges that because the access road would be constructed on fee land it would be subject to federal, state and local land use regulations. (DEIS at 3.9-2.) It further notes that "[b]ecause off-reservation improvements are not under Tribal jurisdiction, such improvements would be subject to negotiation with and approval of other governmental jurisdictions and/or agencies." (*Id.* at 5.15-1.)

[4] For purposes of this analysis, we assume the phrase "slot machines" as used in the DEIS means class III Gaming Devices as defined by IGRA and the Compact. 25 U.S.C. § 2703(8); Compact §§ 2.3, 2.6, 4.1.

limitations, but still would violate IGRA and Compact requirements that gaming only occur on the Tribe's Indian lands.

III. Comments on the DEIS

For reasons discussed below, we believe the Project may have significant environmental effects not addressed in the DEIS, and the DEIS includes insufficient supporting data or detail to allow BIA and the State, respectively, to determine whether the DEIS complies with NEPA and the Compact. Therefore, to comply with the law, the Tribe must either prepare a supplemental DEIS or Final EIS with additional information and analysis that adequately addresses the Project's environmental effects.

A. Applicable NEPA and Compact Standards

The Compact requires the Tribe take appropriate actions to determine whether the Project will have any significant adverse impacts on the off-reservation environment prior to Project commencement. (Compact § 10.8.2(a)(2).) Toward that end, the Tribe must "adopt an ordinance providing for the preparation, circulation and consideration by the Tribe of environmental impact reports concerning potential off-Reservation impacts." (*Id.* at § 10.8.1.) The Tribe is required to make a good faith effort to incorporate into its ordinance the policies and purposes of NEPA and the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000 et seq., and to mitigate any and all significant adverse off-reservation environmental impacts. (*Id.* at §§ 10.8.1, 10.8.2(b)(2).) NEPA and CEQA require an agency to take a "hard look" at the environmental consequences of its actions and at possible alternatives. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Save Our Residential Env't v. City of West Hollywood*, 9 Cal. App. 4t h 1745-52 (Cal. Ct. App. 1992).

B. Aesthetics/Visual Resources

If the Tribe proceeds with any of the action alternatives described in the DEIS, we encourage it to consider reduced vertical building structures with increased horizontal expanse to mitigate what the DEIS recognizes would be a significant visual impact and a significant new source of light and glare. (*See* DEIS at 4.1-4 to 4.1-6.)

C. Air Quality

The DEIS fails to consider whether there is a potential to expose off-reservation residents to odors emanating from the proposed construction and operation of a wastewater treatment facility. (*See* DEIS at 3.8-4.) An acceptable environmental impact statement must quantify the potential odor impact to off-reservation receptors to allow the BIA, State and public to evaluate whether the impact would be significant, and identify plant design features that would be implemented to mitigate the impact.

D. Hydrology, Water Quality and Water Supply

The DEIS fails to adequately address off-reservation impacts to hydrology, water quality and water supply. According to the DEIS, because no groundwater sources have been identified in the Project area, the Project will exclusively utilize an off-reservation water source. (DEIS at 3.8-14.) The suggestion that there are no groundwater sources in the Project area is inconsistent with findings elsewhere in the DEIS that, "Trenching and excavation during construction may reach a depth that can expose the water table, creating an immediate and direct avenue for contaminants to enter the groundwater system." (*Id.* at 4.8-5.) Moreover, despite this acknowledged impact, there is no analysis of the impact to groundwater resources of nearby residential or commercial developments, such as the Ventana Hills development. (*See id.* at 3.1-5.) An acceptable evaluation would identify groundwater resources in the Project area and explain, with empirical evidence, why the sources would be insufficient to meet Project demands, and, if they would be sufficient, how they would be impacted by Project construction and operation, including a cumulative impacts analysis. This analysis is particularly important here because the Tribe proposes to truck in potable water from an off-reservation water source on the Flyin' J Ranch, located about eight miles northeast of the McCabe Allotment, which would require up to sixty trucks (120 trips) per day to accommodate projected water needs. (*Id.* at 2-11.) A trucking operation of this scale would, at minimum, result in significant noise[5] and traffic impacts, and accelerated roadway deterioration. Additional information is required to determine whether the Tribe's preferred alternative for trucking water to the Project is warranted.

In addition, the DEIS does not appear to include any data supporting the conclusion that the Project would require about 150,000 gallons of water per day, or that a 360,000-gallon reserve for fire suppression would be sufficient. (*See* DEIS at 2-11.) Nor does the DEIS include any empirical data supporting the conclusion that a wastewater treatment plant with an average flow of 100,000 gallons per day and a maximum flow of 200,000 gallons per day would meet Project needs. (*Id.* at 3.8-4.) Without such information, it is difficult to evaluate the Project's impacts, or the reasonableness of the proposed mitigation measures.

Further, the DEIS is unclear whether a water pump station exists on the Flyin' J Ranch, and, if not, whether the property is or could be zoned or permitted for such use. If a County permit and compliance with the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000 et seq., is required for this, or any other, Project component,[6] then the environmental review process should not be bifurcated and a revised, combined environmental impact report should issue. *See Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1427 (9th Cir. 1989).

---

[5] *See, e.g.*, DEIS at 4.10-7 (acknowledging truck circulation could "annoy occupants" at nearby residences).

[6] For instance, the DEIS acknowledges County approval and permits would be required to build the proposed access road. (DEIS at 4.9-1.)

The DEIS also fails to adequately address wastewater impacts to the local ephemeral stream. According to the DEIS, after disposal for the approved uses are satisfied, any remaining surplus effluent—up to 100,000 gallons per day (DEIS at 4.4-9, 4.8-1)—would be discharged into an unnamed stream on the McCabe Allotment that enters Little Dry Creek about two miles south of the allotment, which in turn flows about seven miles west to the San Joaquin River. (*Id.* at 2-10 to 2-11.) Although the DEIS indicates a NPDES permit would be required, and the Tribe would develop water quality monitoring program to determine whether the planned wastewater treatment plant is functioning properly (*id.* at 5.8-3), there is no present assessment of the impacts that a daily discharge of this magnitude would have on the off-reservation environment, notwithstanding a properly functioning wastewater treatment plant.

E. Land Use and Planning

The acknowledgement in the DEIS that each action alternative would have a significant impact on existing or planned off-reservation land uses in the Project vicinity during both construction and operational phases that cannot be mitigated (*see* DEIS at 4.9-1 to 4.9-2, 5.9-1) is sufficient justification for the BIA to disapprove the lease agreement, or require the Tribe to propose a different project consistent with off-reservation land uses surrounding the McCabe Allotment, or a gaming project within the Tribe's rancheria boundaries.[7]

F. Noise

The DEIS fails to consider the noise impacts certain to result from 120 daily water truck trips to accommodate projected water needs. (*See* DEIS at 2-11, 4.10-1 to 4.10-7.) In evaluating onsite truck circulation and loading dock noise, the DEIS indicates, "The expected number of deliveries, types of trucks, and anticipated delivery times is not yet available." (*Id.* at 4.10-6.) But the proposed water truck delivery program (sixty trucks per day, 120 trips daily) would put a water truck on the road an average of every fifteen minutes, twenty-four hours a day, seven days a week. Also, it is reasonable to assume that the Tribe can ascertain the type of truck that would be utilized in this process. Accordingly, the noise impact analysis is deficient.

G. Public Services

The DEIS confirms the Project would result in a significant impact to California Department of Forestry and Fire Protection (CAL FIRE) resources (DEIS at 4.12-2), but there is no indication that the Tribe will negotiate with CAL FIRE to mitigate this impact (*see id.* at 5.12-1). Any impact to CAL FIRE resources must be mitigated through negotiations with CAL FIRE.

[7] The DEIS includes no information or data to support the conclusion that an alternative location within rancheria boundaries would be financially infeasible. (*See* DEIS at 2-17 to 2-18.)

In addition, the DEIS indicates the facility will be "outfitted" with a "fire control room that maintains direct, open line communication with the local fire department" (DEIS at 2-14) but the room location is unspecified. Locating the fire control room inside the facility could jeopardize its functionality and purpose, and the Tribe should consult with local or state fire officials to determine the safest location, particularly given the acknowledgement in the DEIS that the proposed Project facilities are located in a high fire hazard severity zone, the access road primarily traverses a moderate fire hazard severity zone, and wildfires are a risk in the area. (*Id.* at 3.7-9.)

The State is encouraged that the Tribe will negotiate with Fresno County in good faith to mitigate impacts to fire, law enforcement, the justice system and health and human services staff and programs, including funding for gambling addiction awareness and treatment programs. (DEIS at 5.12-1 to 5.12-2.) At this point, however, there are no assurances that an enforceable agreement will be reached, and the DEIS omits entirely any mitigation alternatives should the Tribe and County not reach agreement. Indeed, the DEIS fails to specify or meaningfully analyze the public service impacts, other than to conclude they would be significant. In any event, proposed mitigation measures must be described "in sufficient detail to ensure that environmental consequences have been fairly evaluated. . . . A mere listing . . . is insufficient." *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted). Doing so helps to ensure that the agency has taken a "hard look" at the environmental consequences of its action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352. The mitigation proposed in the DEIS—that the Tribe will attempt to negotiate a mitigation agreement with the County—fails to meet NEPA's requirement that all environmental consequences "have been" fairly evaluated and that mitigation measures are described in detail. Accordingly, we are unable to reasonably evaluate whether the Tribe's efforts to mitigate off-reservation impacts to public services satisfy NEPA or the Compact, and the suggestion that the impacts will be sufficiently mitigated is currently unsubstantiated.

Similarly, to the extent the DEIS indicates the Tribe will negotiate with the County for an agreement to mitigate public service impacts, the Compact requires the Tribe to discuss with the County, if the County requests, mitigation of all significant adverse off-reservation environmental impacts, not just those affecting public services. (Compact § 10.8.2(a)(4).)

H. Utilities and Service Systems

According to the DEIS, the Project will utilize the American Avenue Landfill for solid waste disposal, including disposal of asbestos and construction and demolition materials. (DEIS at 3.16-3.) But the American Avenue Landfill no longer accepts asbestos or construction and demolition debris. *See* http://www.fresno.gov/Government/DepartmentDirectory/PublicUtilities/SolidWaste/Additional+Services/Landfill.htm (last viewed Apr. 11, 2011). In addition, the American Avenue Landfill is expected to close in twenty years. (DEIS at 3.16-3.) Yet the DEIS fails to analyze the cumulative impact the proposed Project and other known pending developments that utilize the American Avenue Landfill might have on the landfill's expected

closure date, and how that might impact the off-reservation environment. Accordingly, the conclusion that the Project will not have a significant effect on this environmental component is unsupported.

The DEIS also assumes that Pacific Gas and Electric will provide a "will serve" letter for the Project and that Western Solid Waste will provide trash hauling services for the Project. (DEIS at 3.16-2.) It is, however, unclear whether these companies are capable of meeting Project demands during construction and operation. Indeed, the Project's construction and operational energy needs are unspecified, rendering uncertain the Project's impact to off-reservation energy sources. Because the Project is proposed to be all electric (*id.*), additional information is needed to evaluate the Project's individual and cumulative impact on the State's electrical grid, particularly during peak summer hours when demand surges, and the energy conservation measures the Tribe proposes to reduce wasteful, inefficient and unnecessary energy consumption to mitigate, among other things, what the DEIS identifies as a significant impact resulting from the generation of harmful greenhouse gas emissions.

I. Cumulative Impacts Analysis

NEPA requires an agency to consider the environmental impact that "results from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999 (citing 40 C.F.R. § 1508.7). An environmental impact statement must, at minimum provide a "catalog of past projects" and a "discussion of how those projects (and differences between the projects) have harmed the environment." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005). The cumulative impacts analysis must include sufficient detail to be "useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Muckleshoot Indian Tribe*, 177 F.3d at 810 (quoting *Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997).

The cumulative impacts analysis in the DEIS does not evaluate the incremental impacts from past projects, both Tribal and non-Tribal, federal and non-federal, located within and outside reservation boundaries or the McCabe Allotment, including, without limitation, construction and operation of the Table Mountain Casino, with 2,000 class III Gaming Devices, located about one mile west of the McCabe Allotment. (*See* DEIS at 3.9-2.) A comprehensive cumulative impacts analysis is critical here given the Table Mountain Casino's close proximity to the McCabe Allotment.

IV. Conclusion

The DEIS appears to be deficient in several areas, necessitating additional information to fully assess the nature and scope of the Project's impacts to the on- and off-reservation environment, and the adequacy of proposed mitigation measures. These comments do not

constitute the entirety of the State's comments on the DEIS. Other State agencies with specific technical expertise may provide additional comments in separate letters.[8] Thank you for this opportunity to comment on the DEIS.

Sincerely,

RANDALL A. PINAL
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

RAP:gnn

Enclosures

cc: Amy Dutschke, Regional Director, BIA Pacific Region
Elizabeth D. Kipp, Chairperson, Big Sandy Band of Western Mono Indians
Leanne Walker-Grant, Chairperson, Table Mountain Rancheria

SA2003102648
80487407.doc

[8] In particular, we note an encroachment permit or permits from Caltrans may be required for Project construction and operation. If so, the appropriate CEQA documents will need to be prepared.

Exhibit 1

ML 8 292

OFFICE OF THE GOVERNOR

September 9, 2005

Via Facsimile (202) 632-7066 & U.S. Mail

Ms. Penny Coleman
Acting General Counsel
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, D.C. 20005

Re: Big Sandy Band of Western Mono Indians
Indian lands determination

Dear Ms. Coleman:

The Big Sandy Band of Western Mono Indians (Tribe or Big Sandy) has a management contract pending before the National Indian Gaming Commission (NIGC). On April 19, 2005, the Tribe supplemented its documentation with evidence it believes demonstrates the proposed casino site constitutes Indian lands as defined by the Indian Gaming Regulatory Act (IGRA). The Governor's Office of Legal Affairs has reviewed the Tribe's new information and objects to the proposed Indian lands determination because there is a significant dispute over whether the Tribe exercises exclusive jurisdiction over the land. Additionally, there is insufficient evidence to conclude the Tribe has exercised sufficient historic governmental power over the property to qualify it as Indian lands under IGRA. We believe that to accomplish IGRA's purpose, a tribe seeking to game on an individual allotment must provide concrete evidence it has jurisdiction and has exerted governmental authority over the land for a significant period of time, to a point at least predating IGRA's enactment.

I. Tribal History

In the early twentieth century, Congress recognized the need to address the homeless Indian issue in California. It passed a series of appropriation Acts on June 21, 1906 (34 Stat. 325) and April 30, 1908 (35 Stat. 70), which provided money to purchase land for residential and agricultural use for homeless Indians in California. The parcels, which came to be known as

rancherias (*Duncan v. Andrus* (N.D. Cal. 1977) 517 F.Supp. 1, 2), were populated by small extended-family groups, or unrelated groups with no specific tribal or racial affiliation.[1]

The Bureau of Indian Affairs (BIA) reports the United States purchased the Big Sandy Rancheria in 1909 with funds appropriated under the Act of April 30, 1908. (Exh. A, BIA Narrative.) The BIA, however, is unable to locate correspondence directly relating to the actual purchase, although the agency suggests subsequent correspondence indicates the United States purchased land for the use of the San Joaquin or Big Sandy Band of Indians, with title retained by the United States. (*Ibid.*) On February 17, 1965, the United States removed the Rancheria's occupants from the BIA's list of Indians entitled to receive services, pursuant to an asset Distribution Plan enacted under the Rancheria Act of 1958 (Pub.L. No. 85-671 (Aug. 18, 1958) 72 Stat. 619), and terminated the Rancheria. (See Tribe's Apr. 19, 2005 letter to NIGC, Exh. A.) At that time, the Tribe still "had no constitution and bylaws or any other formal type of organization." (*Id.* at p. 2.) In 1983, a federal court restored the Tribe's recognition. (See *San Joaquin or Big Sandy Band of Indians v. Watt* (N.D. Cal., Mar. 28, 1983, No. C-80-3787-MHP (Tribe's Apr. 19, 2005 letter to NIGC, Exh. B); 49 Fed.Reg. 1140-02.) Big Sandy is currently on the BIA's list of federally recognized Indian tribes. (68 Fed.Reg. 68180.)

It is our understanding that as of 1999 the United States held 128.83 acres in trust for the Tribe and individual Tribal members, and such property is located within the Tribe's approximately 280-acre Rancheria in Auberry, California. The Tribe and individuals[2] own the remaining parcels within the Rancheria in fee.

In 1999, the Tribe and State entered into a Tribal-State Gaming Compact to conduct class III gaming under IGRA. (See 65 Fed.Reg. 31189-01.) The Tribe currently conducts class II and class III gaming at the Mono Wind Casino, located within the Rancheria.

On February 11, 2000, the Tribe adopted its first formal Constitution. (Exh. B, Big Sandy Const.) Article I defines the Tribe's territorial jurisdiction:

> The territorial jurisdiction of the tribe shall extend to all those lands as shown on the map of Fresno County Tract No. 2060 recorded at pages 89, 90 and 91 in volume 22 of the plats, Fresno County Records, and to such other lands as may be hereafter acquired by or for the tribe.

(*Id.* at art. I.) This description identifies the Tribe's existing Rancheria boundaries. The Tribe, however, represents it amended its Constitution on March 28, 2005, to expand the territorial jurisdiction provision to include "all Indian country (as now defined by 18 U.S.C. § 1151) held by or for the benefit of the Tribe or any member of the Tribe, wherever located." (Tribe's Apr. 19, 2005 letter to NIGC at p. 12.)

---

[1] RG 75 Reno Indian Agency Annual Narrative and Statistical Reports 1912-1924, box 6, folder "Annual Narrative Reports 1923 Reno Ind. A.," 1-31.

[2] The State does not know whether the individual fee owners are members, Indians, or non-Indians.

On June 12, 2004, the Tribe enacted a resolution purportedly "Affirming Tribal Government Jurisdiction Over Indian Lands of the Tribe." (Tribe's Apr. 19, 2005 letter to NIGC, Exh. P.) The resolution claims to "affirm" that the Tribe exercises "governmental power" over all the Tribe's Indian lands,

> including all land within the limits of its Rancheria, all land held in trust by the United States for the benefit of the Tribe or an individual Tribal member and all land held by the Tribe or an individual Tribal member subject to restriction by the United States against alienation whether within or exterior to the Rancheria.

(*Ibid.*) The resolution further states the Tribe "has historically provided, and continues to provide, Tribal governmental services and programs" to its lands. (*Ibid.*) To provide notice to others that the Tribe exercises "governmental authority" over such lands, the resolution requires a "No Trespassing" sign to be placed on or near the perimeter of all off-reservation allotments. (*Ibid.*)

On December 30, 2004, the Tribe adopted a "Tribal Jurisdiction and Government Services Ordinance." (Tribe's Apr. 19, 2005 letter to NIGC, Exh. R.) The ordinance states that

> Pursuant to custom and tradition, the tribal government has historically provided for the general welfare of Tribal Members and well-being of the Tribe and its lands and natural resources by extending all jurisdictions, laws, resolutions, ordinances, and customs and traditions of the Tribe (a) to all Indian Lands . . . of the Tribe or any Tribal Member within or exterior to the Rancheria, and (b) to all Tribal Members, whether located within or exterior to the Rancheria.

(*Id.* at art. 1, ¶ D.) The ordinance further suggests that according to "custom and tradition," the Tribe has "historically" administered "social, health, housing and maintenance, welfare, transportation, food-delivery, charity, environmental, security, and other tribal government services and programs" to all aforementioned lands and members. (*Id.* at ¶ E.) The ordinance was intended to acknowledge and approve into Tribal law the Tribe's "longstanding practice . . . to extend and apply tribal jurisdiction over, and provide tribal government services and programs to," its lands and members. (*Id.* at art. 2.) The ordinance defines "Indian Lands" to have the same meaning as the phrase is used in Title 25 United States Code section 2703, with some additional minimum standards.[3] (*Id.* at art. 3, ¶ A.)

Recently, the Tribe and Sherrill Anne McCabe, a Tribal member and individual Indian allottee, executed and submitted for BIA approval a lease agreement granting possession of McCabe's allotted property to the Tribe for gaming purposes. The McCabe Allotment is the parcel on which the Tribe seeks an Indian lands determination.

---

[3] To the extent the ordinance purports to expand the meaning of "Indian lands," the definition found in IGRA controls this analysis.

II. McCabe Allotment Title History

From the early nineteenth century, many individual Indians acquired land through the allotment process.[4] The Indian General Allotment Act of 1887, commonly known as the Dawes Act, authorized the United States to issue land patents to individual Indian allottees. (Act of Feb. 8, 1887, 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381.) An Indian allotment "may either be a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment)" (*Yankton Sioux Tribe v. Gaffey* (8th Cir. 1999) 188 F.3d 1010, 1022), although the distinction is irrelevant for jurisdictional purposes (*United States v. Stands* (8th Cir. 1997) 105 F.3d 1565, 1572). Congress ultimately repudiated the allotment practice in the Indian Reorganization Act of 1934 (IRA). (25 U.S.C. § 461.) IRA application, however, depended upon tribal consent (see 25 U.S.C. § 478), and the BIA reports the Tribe rejected the IRA in 1935.

The McCabe Allotment is a 40.82-acre trust allotment patented by the federal government to Mary McCabe in 1920, subject to a restriction against alienation for 25 years. (Exh. C.) The property is located about 12 miles from the Tribe's existing Rancheria in Fresno County. While the federal patent did not issue until 1920, Mary McCabe died in approximately 1916. (Exh. D.) Nonetheless, in 1922, Mary McCabe's interest in the allotment passed intestate equally to her son, Frank McCabe, and husband, Robert Lewis. (*Ibid.*) Federal documents suggest Robert Lewis was an "unallotted Chickchansie," most likely from the Picayune Rancheria of Chuckchansi Indians in nearby Coarsegold. (Exh. E.) Upon Robert Lewis' death in 1943, his interest in the allotment passed to Frank McCabe, making Frank McCabe the sole beneficial owner. (*Ibid.*) In 1970, Frank McCabe's son, Lester McCabe, inherited exclusive beneficial interest in the allotment. (Exh. F.) In 1979, Lester McCabe deeded the allotment to his daughter, Sherrill Ann McCabe, who is the current sole beneficial owner. (Exh. G.)

The McCabe Allotment is located in the Sierra Nevada foothills and is currently undeveloped. It is landlocked without paved access to a main road. The immediately surrounding properties are also undeveloped pasture owned by Table Mountain Rancheria, Sierra Foothills Conservancy, Bull Pine Investors and QBS, LLC.[5] (Exh. H.) As we discuss more thoroughly below, Table Mountain Rancheria claims it has ancestral ties to the McCabe Allotment, which conflict with Big Sandy's claims to the parcel.

III. Applicable Law

An Indian tribe may engage in gaming under IGRA only on "Indian lands within such tribe's jurisdiction." (25 U.S.C. § 2710(b).) IGRA explicitly defines "Indian lands" to include

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

---

[4] For a comprehensive discussion of the allotment program, see the Indian law treatise by Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 130-143, 612-632.

[5] Apparently, QBS, LLC is a subsidiary of Caesars Entertainment, LLC.

> (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).)

NIGC regulations further clarify the "Indian lands" definition:

> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either--
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

Using these standards, we believe the McCabe Allotment is not Indian land over which the Tribe can exercise exclusive governmental power. Even if the Tribe may exercise governmental power over the allotment, we do not believe it has sufficiently demonstrated that it does so presently, or for a historically significant time period.

IV. The McCabe Allotment Fails to Qualify as Big Sandy's Indian Lands For IGRA Purposes Because the Tribe Does Not Exercise Exclusive Jurisdiction Over the Parcel

"A necessary prelude to the exercise of governmental power is the existence of jurisdiction." (*Miami Tribe of Oklahoma v. United States* (D. Kan. 1996) 927 F.Supp. 1419, 1422, affd. *Kansas v. United States* (10th Cir. 2001) 249 F.3d 1213, 1229; see 25 U.S.C. § 2710(b).) IGRA defines "Indian lands" to include land outside the exterior boundaries of a reservation or rancheria held by the United States in trust or restricted status for a tribe or individual member and subject to the tribe's "governmental power." (25 U.S.C. § 2703(4).) The Tribe insists the McCabe Allotment is Indian land within its jurisdiction because all Indian allotments constitute "Indian country," and tribes possess jurisdiction within "Indian country." (Tribe's Apr. 19, 2005 letter to NIGC at pp. 7-10.) It is true that tribal jurisdiction is generally limited to "Indian country," which may include off-reservation allotments (18 U.S.C. § 1151); however, the statutory definition of Indian country relied upon by the Tribe is distinct from IGRA's Indian lands definition.

The Tribe relies primarily upon the Indian country definition found in Title 18 United States Code section 1151 to include "all Indian allotments, the Indian titles to which have not been extinguished . . . ." (Tribe's Apr. 19, 2005 letter to NIGC at p. 8, citing 18 U.S.C. § 1151(3).) As the NIGC previously determined, IGRA's Indian lands definition is distinct from Indian country as defined in other statutes. Indeed, in a September 25, 1996, memorandum from

the Department of the Interior, Office of the Solicitor, to Indian Gaming Management Staff regarding the Sampson Johns Allotment—which is attached to the Tribe's April 19, 2005, letter to the NIGC as Exhibit L (Sampson Johns memo)—the NIGC found that "IGRA's use of the phrase 'Indian lands' rather than 'Indian country' indicates that IGRA's jurisdictional reach is not precisely equivalent to statutes which refer to 'Indian country.'" (Sampson Johns memo, p. 4.) Thus, the Tribe's Indian country analysis is misplaced.

The McCabe Allotment presents special circumstances that rebut any presumption in favor of Big Sandy Tribal jurisdiction.

A. The 1983 Judicial Order

In 1983, the Tribe and the United States entered into a stipulated judgment to restore federally recognized Indian status to Big Sandy members and their heirs, et cetera, who participated in the Rancheria's asset Distribution Plan. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. B.) The judgment also restored land within the Rancheria's exterior boundaries as Indian country. It specifically states:

> The exterior boundaries of the Big Sandy Rancheria, encompassing all parcels shown on the Map of Fresno County Tract No. 2060 recorded at pages 89, 90 and 91 in volume 22 of Plats, Fresno County Records, except for Parcel 26 of said Tract, which was sold under the Rancheria's Distribution Plan, are reestablished, as is the status of said lands as Indian country within the meaning of 18 U.S.C. § 1151.

(*Id.* at p. 2, ¶ 5.)

Notably, the court did not invest the Tribe with jurisdiction over off-Rancheria trust or allotted lands beneficially owned by individual members. Instead, the judgment carefully limits land within the Tribe's former Rancheria boundaries as fitting within the statutory definition of Indian country. Moreover, rancherias are lands, not governments, held in trust by the United States for homeless Indians with no specific tribal affiliation. Thus, the Tribe's recent Constitutional amendment purporting to expand the Tribe's territorial jurisdiction to include "all Indian country (as now defined by 18 U.S.C. § 1151) held by or for the benefit of the Tribe or any member of the Tribe, *wherever located*," does not appear to be a valid extension of Tribal jurisdiction beyond the court's judgment, which simply reestablished the Rancheria boundaries. (See Tribe's Apr. 19, 2005 letter to NIGC at p. 12, italics added.)[6]

Even though the McCabe Allotment is currently held in trust for a Tribal member, additional considerations weigh against finding the parcel exclusively within Big Sandy's jurisdiction.

---

[6] The Tribe's failure to exclude Parcel 26 from its Constitution's territorial jurisdiction description (see Big Sandy Const., art. I) also appears to contradict the judgment excluding that parcel from reestablishment as Indian country within the Rancheria boundaries.

B. Table Mountain's Claim to the McCabe Allotment Precludes a Determination That the Property is Big Sandy's Indian Lands

The Tribe maintains it exercises jurisdiction over the McCabe Allotment because the beneficial owner is a Tribal member and has been continuously since it was allotted to Mary McCabe in 1920. (Tribe's Apr. 19, 2005 letter to NIGC at p. 10.) Table Mountain contends differently.

Table Mountain has informed the State and the NIGC that it will object to the proposed land determination because of its ancestral, cultural and archeological ties to the property. (See Table Mountain's May 26, 2005, letter to NIGC.) Table Mountain's exterior Rancheria boundary is about one mile from the McCabe Allotment and Table Mountain owns in fee several parcels totaling about 265 acres that are near or adjacent to the allotment. (Exh. H.) Table Mountain claims Frank McCabe is listed on its 1916 base roll and enrolled members occupied the allotment until the United States terminated the Table Mountain Rancheria in the 1960s. Table Mountain also insists the subject parcel contains sacred burial plots and many invaluable archeological sites, which have been independently verified by a recent university study. Additionally, Table Mountain maintains it has jurisdiction and asserts governmental power over the allotment, although the State does not know to what extent. In any event, there is a clear factual dispute about whether Big Sandy or Table Mountain has jurisdiction over the parcel.

The State does not, by this response, endorse Table Mountain's contentions but defers to the Tribe for substantiation of its claims. At a minimum, however, we believe that the claims merit investigation and federal resolution before the NIGC can find the parcel is Big Sandy's Indian lands.

Case law indicates the federal agency or court that ultimately settles the dispute must consider the parcel's jurisdictional history. In *State of Rhode Island v. Narragansett Indian Tribe* (1st Cir. 1994) 19 F.3d 685, the First Circuit held in a case involving an Indian lands determination under Title 25 United States Code section 2703(4)(B), that a "historical perspective is also relevant to the 'having jurisdiction' inquiry. A 'longstanding assumption of jurisdiction . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset . . . .'" (*Id.* at p. 703, fn. 18, quoting *Rosebud Sioux Tribe v. Kneip* (1977) 430 U.S. 584, 604-605.) Thus, Table Mountain's historical claims to the McCabe Allotment must be considered before a determination is made on Big Sandy's request.

An Indian lands determination on the McCabe Allotment raises federal policy issues that necessarily interpret the histories of the Big Sandy and Table Mountain tribes. It is inherently contradictory for two federally recognized sovereigns to exercise jurisdiction over the same property, absent explicit congressional authorization. (See *Williams v. Clark* (9th Cir. 1984) 742 F.2d 549, 555; *Native American Church of North America v. Navajo Tribal Council* (10th Cir. 1959) 272 F.2d 131, 133 ["Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive"].) Indeed, the NIGC has twice

previously suggested an Indian tribe may conduct gaming on Indian lands where it "was *undisputedly* the *only* tribe exercising jurisdiction over the land . . . ." (Exh. I, Jun. 30, 2005, Indian lands determination for Buena Vista Rancheria of Me-Wuk Indians, p. 7, citing Memorandum to NIGC Acting General Counsel Re: Tribal jurisdiction over gaming on fee land at White Earth Reservation, dated Mar. 14, 2005, italics added; see also *id.* at p. 12 ["Because the Tribe is *undisputedly* the only tribe that exercises jurisdiction over the Rancheria, the Tribe meets IGRA's requirements that it be the tribe with jurisdiction over the Indian lands at issue." (Italics added.)].)

At this point, Table Mountain's jurisdictional and historical claim to the McCabe Allotment precludes a finding that the property is Big Sandy's Indian lands.

C. It is Uncertain Whether Each Successive Beneficial Owner of the McCabe Allotment was a Big Sandy Member

The Tribe's principal argument for jurisdictional authority is that the McCabe Allotment has continuously been held in trust for the benefit of a Big Sandy member since 1920. (Tribe's Apr. 19, 2005 letter to NIGC at p. 10.) Because the jurisdictional inquiry must contain a historical perspective of the property, it is important in this instance to review the allotment's title history to help clarify the sovereignty dispute between Big Sandy and Table Mountain.

> [A]djudicating the question of whether a tract of land constitutes "Indian lands" for Indian gaming purposes is "conceptually quite distinct" from adjudicating title to that land. One inquiry has little to do with the other as land status and land title "'are not congruent concepts' in Indian law." [*Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475] (quoting *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1097 (10th Cir. 1985) (en banc) (Seymour, J., concurring)). A determination that a tract of land does or does not qualify as "Indian lands" within the meaning of IGRA in no way affects title to the land. Such a determination "would merely clarify sovereignty over the land in question." *Navajo Tribe*, 809 F.2d at 1475 n.29.

(*Kansas v. United States*, *supra*, 249 F.3d at p. 1225.)

To assist the NIGC or any other federal agency tasked with resolving the competing land claims at issue here, we identify some aspects of the issue of Tribal membership of the McCabe Allotment's successive beneficial owners.

Mary McCabe. While Mary McCabe is identified on the original federal trust patent as "a Mono Indian" (Exh. C), it is unclear whether she was a Big Sandy member. This omission is critical given the existence of at least two other bands of Mono Indians in the area; namely the North Fork Rancheria and Cold Springs Rancheria. The Tribe asserts its oral history confirms Mary McCabe was a member but does not offer any supporting declaration.

Frank McCabe. Frank McCabe is formally listed as a distributee in the Distribution Plan that effected the Tribe's termination in 1965. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. A, p. 6.) According to the Tribe's Constitution, all distributees or dependent members of distributees identified in the 1965 Distribution Plan are members. (Big Sandy Const., art. II, § 1(a).) Frank McCabe's status as a distributee, however, does not conclusively establish any significant heirship to Big Sandy bloodlines. Indeed, to qualify as a distributee under the 1965 Distribution Plan, one need not have been a Big Sandy member, or claim any Mono Indian heritage. Instead, distribution was available to "'[a]ll Indian families who have continuously resided on the Big Sandy Rancheria for the two (2) year period immediately prior to May 1, 1963.'" (Tribe's Apr. 19, 2005 letter to NIGC, Exh. A, p. 2.) Thus, any Indian from any tribe who happened to live on the Rancheria for the established two-year period would have qualified for Big Sandy asset distribution and subsequent membership once the Rancheria's termination was reversed. Indeed, Table Mountain reports Frank McCabe married a Big Sandy member and at some point moved onto the Big Sandy Rancheria, which likely explains his presence there and consequential eligibility for asset distribution.

Frank McCabe is also purportedly identified in the BIA's "1933 California Rollbook," with an identification number and residence in Auberry. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. F.) The Rollbook, however, does not confirm he was a Big Sandy member. (*Ibid.*) The Tribe also claims he was once a member of its business committee (*id.* at Exh. G), but the supporting document is largely illegible and it is unclear which tribe is referenced, including whether it is even a Mono Indian tribe. The Tribe also offers a member's declaration claiming Frank McCabe was a member. (*Id.* at Exh. I.) Nonetheless, Table Mountain likewise contends Frank McCabe was a member of that tribe.

Robert Lewis. As indicated, Robert Lewis was not a Big Sandy member, but possibly a Chuckchansi member, perhaps from the nearby Picayune Rancheria of Chuckchansi Indians.

Lester McCabe. The Tribe asserts it did not always maintain formal enrollment records but Tribal history indicates Lester McCabe was a member. (Tribe's Apr. 19, 2005 letter to NIGC, at p. 5, fn. 3.) Moreover, the Tribal member professing knowledge about Tribal membership history—including Frank McCabe's membership—provides no information about Frank's son, Lester. In any event, the Tribe offers a "Grant Deed to Restricted Indian Land Special Form," which identifies Lester McCabe as a Mono Indian but not specifically as a Big Sandy member. (*Id.* at Exh. J.) Similarly, Lester McCabe's Index and Heirship Card, issued by the BIA, identifies him as a Mono Indian, son of Frank McCabe, and exclusive owner of an allotment from Frank McCabe originally owned by Mary McCabe, but again there is no indication he was a Big Sandy member. (*Id.* at Exh. K.)

The foregoing suggests the tribal affiliation of each successive beneficial owner of the McCabe Allotment is uncertain. Accordingly, Big Sandy's assertion of exclusive jurisdiction over the McCabe Allotment because of the parcel's title history appears tenuous in need of federal clarification.

V. The Tribe Has Failed to Sufficiently Demonstrate it Exercises Governmental Power Over the McCabe Allotment

"In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger the Gaming Act." (*State of Rhode Island v. Narragansett Indian Tribe*, *supra*, 19 F.3d at pp. 702-703; see 25 U.S.C. § 2703(4)(B).) We believe that even if the Tribe has exclusive jurisdiction over the McCabe Allotment, it has not adequately demonstrated that it exercises governmental power over the property in a sufficient manner, or for a historically significant time period.

The term "governmental power" is not defined. One of the few courts to address the issue has held that governmental power over off-reservation allotments may be demonstrated by evidence showing: (1) whether the area is developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement is provided by the tribe or the state; and (5) other indicia as to who exercises governmental power over the area. (*Cheyenne River Sioux Tribe v. South Dakota* (D.S.D. 1993) 830 F.Supp. 523, 528, affd. (8th Cir. 1993) 3 F.3d 273, 279.)

The Tribe argues the Solicitor for the Department of the Interior does not consider it necessary for a tribe to demonstrate that it *actually* exercised governmental power over a tract of Indian land, but instead considers it sufficient that the tribe *can* exercise governmental power if it chooses to do so; to the extent a tribe *actually* exercises such power simply weighs in favor of finding the property to be Indian lands under IGRA. (Sampson Johns memo, p. 6.) Controlling case law is to the contrary.

In *State of Rhode Island v. Narragansett Indian Tribe*, *supra*, 19 F.3d at p. 703, the court held, "Meeting [the governmental power] requirement does not depend upon the Tribe's theoretical authority, but upon the presence of *concrete manifestations* of that authority. Consequently, an inquiring court must assay the *jurisdictional history* of the [lands in issue]. [Fn. omitted.] *Cf., e.g., DeCoteau v. District County Court*, 420 U.S. 425, 442, 95 S.Ct. 1082, 1091, 43 L.Ed.2d 300 (1975)." (Italics added.) In this instance, the Tribe's evidence of governmental power fails to rise to the level of a "concrete manifestation" of that authority for any historically significant time period.

In June 2004, the Tribe claimed for the first time by official resolution that it has historically provided governmental services to allotments located off its Rancheria and owned or occupied by Tribal members. (See Tribe's Apr. 19, 2005 letter to NIGC, Exh. P.) The resolution, however, fails to articulate how far back into history the Tribe's alleged exercise of governmental power actually reached.

In an attempt to establish some measurable proof of historic governmental power over the McCabe Allotment, the Tribe asserts its members previously used the property—and various surrounding parcels—for hunting rabbits, deer and other animals, and gathering wild

mushrooms, acorns and downed wood. (Tribe's Apr. 19, 2005 letter to NIGC, Exh. I.) This assertion fails to describe when or for how long the hunting and gathering occurred.

The Tribe also asserts Frank McCabe lived on the allotment and maintained a house and ranch animals during his residency. (Tribe's Apr. 19, 2005 letter to NIGC, Exhs. I & M.) It appears Frank McCabe's house may have burned down in or around 1960, after which he may have moved to the Rancheria. (*Id.* at Exh. I.) The Tribe claims its members regularly visited and inspected the allotment for trespassers, squatters and any damage to or removal of objects from the land. Apparently, Frank McCabe was concerned about and protective of his land. (*Ibid.*) The evidence, however, does not specify when or how frequently the visits occurred, what the "visits" or "inspections" entailed, whether the members inspected the entire allotment, or more importantly, whether they did so on the Tribe's behalf or with any Tribal governmental power or objective, or whether they did so based on platonic friendship with the beneficial owner. Nonetheless, evidence of Frank McCabe's concern for his property does not equate to a tribal governmental concern or exercise of governmental power over the property.

Nor does the Tribe offer any evidence that Frank McCabe was the only Indian living, or to have ever lived, on the allotment since it was patented to Mary McCabe in 1920. As indicated, Table Mountain reports its members lived on the allotment until the 1960s. While one Big Sandy Tribal member claims he recently became employed as a Tribal security officer and in that capacity he frequently visits and inspects various off-Rancheria allotments owned or occupied by Tribal members, including the McCabe Allotment (Tribe's Apr. 19, 2005 letter to NIGC, Exh. I), there is no indication when he began inspecting the McCabe Allotment as a Tribal official, whether he inspected the entire allotment, or what his "inspection" entailed or discovered. Thus, it is unclear when, if ever, the Tribe actually enforced its laws on the land to exclude non-Tribal members.

The Tribe also offers several conclusive declarations from Tribal members suggesting the Tribe provides governmental services and benefits, including inspection by Tribal patrol officers, sign placement, fence repair, maintenance, monitoring for unauthorized grazing and general supervision. (Tribe's Apr. 19, 2005 letter to NIGC, Exhs. M-O.) The current beneficial owner also acknowledges the Tribe has governmental authority over the allotment and exercises the authority as needed (*id.* at Exh. M), although it is unclear how, when, or to what extent the Tribe has actually exercised such authority. The Tribe further asserts a recent inspection by a Tribal employee revealed evidence of unauthorized cattle grazing on the allotment and the Tribe subsequently sealed off any entries through which the cattle may have gained access. (*Id.* at Exh. O.) The declarations, however, are phrased in such a way that it is impossible to ascertain when the events occurred, how long the Tribe has provided the alleged governmental services, or in what manner the Tribe has enforced its laws specifically on the McCabe Allotment.

Furthermore, while "No Trespassing" signs are to be posted in plain view on all the Tribe's "off-reservation individually owned restricted fee allotments and off-reservation allotments held by the United States in trust of the benefit of the Tribe or any Tribal member," declaring the property to be under Tribal jurisdiction (*id.* at Exh. P), there is no evidence such a

sign exists on the McCabe Allotment or, if so, who installed it, where it is located, or how long it has been there. The Tribe also purportedly requires nonmembers to obtain a permit to enter restricted trust lands, including the McCabe Allotment (*id.* at Exhs. O & Q), but there is no evidence indicating the requirement is routinely enforced.

On this record, we do not feel that the Tribe has provided concrete evidence that it has historically asserted governmental power over the McCabe Allotment. (See *State of Rhode Island v. Narragansett Indian Tribe*, *supra*, 19 F.3d at p. 703.) Although the Tribe has reportedly been active since 1909, it may have asserted jurisdictional authority and governmental power over off-Rancheria land only within the last 14 months. Indeed, the 1965 Distribution Plan clearly states the Tribe "has had no constitution and bylaws or any other formal type of organization." (Tribe's Apr. 19, 2005, letter to NIGC, Exh. A, p. 2.) The Tribe's first formal Constitution adopted only five years ago did not specify the Tribe's jurisdiction or governmental power extended beyond the Rancheria boundaries. (Big Sandy Const., art. I.) Thus, it appears difficult for the Tribe to contend it actually exercised governmental power over the McCabe Allotment before 1965, or even 2000. Moreover, the Tribe's recent legislative acts do not provide concrete proof that the Tribe actually exercised historic governmental power over the McCabe Allotment.

VI. To the Extent IGRA Requires a Tribe to Demonstrate it Has Exercised Governmental Power Over Claimed Indian Lands For a Historically Significant Time Period, Big Sandy Fails to Meet This Requirement

The Indian lands definition in section 2703(4)(B) includes "any lands title to which *is* either held in trust" for "any Indian tribe or individual . . . *and* over which an Indian tribe *exercises* governmental power." (25 U.S.C. § 2703(4)(B), italics added.) The italicized words indicate this is a temporal definition as of IGRA's enactment and that section 2719(b)(1)(A) is the sole means by which an Indian tribe may game on after-acquired land, or land on which it asserts jurisdiction and governmental power after October 17, 1988.

Our interpretation of section 2703(4)(B) to include a temporal limitation is consistent with a previous memorandum from the Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary of Indian Affairs, regarding an Indian lands determination concerning "restored lands." Upon reconsideration, the Department concluded that interpreting

> the restored lands 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 and restored lands.

(Exh. J, Confederated Tribes memo, p. 4.) The Department specifically referenced IGRA's effective date, October 17, 1988, as an inherent temporal limitation for establishing reservation

boundaries within which gaming could be conducted. (*Ibid.* ["IGRA provides certain temporal (i.e., the October 17, 1988 limitation for reservation boundaries) . . . limitations"].)

Although restored lands are not at issue here, the interpretation of IGRA to include temporal limitations applies with equal force to the requisite exercise of governmental power under section 2703(4)(B) before a parcel may be found to be Indian lands for gaming purposes. Any other construction would produce a result that is at odds with IGRA's purpose and Federal Indian law policy of promoting tribal economic development, tribal self-sufficiency, and strong tribal government. (See 25 U.S.C. §§ 2701(4), 2702(1).) Interpreting the governmental power provision without temporal standards would encourage tribes and investors to stretch IGRA's boundaries, and give certain tribes an unintended advantage over tribes who are bound by IGRA's after-acquired lands provisions. We do not believe such a result was intended when IGRA was enacted.

Thank you for considering our views on this important matter.

Sincerely,

Stephanie Shimazu

STEPHANIE K. SHIMAZU
Deputy Legal Affairs Secretary

Enclosures: Exhibit List
Attachments

cc: Chairperson Connie Lewis, Big Sandy Band of Western Mono Indians
Chairperson Leanne Walter-Grant, Table Mountain Rancheria
Padraic I. McCoy, Esq. Holland & Knight LLP
Jerome L. Levine, Esq, Holland & Knight LLP
Daniel E. Casas, Esq.

Exhibit List

A. BIA Narrative

B. Constitution of the Big Sandy Band of Western Mono Indians

C. March 29, 1920, Patent to Mary McCabe

D. October 6, 1922, probate documents regarding Mary McCabe's estate

E. July 6, 1943, probate documents regarding Robert Lewis's estate

F. May 14, 1970, Order Approving Will and Decree of Distribution for Frank McCabe's estate

G. February 2, 1979, Deed to Restricted Indian Land Special Form

H. Area maps

I. June 30, 2005, Indian lands determination for Buena Vista Rancheria of Me-Wuk Indians

J. December 5, 2001, Department of Interior Memorandum re Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians proposed gaming on Hatch Tract in Lane County, Oregon

K. Articles and publications

Exhibit A

1. Narrative statement concerning the acquisition of the Rancheria, covering the date of purchase, purchase authority, purpose of purchase, group(s) for whom the land was purchased, etc.; please include copy of title documents and any memoranda or correspondence bearing on whether the Rancheria was intended to be held in trust.

The Big Sandy Rancheria was purchased in 1909 with funds appropriated under the Act of April 30, 1908 (35 Stat. 70, 76) "for the use of the Indians in California...". While this office has not been able to locate correspondence directly relating to the actual purchase, subsequent correspondence reflects that it was purchased by the United States for the use of the San Joaquin or Big Sandy Band of Indians, with title retained in the name of the United States. See attachments 2, 5, 6, and 12 under Title Evidence.

In 1915, because the Northern California Baptist Convention (who owned adjacent land) had inadvertently erected buildings upon a portion of the property belonging to the U.S., it was then proposed that the Baptist Convention exchange some of its own property for ten acres of the government's land. After consideration, the proposal was not accepted, however, by Secretarial Order, the Baptist Convention was allowed to occupy the property for "mission purposes" with the understanding that the use vested no right, title, or interest to the Baptist Convention. See attachment 5 under Title Evidence.

Subsequently, the Northern California Baptist Convention transferred all of their property to the American Baptist Home Mission Society and requested approval by the U.S. concerning

the property at Big Sandy. On November 17, 1936, Secretarial approval was granted. See attachment No. 10 under Title Evidence.

In light of the terminal legislation duuing the 50's, it appears the Mission Society became concerned about the disposition of the lands upon which their church had placed improvements. Officials of the Mission Society and Congressman Sisk had deliberated a proposed land exchange and presented the proposal to the BIA on several occasions. By letter dated May 14, 1959, (attachment No. 15 of Miscellaneous Correspondence) the Big Sandy group was asked to give their opinion about the exchange and were offered an alternative to the proposal. The negotiations apparently continued for some time after that, but, eventually, all parties agreed to an exchange and appropriate legislation was introduced and passed. See attachment 3 and 4 under Title Evidence.

The land exchange authorized by the Act of August 10, 1961, between the United States and the Mission Society, left a total of 2.5 acres still affected by the "mission reserve". Pursuant to delegated authority, the remaining mission reserve was revoked by the Sacramento Area Director in 1967 thereby restoring clear title to the 2.5 acres in the United States. See attachment 14 under Title Evidence.

By Secretarial Order of June 15, 1970, the same 2.5 acres was relinquished by the United States (Assistant Secretary of

Interior, Harrison Loesch, Public Land Management) with title thereto to be conveyed to the Big Sandy Association in accordance with the approved distribution plan and as was authorized by the Rancheria Act. See attachment 15 under Title Evidence.

Based upon the above events and the correspondence attached hereto, there seems to be no evidence which implies that the subject rancheria lands were intended to be held "in trust" for the San Joaquin or Big Sandy Band of Indians. It should be duly noted, however, that the Indians were consulted when the land exchange was initially proposed in the late 50's, and the existing "general council" passed a resolution concurring with approval of the land exchange. See attachment No. 4 under Tribal Resolutions.

The record reflects that there were no formal land assignments, hence, the eligibility criteria established by the Auberry Indian Council for determining distributees was: "All Indian families who have continuously resided on the Big Sandy Rancheria for the two (2) year period immediately prior to May 1, 1963" (see the distribution plan). Initially, residence on the rancheria was authorized based on an individual's need (see letters of November 9, 1933 and January 10, 1934, attachment 7 and 8 of Title Evidence) and there appears to have been no regard for tribal affiliation.

2. Copy of organic documents for the Auberry Indian Council and the Auberry-Big Sandy Association.

The Auberry Indian Council had no organic documents. From the record, it appears the Auberry Indian Council evolved in 1955 (see letter of May 24, 1955, attachment No. 1 under Miscellaneous Correspondence) and was composed of both rancheria resident and nonresident Indians (see attachment No. 38 of Miscellaneous Correspondence, letter to Commissioner dated October 7, 1964). The council did conduct regular meetings, however, the subjects were centered on termination, land assignments, and operation of the water system. See correspondence under Meetings with Indians.

Prior to the Auberry Council, there is record that the Indians elected a business committee as early as 1935 (see letter dated April 24, 1935, attachment No. 9 of Title Evidence) to handle "affairs of the community". We are presently unable to find record of what comprised "affairs of the community", but can assume that they may have entailed social events or events related to the operation of the Baptist church.

According to the 1937 MacGregor report (attachment No. 11 of Title Evidence), the organization as a self-governing body, did not appeal to the Indians of the Auberry area (see page 5 of the subject report).

The Big Sandy Association was created after passage of the Rancheria Act in order to take title to and manage the community

properties and the water system. The Articles of Association were executed by the distributees on December 8, 1966.

3. Copy of title documents tranferring former Rancheria property or assets to the Association.

The copy of the deed transferring title from the U.S. to the Big Sandy Association is attached. The assets distributed consisted of the following:

Parcel 1	-	vacant land
Parcel 5	-	well site
Parcel 14	-	well site, school bldg. site
Parcel 21	-	vacant land
Parcel 22	-	cemetery
Parcel 23	-	vacant land
Parcel 24	-	vacant land
Outlot A	-	storage tank site
Gov't-owned Bldg. #681	-	pump house
Gov't-owned Bldg. #682	-	community house
Water system		

4. Copy of lists of distributees and copy of the documents transferring Rancheria property or assets to distributees.

The distributees are listed on the attached copy of the distribution plan. Copies of the deeds transferring property to the individual distributees are attached.

5. Copy of list of dependent members of distributees' families at time of approval of distribution plan.

See "dependent members" as listed on the distribution plan.

6. Copy of distribution plan, dates of tribal and federal approval; name(s) of official(s) approving plan.

See page 7 of the distribution plan. Attached to the back of the plan is a copy of the results of the referendum election of March 5, 1965.

7. Narrative statement covering information provided by BIA to Indians of the Rancheria concerning termination and its relative advantages and disadvantages. Also describe all representations made to Rancheria Indians. See Complaint, paragraph 59. Any information as to whether BIA represented termination to be mandatory is particularly important. Include a list of all meetings held, subjects discussed, participants and dates along with supporting documentation. Include copy of all correspondence to Indians of the Rancheria concerning termination, the distribution plan, services to be provided, etc.

(paragraph 59 from Complaint: "In order to induce plaintiffs to enter into said contract, defendants represented to plaintiffs that, inter alia termination was mandatory, that services and improvements mentioned in the Rancheria Act would adequately be provided, that funds to pay for said services and improvements mentioned in the Rancheria Act would adequately be provided, that funds to pay for said services and improvements would be available, and that only if the contract were entered into would such services be available to plaintiffs. These representations: termination under the Rancheria Act was not mandatory, no funds actually had been appropriated to carry out the Rancheria Act and the BIA lacked funds with which to provide adequate improvements and services; the BIA had no standards by which to evaluate either the needs of the Indians or the adequacy of the services and improvements provided; and fewer services were available, and to fewer persons, than the Indians had been led to believe.")

Although the Rancheria Act authorized the expenditure of $509,235, the funds were not appropriated by Congress. By letter

dated August 19, 1958, a copy of which was mailed to Mr. John S. Marvin, representative for the Big Sandy Rancheria, the Indians were advised that BIA would proceed with existing funding because Congress had not appropriated additional monies (attachment 9 under Miscellaneous correspondence). The letter of March 18, 1959 (attachment 13 under Miscellaneous) addressed to Reverend Vernon Brooks, who had made inquiries on behalf of the band, again restated the fact the Congress had not appropriated monies under the Rancheria Act.

The Indians' misconception that improvements were conditioned upon termination were made known to Congressman Sisk, and the matter was discussed with BIA staff. By letter of November 4, 1959 to Mr. and Mrs. John Marvin from Congressman Sisk's staff (see attachment 3 under Roads and Waterline correspondence), it was clearly stated that BIA had no intention of using the band's need for water supply improvements as a means of requiring the Indians to agree to termination.

By letter dated April 15, 1959 to Congressman Sisk, BIA advised that assistance would be provided to the Indians in a land exchange transaction even if the Big Sandy people decided not to avail themselves of the provisions of the Rancheria Act (see attachment 14 under Miscellaneous correspondence).

The Big Sandy group did ask a BIA representative whether or not BIA would proceed with plans to survey the rancheria even if they chose not to participate in the termination process. The

response was that surveys would be done whether or not termination was planned (see Tribal Minutes dated April 3, 1963, attachment 9 under Meetings with Indians).

Sanitation facilities to be undertaken by PHS in accordance with P.L. 86-121 were provided to both terminating and nonterminating rancherias/reservations in California. In reviewing the informational letter to the Big Sandy people, there is no statement made nor was it implied, that termination was mandatory in order to receive sanitation services (see attachment 2 under Sanitation Correspondence).

The HEW letter of June 12, 1968 (attachment 12 under Sanitation Correspondence) directed to California Senator William E. Coombs, regarding the policies of the Indian Health Division, set out the reasons why a feeling had developed among the California Indian groups that they must initiate termination in order to receive consideration to their request for a sanitation project.

See "index" under Meetings with Indians tab which outlines the topics discussed during metings and/or trips with or by BIA representatives. Below are the names and titles of the participating BIA staff:

Ten Broeck Williamson, Program Officer, Tribal Operations
Walter J. Wood, Appraiser
Guy Robertson, Assistant Area Director
Maurice (Bill) Babby, Program Officer, Tribal Operations
Consuelo Gosnell, Community Services Officer
Frederick H. Varnum, Land Operations Officer
Lawrence J. Badurina, Area Plant Management Officer

Leo Granger, Irrigation Foreman
Victor T. Courtwright, Tribal Operations Officer
John E. Jorenby, Realty Officer
Emmet Lynch, Realty Officer
Elmer Panky, Housing Officer
Norman Sahmaunt, Resident Road Engineer (and later as Assistant to Area Director)
Jimmie Wolf, Realty Officer
Pat Calf Looking, Tribal Operations Officer
Audrey French, Housing Assistant

As to the standards used to evaluate either the needs of the Indians or the adequacy of the improvements, nothing can be located regarding evaluation of needs, however, improvements to roads, water system, and the installation of sanitation facilities were all inspected by county officials.

8. Narrative statement concerning funding for carrying out the Rancheria Act (see Complaint, paragraph 59).

Although appropriations under the Rancheria Act were not made, BIA made the needed improvements to the Big Sandy Rancheria. Correspondence reflects, however, that these same improvements were to have been made even if the group had chosen not to participate in the Rancheria Act. See attachments 13 and 14 regarding the land exchange under Miscellaneous correspondence, attachment 3 under Roads and Waterline correspondence regarding improvements planned for the water system, attachment 9 under Meetings with Indians regarding the survey of the rancheria.

By letter of March 16, 1964 (attachment 32 under Miscellaneous) to the Commissioner of Indian Affairs, the Sacramento Area

Office advised that an estimated $19,000 was needed for rehabilitation of the domestic water system and that road construction was estimated to cost between $125,000 to $150,000, and that the tentative amounts had been included in fiscal year 1965 budget estimates.

Also, additional funds were requested by letter of September 10, 1964 (attachment 37 under Miscellaneous), in order to complete a survey of the rancheria, and the requested supplement was received per October 7, 1964 memorandum (attachment 39 under Miscellaneous).

By letter of January 13, 1966 to the Commissioner (attachment 2 under Housing), the Area Director requested that $50,000 be allocated under HIP to improve the housing situation at the rancheria, however, the allocation was not made. (BIA, Sacramento Area Office, received its first allocation under the housing program in 1968 in the amount of $174,187, none of which was used at the Big Sandy Rancheria.)

The figures readily available show that $145,955.21 was spent under contract No. 14-20-J50-1354 for the completion of the road work and waterline placement (see attachment 5 under Road and Waterline), $2,858.00 was spent for well drilling under contract No. 14-20-J50-1400 (attachment 8 under Water Correspondence), and a total of $7,479.00 was spent for the survey work (attachment 56 under Miscellaneous).

The appointments of conservators were coordinated between BIA, the Fresno County Welfare Department, the County Counsel office, and the Veterans Administration (see attachments 70, 72, 75, 78, and 79 under Miscellaneous), and correspondence as to any direct or indirect costs to the BIA cannot be located.

9. Narrative statements as to: (a) whether Secretarial recognition of Auberry Indian Council was revoked and the period of such revocation;

There is no evidence that the Auberry Indian Council ever received Secretarial recognition. It appears the Council operated on a "general council" basis after May 1955, and there were no organizational documents ever created or which required revocation.

(b) whether BIA treated the distributees and their dependents as terminated, and the period of same;

The Big Sandy distributees and their dependents were considered by BIA as being terminated as of May 2, 1973 (see Central California Agency inter-office memorandum of May 2, 1973, attachment 92 under Miscellaneous).

The date which BIA considered Big Sandy as not terminated cannot be definitely determined. In response to the BIA Area Director's inquiry of June 27, 1974, Indian Health Service advised BIA in their letter of August 1, 1974 that they felt the water and sanitation systems were inadequate, they planned to do additional work, and that they felt termination was at that time

unwarranted (see attachments 13 and 14 under Sanitation correspondence).

The Commissioner's memorandum of June 25, 1975 states "the Bureau of Indian Affairs, with the concurrence of the Associate Solicitor for Indian Affairs, has determined that termination under both the 1958 Act and the 1964 Amendment does not occur until the section 3 improvements have been adequately completed according to standards which have been set by HEW, ...".

Denials to requests for services (see correspondence under Services to Individuals) by the Big Sandy dependent members were made subsequent to May 2, 1973; however, an application dated September 29, 1975 for AVT assistance filed by a dependent member (Rodney Lewis) was approved.

Notifications to the distributees as to restored eligibility for BIA services have not been issued; and all dependent members received notification of restored eligibility as a result of the Eddie Knight case (notifications were dated March 26, 1976 and were sent by certified mail).

The band's requests for BIA assistance and/or advice for the purposes of electing an interim tribal council and application for housing assistance were given approval.

(c) whether BIA treated the distributees and their dependents as ineligible, for BIA services and the period of same. Please determine, if possible, whether any distributee or dependent actually applied for BIA services after approval of the distribution plan and the action taken by BIA respecting such application.

See response to "(b)" above and the material furnished under the tab, Services to Individuals.

(d) whether the Big Sandy Band requested grants, loans, contracts, or other federal benefits or services after approval of the distribution plan and the action taken by BIA respecting such reqeusts. Include copy of all relevant memoranda, correspondence, applications, etc.

The Big Sandy Band negotiated a self-determination grant under P.L. 93-638 on August 14, 1980 in the amount of $2,000. The contract was amended on August 29, 1980 increasing the grant amount to $3,940.00 (see tribal resolution of July 25, 1980, attachment No. 6 under Tribal Resolutions).

The Band had also requested an interior lot survey and an archeological survey. No written response can be located to the first request, and the request for an archeological survey was denied because BIA has no authority to expend funds on nontrust lands (see attachments 94 and 97 under Miscellaneous correspondence).

10. Narrative statement describing the nature, conditions and adequacy for present and future needs of the Rancheria's water, sanitation and irrigation systems (a) at the time of distribution plan approval and (b) presently. Include copy of all pertinent memos, correspondence, etc.

At the time the distribution plan was approved, nearly all of the homes were served by a community water system that had been constructed by BIA during the late 1930's, and it was in need of rehabilitation (see first page of the distribution plan). No further description of the old system can be located.

As to the new system, the county officials initially felt that BIA should provide special equipment to enable water distribution to the vacant lots (22, 23, 25, and 27) which, because of their elevation, were not served by the gravity flow water system.

BIA responded by stating that in accordance with the distribution plan, BIA was to provide a safe and adequate domestic water sypply for all of the existing homes and to any residence which was under construction that was as much as 50% complete within 180 days after approval of the distribution plan. The Bureau stated that it could not "legally expend funds to provide such service for a potential use . . .". (See March 1, 1966 letter, attachment No. 12 under Water correspondence.)

There is no correspondence which would indicate future irrigation needs (there was no existing system) were assessed, and it is assumed that no consideration was given because of the terrain of the rancheria. Following are descriptions:

> "Their homes have been built on knolls and are usually separated by rocky brushy ravines or other topographic barriers." (July 20, 1966 appraisal report at page 8.)
>
> "The rancheria is strictly a homesite area since there is little arable land and the mountainside areas are too steep and brushy for cattle grazing." (April 21, 1966 appraisal report at page 4.)

11. Narrative statement describing any and all improvements to water, sanitation, and irrigation systems of the Rancheria promised, undertaken or completed by BIA in connection with termination. Include copy of all pertinent memos, correpondence, etc.

The plans and specifications for the proposed domestic water distribution system were submitted to the county for review and received the approval of the Fresno County Public Works Department (see March 29, 1965 letter marked as attachment No. 2 under the Water correspondence). The proposed project included the provision of fire hydrants in addition to domestic water to each completed home. (A map showing the location of the pipelines, tanks, etc., is available from the Area Land Operations office if needed.) See attachments 4 & 5 under Roads and Water correspondence for furthur details.

By letter of February 8, 1966, the county was informed as to the details of the completed domestic water systems (attachment No. 10 under Water correspondence). By letter of February 23, 1966 (attachment No. 11), the Public Health Department expressed several concerns as to the adequacy of the system, offered recommendations, and stated that they had found contamination in a water sample taken from the independent spring-fed supply serving lots 6, 7, and 8.

Subsequent to BIA's March 1, 1966 letter (attachment 12 under Water correspondence) of explanation, the Health Department by letter of March 3, 1966 advised the Director of Public Works that the government-installed water system could be accepted by the Health Department, and that they would advise the Indians as to future protective measures for the private water supplies. BIA apparently continued to work with the Health Department,

Albert Moore, and Wilshire Alec (both distributees) in correcting problems with the spring-fed water supply; see the March 3, 1966 letter (attachment 14 under Water correspondence) to the Area Director from the Health Department.

There appears to have been no funds expended for irrigation purposes (see response to question 10 above). The net charges for various domestic water system improvements incurred at the rancheria since 1938 amounted to $42,630.31. As best can be determined (see attachment No. 1 under Water correspondence), $2,372.80 was incurred prior to October 4, 1961 leaving a total of $40,257.51 being expended between October 1961 and August of 1966. The final domestic water system is described on attachment No. 18 under Water correspondence and on pages 9 and 10 of the July 20, 1966 appraisal report.

The sanitation facilities were furnished by PHS pursuant to P.L. 86-121, and according to the Final Report (a copy of which is on file in BIA's Real Property Management office), the following twelve individuals' homes were served: Wilshire Alec, Minnie Bob, Melba Beecher, Steve Cheepo, Ned Joe, Frank McCabe, Emma Major, Clarence Marvin, Albert Moore, Nellie Riley, May Sample, and Wilbur Beecher. See also, correspondence re Sanitation attached hereto.

12. Narrative statement concerning housing conditions on the Rancheria at time of approval of the distribution plan and presently.

According to BIA's record (see Housing correspondence, letter of January 13, 1966), Public Health Service requested that the county issue building/plumbing permits before undertaking the Big Sandy sanitation project. The January 13 letter states that the applications for five of the homes were denied because of their "deteriorated condition and inadequate size". (In the same letter, the Area Director at that time requested that $50,000 be allocated under the Bureau's Housing Improvement Program to improve the five homes.) No written response from the Commissioner to the Sacramento Area Office January 13 letter can be located.

The conditions of the homes are described in the July 20, 1966 BIA appraisal report beginning at pages 32, 34, 38, 40, 42, 45, 47, 49, 51, 54, 56, 58, and 60 and also in a trip report, attachment 19 under Meetings with Indians.

By letter of January 17, 1966, the Area Director further advised the Commissioner that PHS was installing the sanitation facilities in three of the five inadequate homes.

The Band received a HUD grant in the amount of $75,000 with work apparently beginning in February of 1979. The project was to be completed by early 1980, however, BIA has no record of the planned work nor of the actual improvements made, if any.

BIA had set aside $5,000 under HIP to be used in conjunction with the HUD funds for fiscal year 1980, however, the funds were

withdrawn and used at the Santa Rosa Rancheria because BIA did not receive word from the Big Sandy members as to how the funds were to be used. (See attachment 10 under Housing correspondence.)

ORDER OF ATTACHMENTS

1. Title Evidence/Correspondence (see separate index - 16 attachments)
2. Articles of Association
3. Distribution Plan
4. Miscellaneous Correspondence (see separate index - 104 attachments)
5. Deed to Association
6. Deeds to Individuals
7. Tribal Resolutions (see separate index - 6 attachments)
8. Meetings with Indians (and/or Trip Reports) (see separate index - 23 attachments)
9. Correspondence re Water (see separate index - 18 attachments)
10. Correspondence re Sanitation (see separate index - 14 attachments)
11. Correspondence re Housing (see separate index - 11 attachments)
12. Services to Individuals (includes denials)
13. Correspondence re Roads & Waterline (see separate index - 5 attachments)
14. Appraisal of April 21, 1966 (Parcels 1 & 26)
15. Appraisal of July 20, 1966

Exhibit B

Adopted by Tribe 2-21-00
Amended 2-21-00

Constitution
of the
Big Sandy Band of Western Mono Indians

PREAMBLE

We, the adult members of the Big Sandy Band of Western Mono Indians, also known as the San Joaquin Band of Indians, hereinafter referred to as the tribe, in order to establish tribal governmental powers and privileges, do hereby ordain and establish this constitution.

ARTICLE I - TERRITORY

The territorial jurisdiction of the tribe shall extend to all those lands as shown on the map of Fresno County Tract No. 2060 recorded at pages 89, 90 and 91 in volume 22 of plats, Fresno County Records, and to such other lands as may be hereafter acquired by or for the tribe.

ARTICLE II- MEMBERSHIP

Section 1. The membership of the tribe shall consist of the following:

(a) All persons of California Indian descent who were listed as distributees or as dependent members of distributees in the Plan for the Distribution of the Assets of the Big Sandy (Auberry) Rancheria as approved by the Under Secretary of the Interior on February 17, 1965, and amended on January 24, 1967.

(b) Direct lineal descendants or individuals who qualify under (a) of this section.

Section 2. No person who is enrolled with the Big Sandy Band of Western Mono Indians shall also be a member of another tribe, band or community of Indians. Any persons so dually enrolled shall relinquish membership in the other tribe or be disenrolled, provided nothing in this provision shall be construed in any way to require the relinquishment of any property acquired by purchase, allotment, bequest, inheritance, assignment, or other manner of acquisition.

Section 3. The general council shall have the power to adopt ordinances consistent with this constitution governing future membership, loss of membership and the adoption of members into the tribe.

ARTICLE III - GOVERNING BODY

Section 1. The governing body of the Big Sandy Band of Western Mono Indians shall be a five (5) member tribal council. The tribal council shall consist of a chairperson, vice-chairperson, secretary, treasurer and one (1) member each elected by a majority vote of the qualified voters of the tribe in an election in which at least thirty percent (30%) of the qualified voters have voted. In the event that no candidate receives a majority of the votes cast or in the event that thirty percent (30%) of the voters fail to participate in the election, a subsequent election shall be held within thirty (30) days. Should it be necessary to hold a subsequent election, the two (2) candidates receiving the highest number of votes for each position shall be the only candidates for that office at such election.

Section 2. The general council shall consist of all members of the Big Sandy Band of Western Mono Indians eighteen (18) years of age or older.

Section 3. Other officials or committees may be appointed by the tribal council when deemed necessary.

ARTICLE IV - NOMINATIONS AND ELECTIONS

Section 1. The officers of the Big Sandy Band of Western Mono Indians in office at the time of approval of this constitution shall, hold office until their successors are duly elected and installed. The first election under this constitution shall be held on the second Wednesday in September of 1986 and the officials elected shall hold office for two (2) years, Thereafter, elections shall be held every two (2) years on the second Wednesday in September.

Section 2. Any enrolled member of the tribe who is at least eighteen (18) years of age at the time of the election shall be entitled to vote and hold office regardless of residency. Absentee voting shall be permitted.

Section 3. Any qualified voter of the general council shall announce his/her candidacy for the tribal council no later than thirty (30) days prior to an election. The list of candidates shall be posted at the tribal office. In the event an insufficient number announce their candidacy, a general council meeting shall be called and convened to accept nominations.

Section 4. The candidate receiving the highest number of votes for a particular office shall hold that office.

Section 5. The general council shall adopt an election ordinance within six (6) months following the effective date of this constitution. The ordinance shall include secret balloting, voter registration, maintenance at all times of a current list of qualified voters and a procedure for handing election disputes and appeals. Procedures shall also be included regarding the conduct of recall and referendum elections and a uniform procedure and format for submitting and validating petitions. Elections to amend this constitution shall be conducted in accordance with Article XIV.

ARTICLE V - VACANCIES AND REMOVAL

Section 1. If a member of the tribal council shall die, resign or be absent from regular council meetings two (2) successive unexcused times or three (3) unexcused times in any twelve (12) month period, the council shall declare the position vacant, if a member of the tribal council shall be convicted by a court of competent jurisdiction of a felony while in office, the council shall declare the position vacant by a majority vote of the council members. If less than twelve (12) months of a term remains, the council shall fill the vacancy by appointment of a tribal member who qualifies for candidacy. A special election shall be called to fill vacated positions when more than twelve (12) months remain in the unexpired term.

Section 2. The tribal council may, by three affirmative votes, expel any officer or tribal council member who is proven guilty of improper conduct or of gross neglect of duty, provided the accused official is given written notification of charges at least ten (10) days prior to the designated tribal council meeting. Before any vote for expulsion is taken in the matter, such officer or member shall be given an opportunity to answer all written charges at a designated tribal council meeting called for that purpose. The decisions of the tribal council shall be final. Voting shall be by secret ballot and the chairman is eligible to vote.

ARTICLE VI- POWERS OF THE TRIBAL COUNCIL

Section 1. Enumerated Powers. The tribal council shall exercise the following powers and responsibilities subject only to those limitations imposed by this constitution and the laws of the United States;

(a) To consult and negotiate with Federal, State, local and tribal governments and other agencies on behalf of the tribe on all matters which may affect the Big Sandy Band of Western Mono Indians or the Big Sandy Rancheria; and to advise the Secretary of the Interior on all federal projects for the benefit of the tribe or the Rancheria.

(b) To promote the health, education and general welfare of the members of the tribe and to administer charity and other services as may contribute to the social and economic advancement of the tribe and its members.

(c) To encourage and foster arts, crafts, traditions and culture of the tribe.

(d) To promulgate and enforce resolutions or ordinances, providing for the manner of making, holding and revoking assignments of Big Sandy Rancheria land; providing for the levying of taxes and the appropriation of available tribal funds for public purposes; providing for the licensing of non-tribal members; and for the exclusion of persons who are not so licensed or are otherwise undesirable, from the Big Sandy Rancheria or other tribal lands.

(e) To promulgate and enforce ordinances on such subjects as the activity of the tribe may require as are not inconsistent with this constitution.

(f) To borrow money and provide for the repayment thereof, manage all economic affairs and enterprises, negotiate and contract on behalf of the tribe, and create tribally-owned corporations.

(g) To initiate, approve, grant or reject any acquisition, disposition, lease, or encumbrance of tribal lands or property; to manage, protect and preserve all lands, minerals, wildlife and other natural resources of the Big Sandy Rancheria; to initiate and administer land development projects for the entire Rancheria.

(h) To create and maintain a reasonable tribal fund for administrative expenses of the tribe and to provide for remuneration of tribal council members and tribal officials as may be required, to administer any funds or property within the control of the tribe for the benefit of the tribe and its members, officers or employees; and to allocate tribal funds as loans or grants and to transfer tribal property and other assets to tribal organizations for such use as the tribal council may determine.

(i) To employ legal counsel on behalf of the tribe, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior or his authorized representative so long as such approval is required by Federal law.

(j) To sue and be sued on behalf of the tribe provided such suit is consented to by waiver of sovereign immunity; provided, no waiver of sovereign immunity shall be made by the tribal council without the express prior approval by a majority of the general council, voting thereon at a meeting duly called and noticed for that express purpose, or at a regularly scheduled meeting.

(k) Employ consultants for the protection and advancement of the interest of the tribe and its members.

(l) To form or join existing tribal courts, consortiums or Indian organizations dealing with Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.) and to reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act (25 U.S.C. 1918).

(m) To establish a tribal judicial system, define its jurisdiction and promulgate tribal court rules.

(n) To create and regulate subordinate organizations; and to delegate to such organizations, or to any subordinate boards or officials of the Auberry Big Sandy Rancheria, any of the foregoing powers, reserving the right to review and rescind any action taken by virtue of such delegated powers.

(o) To form or join an existing housing authority.

Section 2. The tribal council shall have all of the appropriate powers necessary to implement specific provisions of this constitution and to effectively govern tribal affairs. All powers heretofore vested in the tribe, but not specifically referred to in this Constitution, shall not be abridged, but shall be reserved to the people of the tribe and may be exercised through appropriate amendment to this constitution.

ARTICLE VII - DUTIES OF OFFICERS

Section 1. The chairperson of the tribal council shall preside at all meetings of the general council and of the tribal council, and shall execute on behalf of the tribe all contracts, leases or other documents approved by the tribal council. He/she shall have general supervision of all other officers, employees and committees of the tribe and see that their duties are properly performed. When neither the general council nor the tribal council is in session, he/she shall be the official representative of the Big Sandy Band of Western Mono Indians.

Section 2. The vice-chairperson of the tribal council shall assist the chairperson when called upon to do so, and in the absence of the chairperson, he/she shall preside. When presiding, he/she shall have all the rights, privileges, and duties as well as responsibilities of the chairperson.

Section 3. The secretary of the tribal council shall conduct all tribal correspondence, keep a complete and accurate record of all matters transacted at council meetings and attest to the enactment of all resolutions and ordinances. At the expiration of his/her term of office, all

records and papers in his/her possession shall be turned over to his/her successor or the tribal council.

Section 4. It shall be the duty of the treasurer of the tribal council to accept, receive, receipt for, preserve and safeguard all funds in the custody of the council. As directed by the tribal council, he/she shall deposit all such funds in such banks or elsewhere, where depositor's funds are insured by the Federal Deposit Insurance Corporation. He/she shall not pay out nor authorize disbursement of any funds in his/her possession or custody or in the possession or custody of the council, except when properly authorized to do so by a majority vote of the tribal council. The books and records of the treasurer shall be audited at least once a year by a competent auditor. The treasurer shall be required to give bond satisfactory to the council. The premium for such bond shall be paid from tribal funds.

Section 5. The duties of all appointive committees or officials of the band shall be clearly defined by the tribal council at the time of their creation or appointment. Such committees and officers shall report on their activities and decisions from time to time as required by the tribal council. Their actions and decision shall be subject to review by the tribal council.

Section 6. Newly-elected members who have been duly certified shall be installed at the first regular meeting of the tribal council following certification.

ARTICLE VIII - MEETINGS

Section 1. Regular meetings of the tribal council shall be held on the last Saturday of each month, or at such other times as the tribal council may by resolution provide, on a day to be determined by the tribal council. Special meetings may be called by written notice signed by the chairperson, and shall be called by him upon receipt of a petition signed by at least three (3) tribal council members, and when so called the tribal council shall have the power to transact business as in the regular meetings, provided a quorum is present.

Section 2. The general council shall meet quarterly on the last Sunday of each third month. Special meetings of the general council may be called by the chairperson and/or shall be called by him upon receipt of a petition signed by at least thirty percent (30%) of the members of the general council.

Section 3. No tribal business shall be transacted at regular or special meetings unless a quorum is present. A quorum of the tribal council is three (3) members. For general council meetings a quorum is fifteen percent (15%) of the qualified voters.

Section 4. Order of Business.

(a) Call to Order by Chairperson
(b) Roll Call
(c) Reading of Minutes of Last Meeting
(d) Unfinished Business
(e) Reports
(f) New Business
(g) Adjournment

ARTICLE IX - REFERENDUM AND INITIATIVE

Section 1. Referendum. The tribal council shall, upon receipt of a petition signed by not less then thirty percent (30%) of the qualified voters, submit any enacted or proposed tribal legislation to a referendum of the eligible voters. The decision of a majority of the voters voting in the referendum shall be final and binding on the tribal council provided that at least thirty percent (30%) of the qualified voters have voted in such election. The tribal council shall call the referendum within thirty (30) days from the date of the receipt of a valid petition. The vote shall be by secret ballot.

Section 2. Initiative. The qualified voters of the tribe reserve the power to independently propose tribal legislation. Any proposed initiative measure shall be presented to the tribal council accompanied by a petition signed by not less than thirty percent (30%) of the eligible voters of the general council. Upon receipt of such a petition, the tribal council shall call a special election for the purpose of allowing the members of the tribe to vote on the initiative measure. The election shall be held within thirty (30) days from the date a valid petition is presented. The initiative shall be final and binding provided that at least thirty percent (30%) of the qualified voters have voted in such an election.

ARTICLE X - RECALL

Section 1. Recall. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe demanding a recall of any member of the tribal council, it shall be the duty of the tribal council to call a special election on the question of the recall within thirty (30) days from the date of the filing of the valid petition. The elections shall be hold in the manner prescribed in an election ordinance in accordance with Article IV, Section 5. Should the tribal council fail to call an election within thirty (30) days, the office shall automatically be vacant and shall be filled in accordance with Article V, Section 1. The decision of a majority of the voters voting in the recall shall be final provided at least thirty percent (30%) of the qualified voters voted. Once an individual has been subjected to recall proceedings, he/she shall not again be subject to such action during the balance of his/her term of office.

ARTICLE XI- ORDINANCES AND RESOLUTIONS

Section 1. All final decisions of the tribal council on matters of general and permanent interest (such as action on the tribal budget for a single year, or petitions to Congress or the Secretary of the Interior), or relating especially to particular individuals or officials (such as adoption of members, instructions for tribal employees, or rules of order for the council) shall be embodied in resolutions or ordinances.

Section 2. All questions of procedure (such as acceptance of committee reports, or invitations to outsiders to speak) shall be decided by action of the tribal council, or by the ruling of the chairperson, if no objection is heard. On all ordinance, resolutions, or motions the tribal council may act by a majority of those present.

Section 3. All ordinances and resolutions shall be dated and numbered and shall include certification showing the presence of a quorum and the number of members voting for or against the proposed enactment. No action of the tribal council shall have any validity or

effect in the absence of a quorum.

ARTICLE XII - BILL OF RIGHTS

Section 1. All members of the tribe shall enjoy without hindrance, freedom of worship, conscience, speech, press, assembly and association.

Section 2. This constitution shall not in any way alter, abridge, or otherwise jeopardize the rights and privileges of the members of the tribe as citizens of the State of California or the United States.

Section 3. The individual property rights of any member of the Big Sandy Band of Western Mono Indians shall not be altered, abridged or otherwise affected by the provisions of this constitution.

Section 4. Tribal members shall have the right to review all tribal records, including financial records, at any reasonable time in accordance with procedures established by the tribal council.

Section 5. In accordance with Title II of the Indian Civil Rights Act of 1968 (82 Stat. 77), the Big Sandy Band of Western Mono Indians in exercising its powers of self-government shall not:

(a) Make or enforce any law prohibiting the full exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress of grievances;
(b) Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor issue warrants, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(c) Subject any person for the same offense to be twice put in jeopardy;
(d) Compel any person in any criminal case to be a witness against himself;
(e) Take any private property for a public use without just compensation;
(f) Deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense;
(g) Require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six (6) months or a fine of $500 or both;
(h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of laws;
(i) Pass any bill of attainder or ex post facto law;
(j) Deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE XIII - SEVERABILITY

If any provision of this constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provision or provisions shall be severed and the remaining provisions shall continue in full force and effect.

ARTICLE XIV - AMENDMENTS

Section 1. This constitution may be amended by a majority vote of the qualified voters of the Big Sandy Band of Western Mono Indians, voting in an election called for that purpose by the Tribal Council, provided that at least thirty percent (30%) of those entitled to vote shall vote in such election.

Section 2. It shall be the duty of the Tribal Council to call an election on any proposed amendment at the request of the General Council or upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the Big Sandy Band of Western Mono Indians.

ARTICLE XV - ADOPTION

Section 1. This Constitution when adopted by a majority vote of the qualified voters of the Big Sandy Band of Western Mono Indians, voting at an election called for that purpose by the tribal council in which at least thirty percent (30%) of those entitled to vote shall vote, and shall be effective from the date of its approval.

ARTICLE XVI - CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an order issued February 11, 2000, by Loren Baty, Chairperson, Big Sandy Band of Western Mono Indians, the Constitution of the Big Sandy Band of Western Mono Indians of the Big Sandy Rancheria of California was submitted to the qualified voters of the tribe, and was on February 21, 2000 duly adopted/rejected by a vote of 44 for, and 0 against, in an election in which at least thirty percent (30%) of the 169 entitled to vote cast their ballots in accordance with Article XIV of this constitution.

Jeanette L. Temple
Chairperson, Election Board

Election Board Member

Election Board Member

ARTICLE XVII - CERTIFICATE OF APPROVAL

We, the Big Sandy Rancheria Tribal Council, do hereby approve this Constitution of the Big Sandy Band of Western Mono Indians in accordance with Article XV of this constitution. It is effective as of this date, provided that nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal law.

Chairman, Tribal Council — Date 2/21/00

Vice-Chair, Tribal Council — Date 2/21/2000

Secretary, Tribal Council — Date 2/21/00

Treasurer, Tribal Council — Date 2/21/00

Member-at-Large, Tribal Council — Date 2/21/00

Exhibit C

Sacramento 07501

91835-19

4—1063

The United States of America,

#120

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Mary McCabe, a Mono Indian,

Sacramento Area Office
Vol. 3 Page 68
File No. Sac-128

has been allotted the following-described land:

The north half of Lot two of the northwest quarter of Section eighteen in Township eleven south of Range twenty-two east of the Mount Diablo Meridian, California, containing forty and eighty-two-hundredths acres:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the Land above described, and hereby declares that it does and will hold the Land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Woodrow Wilson,

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the TWENTY-NINTH day of MARCH in the year of our Lord one thousand nine hundred and TWENTY and of the Independence of the United States the one hundred and FORTY-FOURTH.

By the President: Woodrow Wilson

By [illegible], Secretary,

[illegible]
Recorder of the General Land Office.

RECORDED: Patent Number 742095

Exhibit D

PROBATE

JHA
Approval of heirship, Reno Agency, Nevada.

5-107

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

OCT -3 1922, 19

Estate of Mary McCabe.

Respectfully submitted to the Secretary of the Interior recommending finding herewith, as in accordance with the laws of California.

It appeare from the evidence adduced at the hearing that the allottee died during the year 1916, exact date not shown, age about 55 years, intestate, married and with issue, being survived by her husband, Robert Lewis, and her son, Frank McCabe, to whom this estate passed in equal shares under the laws of California in force at the time of her death, giving each a 1/2 interest therein.

The records of this Office show that the decedent was allotted the N/2 of Lot 2 of the NW/4 of Sec. 18, Twp. 11 S., Range 22 E., M. D. M. in California, containing 40.82 acres, under the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of February 28, 1891 (26 Stat. 794), for which a trust patent was issued on March 29, 1920, under said Act of 1887.

No inherited interests nor personal property are reported, and there are no homestead rights involved.

The record in this case shows that the decedent was married twice by Indian custom, first, before allotment to John McCabe, who died prior to the allottee and then, about 1912, to Robert Lewis, with whom she was living at the time of her death and who survives. The only living issue of said marriages is as above set forth.

The Examiner's report shows the appraised value of decedent's trust estate to be $300.00.

Respectfully,

Assistant Commissioner.

9-AS-18
Inclosure-8458.

PROBATE

JEA
Approval of heirship, Reno Agency, Nevada.

5-107

DEPARTMENT OF THE INTERIOR
WASHINGTON

OFFICE OF INDIAN AFFAIRS
RECEIVED
SEP 23 1922
75979

OCT 6 1922, 192

Estate of Mary McCabe.

The proceedings in the matter of the heirship to the estate of Mary McCabe deceased allottee No. 180, of the Bigger (Moss) Tribe, are hereby approved according to the act of June 25, 1910 (36 Stat. L., 855), and the Regulations of the Department, and I find and adjudge that at the date of the hearing held August 21, 1922 the heirs to the estate of the decedent and their respective shares were, as follows:

Robert Lewis, husband,..... 1/2

Frank McCabe, son,..... 1/2

No inherited interests nor personal property are reported, and there are no homestead rights involved.

A fee of $15.00 is to be collected by the Superintendent, under the provisions of the Act of February 14, 1920 (41 Stat. L., 415).

9-AS-18
Inclosure-8458.

Assistant Secretary.

Exhibit E

5-406
PROBATE
(April 1948)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON
Chicago

ADDRESS ALL COMMUNICATIONS TO COMMISSIONER OF INDIAN AFFAIRS

21949-43

Secretary's Notice to Heirs.

TO:
John G. Rockwell, Supt. Sacramento Agency.
D. H. Reyes, Examiner.
Dolly Lewis Riverocmb, Friant, Calif.
Charley Kester, Gen. Del., Madera, Calif.
Polly Kester Pisano, do.
Lillian Kester Fernandez, do.
Frank McCabe, Auberry, Calif.
Merriman's, Clovis, California.

Estate of:
Robert Lewis,
Unal. Chickchansie.

You are hereby notified that the final order was made in the above-entitled estate by the Secretary of the Interior, on June 26, 1943 and a copy of said order was mailed to the Superintendent of the Sacramento Agency on July 1, 1943, where it may be inspected. Under said order the heirs were

As to decedent's separate property: Dolly Lewis Riverocmb, mothe r all.

As to separate property of previously deceased spouse:

Frank McCabe	step-son	all.

As to separate property of previously deceased spouse, Isabelle Rodriquez Kester:

Charlie Kester	step-son	1/3
Pauline (Polly) Kester Pisano	step-dau.	1/3
Lillian Kester Fernandez	step-dau.	1/3

The claim of Merriman's, Clovis, California, in the sum of $8.30is allowed.

This decision becomes final 60 days from the date of this notice. Interested persons who have legal ground for complaint may file a petition with the Superintendent stating all the facts on which they rely, within the 60 days, but not thereafter. The petition must be accompanied by the affidavits of at least two persons who assume to know the facts. Distribution of the estate and payment of claims are made by the Superintendent. For information thereon, consult Superintendent Rockwell of the Sacramento Indian Agency Sacramento, California.

Sincerely yours,

Original allotment appraised at	$
Inherited lands appraised at	$ 632.78
Cash, securities, or personal property appraised at	$
PROBATE FEE TO BE COLLECTED	$ 20.00

(Signed) A. [illegible]
Acting Commissioner.

Mailed: July 6, 1943.

16—12562-2 gpo

Exhibit F

PROBATE
F-36-70
AHW

United States Department of the Interior

OFFICE OF THE SOLICITOR
OFFICE OF THE HEARING EXAMINER
ROOM E-2740, 2800 COTTAGE WAY
SACRAMENTO, CALIFORNIA 95825

IN THE MATTER OF THE ESTATE OF:	)	
	)	ORDER APPROVING WILL
Frank Pete McCabe	)	AND
Mono Unallotted, deceased	)	DECREE OF DISTRIBUTION

The above-entitled matter came on regularly to be heard before the undersigned Hearing Examiner on the 24th day of March 1970, at Fresno, California. The witnesses were duly examined and their testimony taken and, whereupon, the Hearing Examiner being fully advised in the premises finds as follows, to-wit:

1. That Frank Pete McCabe, a Mono Indian, died in September or October, 1969, at the age of 79 years, a resident of the State of California.

2. That at the time of decedent's death, he was the owner of the following described trust interest:

> Entire interest in and to the allotment of Mary McCabe, Sac-120, described as N/2 of Lot 2 of NW/4 section 18, T. 11 S., R. 22 E., M.D.M., Fresno County, California, containing 40.82 acres, more or less.

3. That the said decedent executed a last will and testament as hereinafter described. That in the absence of a valid last will and testament the trust property of the decedent would descend under and by virtue of the California laws of descent and distribution to Lester McCabe, son of the decedent.

4. That the said decedent died testate, having executed a last will and testament on May 17, 1965, whereof the original is attached and identified herein as Exhibit A; that the said document was duly witnessed by Mrs. Daisy Smith, Loretta Alec, and Elsie Sturges; that Elsie Sturges appeared at the hearing and gave testimony regarding the facts and circumstances surrounding the execution of the document and to the fact that the decedent at the time of executing the said document was of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever; that said document was executed and witnessed in all particulars as by law required; and that the said document should be approved as the last will and testament of Frank Pete McCabe.

5. That the said last will and testament devises and bequeaths all the decedent's property, whether it be real, personal, or mixed, to

Lester McCabe, son of the decedent.

6. That Paragraph THIRD, among other things, includes real property described as Lot 16 of the Big Sandy Rancheria, which is non-trust property outside the jurisdiction of the Department of the Interior and, accordingly, no consideration is given thereto.

7. That all notices regarding the hearing were duly given and service made as required by 25 CFR 15.

8. That no creditors claims were filed against the estate herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 CFR 15, the instrument dated and executed on May 17, 1965, purporting to be the last will and testament of Frank Pete McCabe be, and the same is hereby approved as the last will and testament of said decedent.

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED, that by virtue of said last will and testament aforesaid, the decedent's trust property described on page 1 herein, together with any and all other trust property owned by the decedent not specifically mentioned herein, or that may hereafter be discovered, is devised and bequeathed to Lester McCabe, son of the decedent, and that the said Lester McCabe is the owner of and entitled to distribution of same.

IT IS FURTHER ORDERED, that the Area Director, Sacramento Area Office, Sacramento, California, cause distribution to be made of the decedent's trust property and all other property under the jurisdiction of the Department of the Interior in accordance with the terms of said last will and testament and as herein decreed.

IT IS FURTHER ORDERED, that the trust estate of said decedent, consisting of real property only, subject to the jurisdiction of the Department of the Interior, having been appraised at $4,000.00, a probate fee of $50.00 will be collected by the Area Director, or other officerin charge, pursuant to authority found in the Act of January 24, 1923 (42 Stat. 1185).

Done at the City of Sacramento, California, and dated this 14th day of May, 1970.

SGD. ALEXANDER H. WILSON

Alexander H. Wilson
Hearing Examiner

THE VALUE SHOWN IN THIS ORDER MAY BE AN ESTIMATE.
It is made for the purpose of fixing the probate fee required by law to be collected and it may not necessarily represent the present market value of the property. Further investigation of values should be made before entering into any negotiations involving this property

Exhibit G

500 6268

5-1180 h

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Vol. 24 Page 76
File No. 31 Deeds

DEED TO RESTRICTED INDIAN LAND SPECIAL FORM

THIS INDENTURE, made and entered into this 2nd day of February, 1979,

by and between Lester McCabe, a single person, Grantor,

an Indian of the Mono Tribe in the State of California

party of the first part, and Sherrill Anne McCabe, daughter of grantor, Grantee,

also a restricted Indian of said reservation, party of the second part:

WITNESSETH, That whereas the lands hereinafter described were allotted to or inherited by the said party of the first part under the provisions of legislation by Congress pursuant to which said lands are restricted or held in trust by the United States for the benefit of said grantor and are not subject to taxation; nor to alienation or encumbrance without the consent of the Secretary of the Interior, and whereas the said party of the second part being also a restricted Indian desires to acquire said hereinbefore described lands subject to the same conditions, restrictions, and limitations as to taxation, alienation, or encumbrance as now rest thereagainst;

NOW, THEREFORE, for and in consideration of the sum of $1.00, Love and Affection held in trust by the United States for the benefit of said party of the second part, the receipt of which sum is hereby acknowledged, the said party of the first part does hereby transfer, set over, and convey to and unto the said party of the second part all right, title, and interest of the said party of the first part in and to the lands and premises situated in the County of Fresno

State of California, described as: N½ of Lot 2 of NW¼ Sec. 18,

T. 11 S., R. 22 E., Mount Diablo Meridian, containing 40.82 acres, more or less,

being the original allotment of Mary McCabe, Sac. 120.

Subject to all valid existing rights of way.

Together with all improvements thereon and appurtenances thereunto belonging, subject to the express condition that the execution of this deed by the party or parties hereto or its approval by the Secretary of the Interior shall not operate in any manner to remove any of the restrictions now resting against said lands, or to remove any trust or other conditions imposed upon said land as expressed in the original trust or any other patent issued therefor, or any part thereof; it being distinctly understood and agreed that the scope and intent of this deed is simply to transfer and convey such right, title, and interest as the party of the first part now has in such lands to the said party of the second part subject to the conditions, restrictions, and limitations as now rest thereagainst in the hands of the party of the first part.

TO HAVE AND TO HOLD said above-described premises subject to all the conditions above stated unto the said party of the second part, her heirs, executors, administrators, and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

WITNESSES:

Lester McCabe [SEAL]

Lester McCabe [SEAL]

[SEAL]

[SEAL]

[SEAL]

[SEAL]

[OVER]

STATE OF California }
COUNTY OF Sacramento } ss:

BE IT REMEMBERED, That on this 2nd day of February, A. D. 19 79 before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Lester McCabe, a single person

to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the execution of the same.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal on the day and year last hereinabove written.

OFFICIAL SEAL
RAMONA L. HARRIS
NOTARY PUBLIC CALIFORNIA
COUNTY OF SACRAMENTO
My Commission Expires March 9, 1979

Ramona L. Harris
Ramona L. Harris
Notary Public
(Title)

My commission expires March 9, 1979

UNITED STATES
DEPARTMENT OF THE INTERIOR

The within deed is hereby approved:

Pursuant to Authority Delegated By
230 DM 1, 10 BIAM 2 (39 F.R. 32166),
10 BIAM 3.1 (34 F.R. 637), and
10 BIAM 7.

Hames M Brafford
ACTING Superintendent, Central California Agency

Date: 4-24-79

The within deed is recorded in the Bureau of Indian Affairs in Volume _____, Page _____, deeds to Indian lands.

RECEIVED
MAY 7 1979
BRANCH OF
REAL PROPERTY MGMT.

RECEIVED OR FILED
BUR. INDIAN AFFRS.
PORTL[illegible] OFFICE
500 6268
79 APR 30 P 1 : 27

BRANCH OF REALTY
TITLES & RECORDS
SECTION

INDIAN LAND DEED

FROM

TO

This instrument was filed for record this _____ day of _____, 19__, at _____ o'clock ____ M., and duly recorded in Book No. _____, at page _____

Register of Deeds.

RECEIVED
MAY 7 9 01 AM '79
STATE OF CALIFORNIA
COUNTY OF

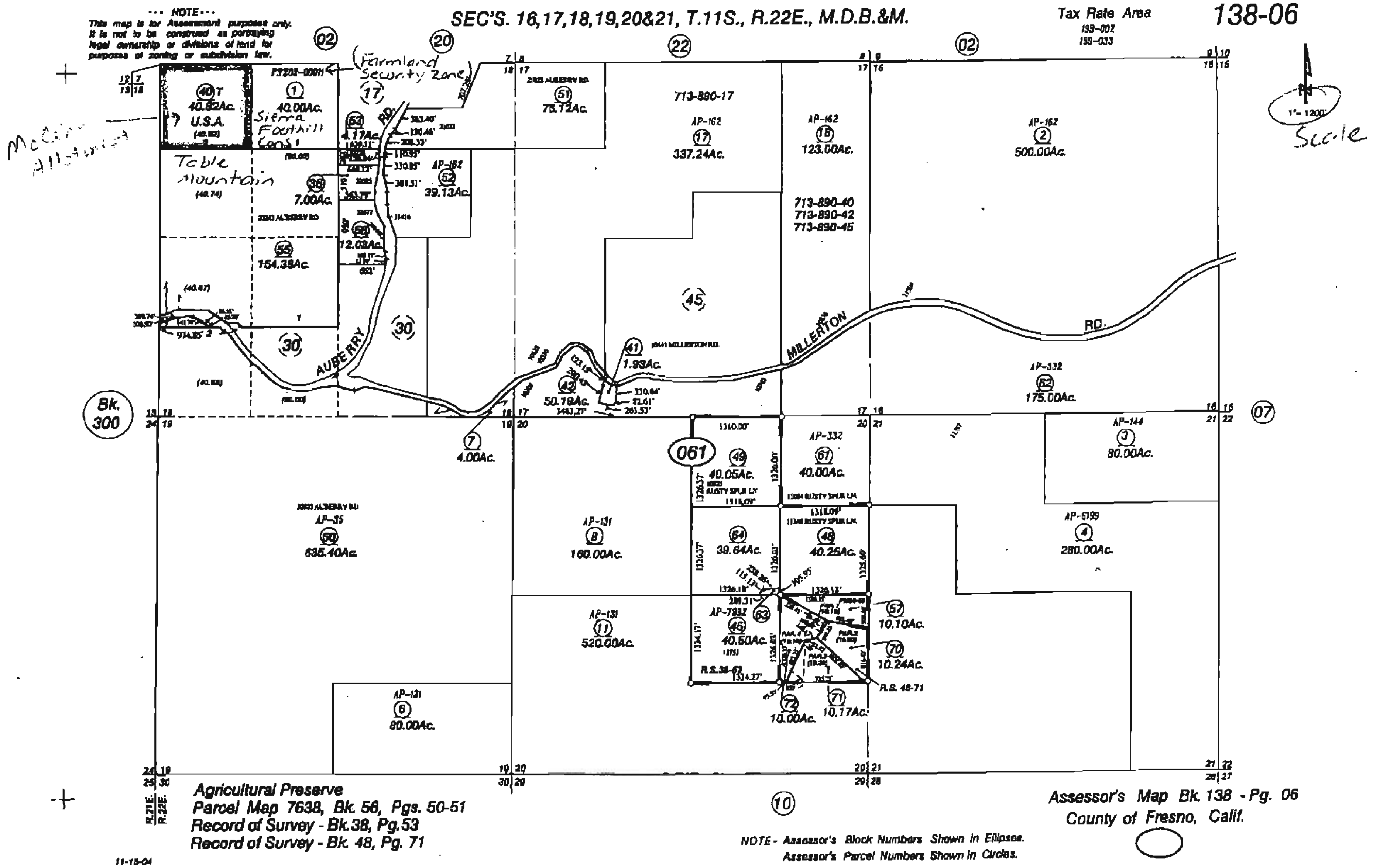
Exhibit H

--- NOTE ---
This map is for Assessment purposes only. It is not to be construed as portraying legal ownership or divisions of land for purposes of zoning or subdivision law.

SEC'S. 16,17,18,19,20&21, T.11S., R.22E., M.D.B.&M.

Tax Rate Area
139-002
139-033

138-06



Agricultural Preserve
Parcel Map 7638, Bk. 56, Pgs. 50-51
Record of Survey - Bk.38, Pg.53
Record of Survey - Bk. 48, Pg. 71

11-15-04

NOTE - Assessor's Block Numbers Shown in Ellipses.
Assessor's Parcel Numbers Shown in Circles.

Assessor's Map Bk. 138 - Pg. 06
County of Fresno, Calif.

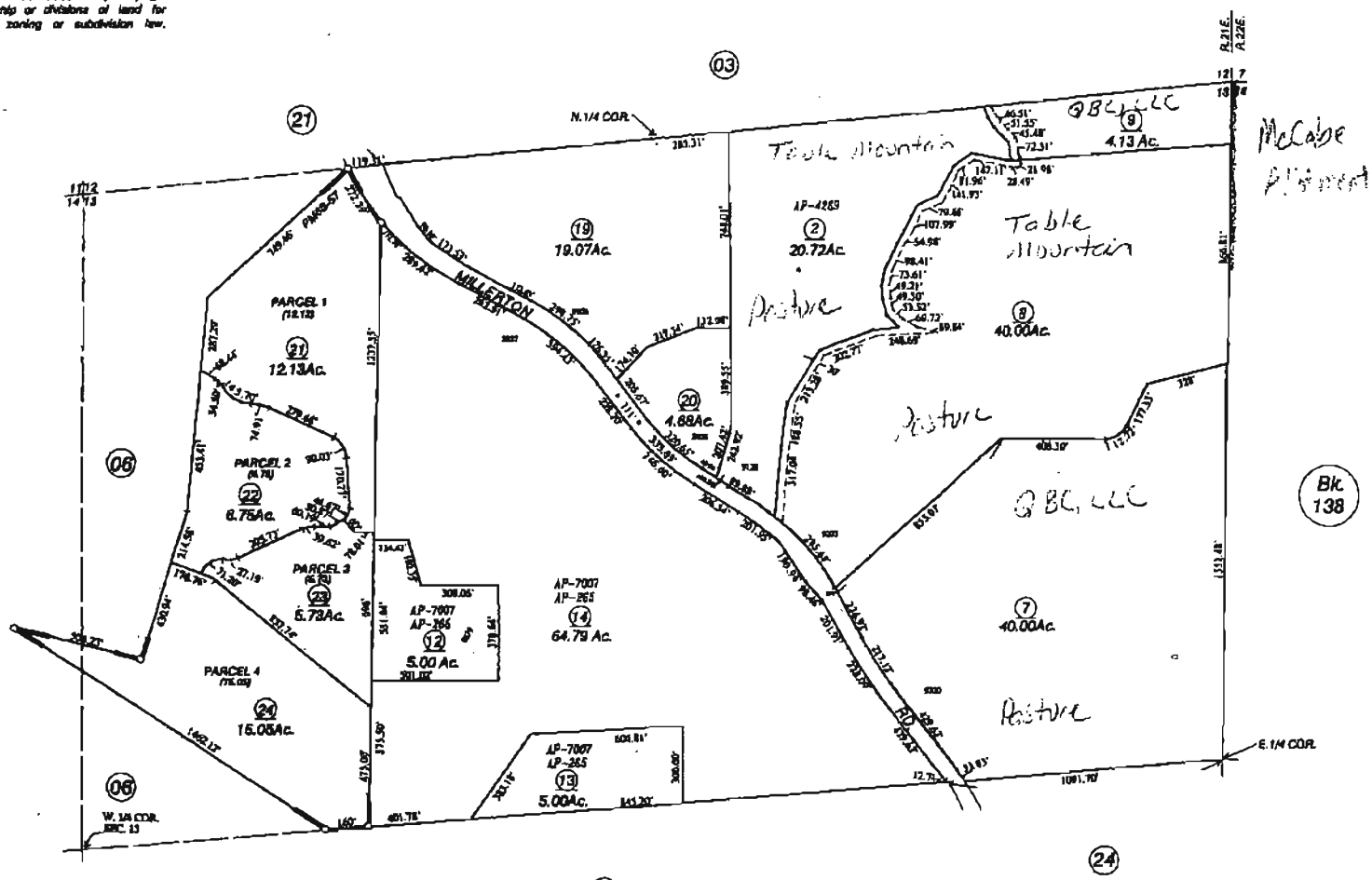
--- NOTE ---

This map is for Assessment purposes only. It is not to be construed as portraying legal ownership or divisions of land for purposes of zoning or subdivision law.

SUBDIVIDED LAND IN POR. SEC.13 & 14, T.11S., R.21E., M.D.B.&M.

Tax Rate Area 199-002 199-008

300-38

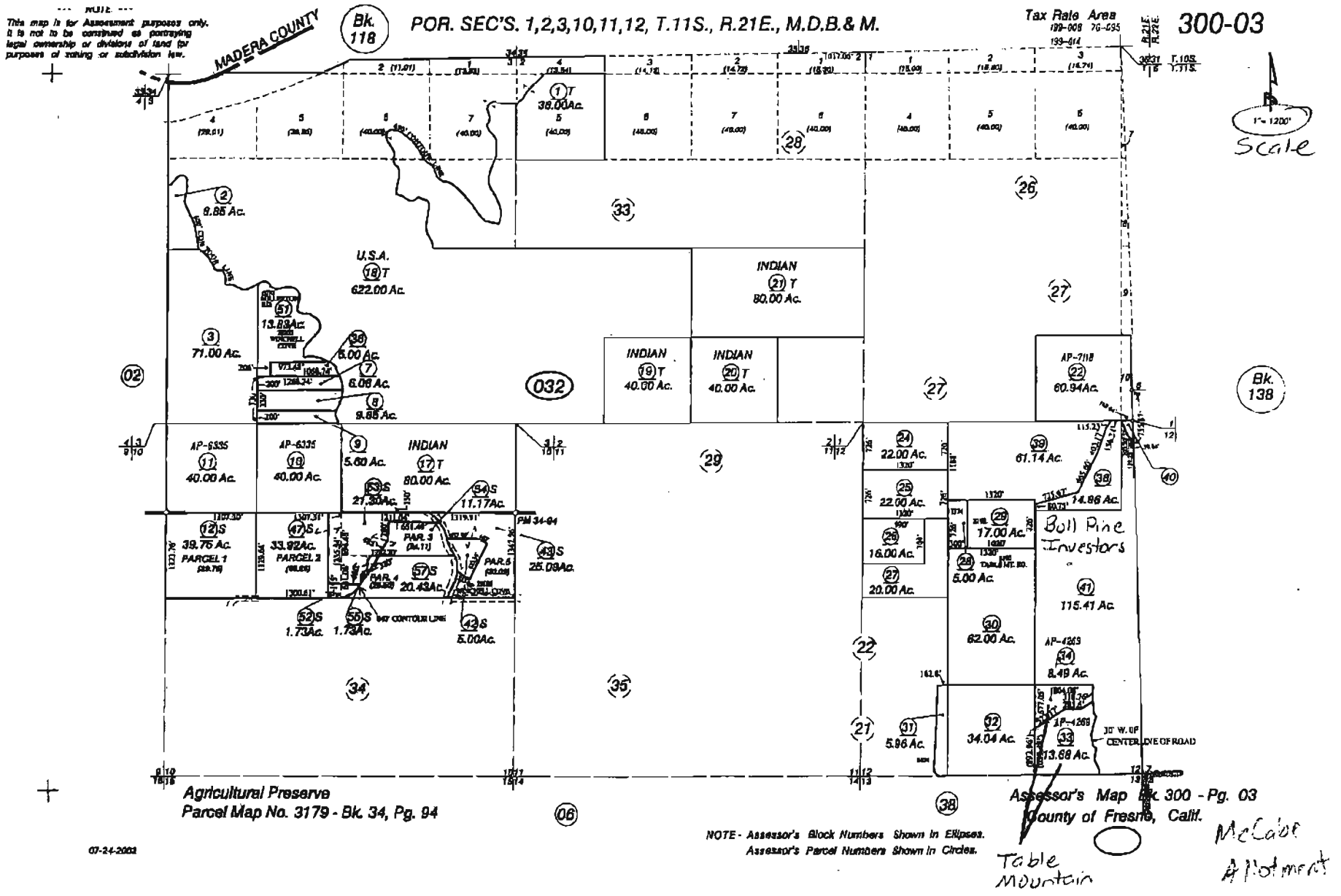


Agricultural Preserve
Parcel Map No. 7665, Bk.63, Pgs. 57 & 58

Assessor's Map Bk.300 - Pg. 38
County of Fresno, Calif.

NOTE - Assessor's Block Numbers Shown In Ellipses.
Assessor's Parcel Numbers Shown In Circles.

05-05-04

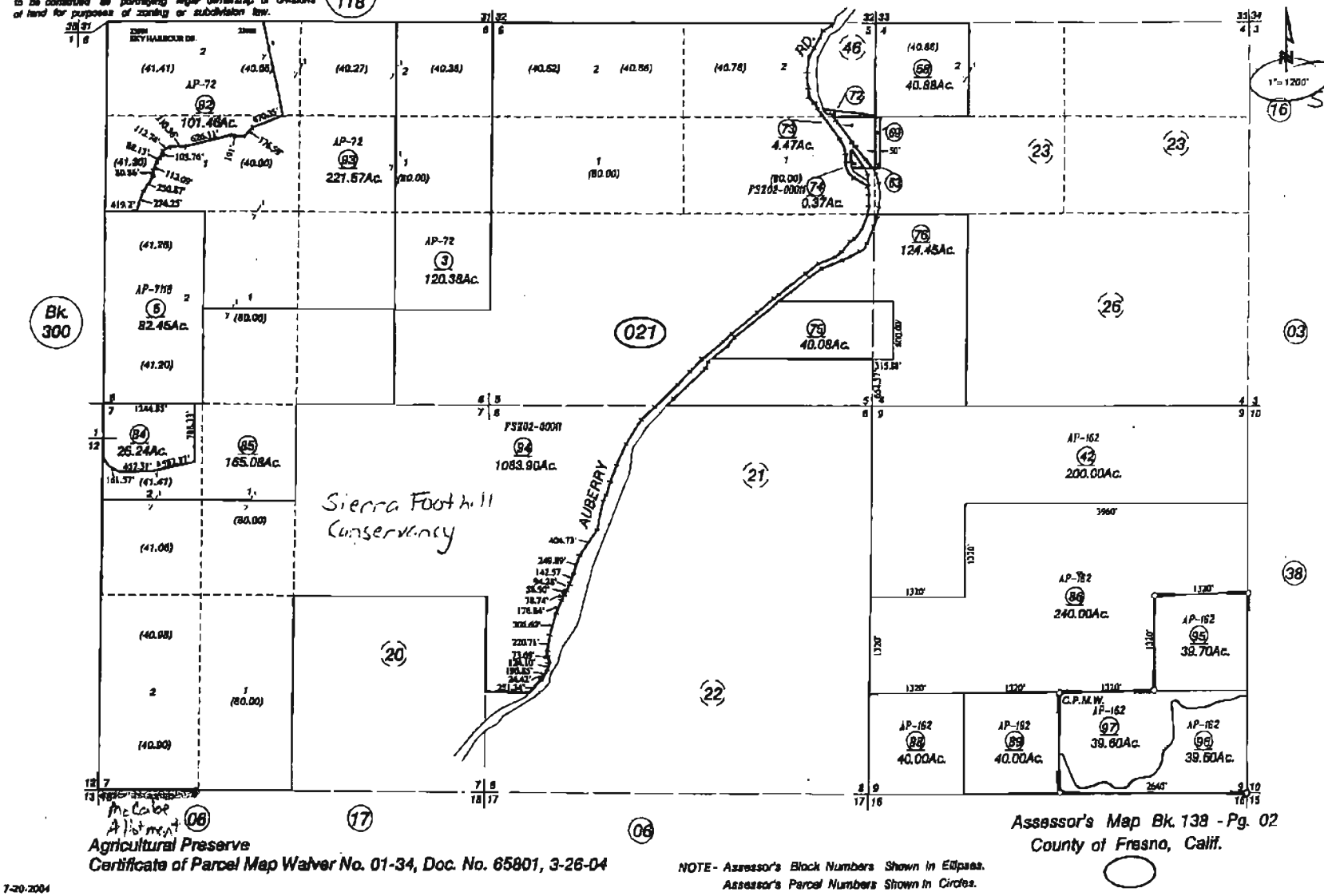

NOTE:
This map is for Assessment purposes only. It is not to be construed as portraying legal ownership or divisions of land for purposes of zoning or subdivision law.
MADERA COUNTY
Bk. 118
POR. SEC'S. 1,2,3,10,11,12, T.11S., R.21E., M.D.B.& M.
Tax Rate Area
199-008 76-095
199-014
300-03
1" = 1200' Scale
U.S.A.
18 T
622.00 Ac.
INDIAN
21 T
80.00 Ac.
INDIAN
19 T
40.00 Ac.
INDIAN
20 T
40.00 Ac.
INDIAN
17 T
80.00 Ac.
1 T
38.00Ac.
2
9.85 Ac.
3
71.00 Ac.
51
13.88Ac.
36
5.00 Ac.
7
6.06 Ac.
8
9.85 Ac.
9
5.60 Ac.
AP-6335
11
40.00 Ac.
AP-6335
10
40.00 Ac.
53 S
21.30Ac.
54 S
11.17Ac.
12 S
39.76 Ac.
PARCEL 1
47 S
33.92Ac.
PARCEL 2
PAR. 3
PAR. 4
PAR. 5
PAR. 6
57 S
20.43Ac.
43 S
25.09Ac.
52 S
1.73Ac.
56 S
1.73Ac.
42 S
5.00Ac.
PM 34-94
667 CONTOUR LINE
AP-7118
22
60.94Ac.
24
22.00 Ac.
25
22.00 Ac.
26
16.00 Ac.
27
20.00 Ac.
39
61.14 Ac.
38
14.86 Ac.
29
17.00 Ac.
28
5.00 Ac.
41
115.41 Ac.
30
62.00 Ac.
AP-4269
34
8.49 Ac.
31
5.96 Ac.
32
34.04 Ac.
AP-4269
33
13.68 Ac.
30' W. OF CENTERLINE OF ROAD
Bull Pine Investors
032
02
Bk. 138
Agricultural Preserve
Parcel Map No. 3179 - Bk. 34, Pg. 94
07-24-2002
NOTE - Assessor's Block Numbers Shown In Ellipses.
Assessor's Parcel Numbers Shown In Circles.
Assessor's Map Bk. 300 - Pg. 03
County of Fresno, Calif.
Table Mountain
McCabe Allotment

--- NOTE ---
This map is for Assessment purposes only. It is not to be construed as portraying legal ownership or divisions of land for purposes of zoning or subdivision law.

Bk. 118

SEC'S. 4,5,6,7,8,9, T.11S., R.22E., M.D.B.&M.

Tax Rate Area 138-02



Agricultural Preserve
Certificate of Parcel Map Waiver No. 01-34, Doc. No. 65801, 3-26-04

NOTE- Assessor's Block Numbers Shown In Ellipses.
Assessor's Parcel Numbers Shown In Circles.

Assessor's Map Bk. 138 - Pg. 02
County of Fresno, Calif.

7-20-2004

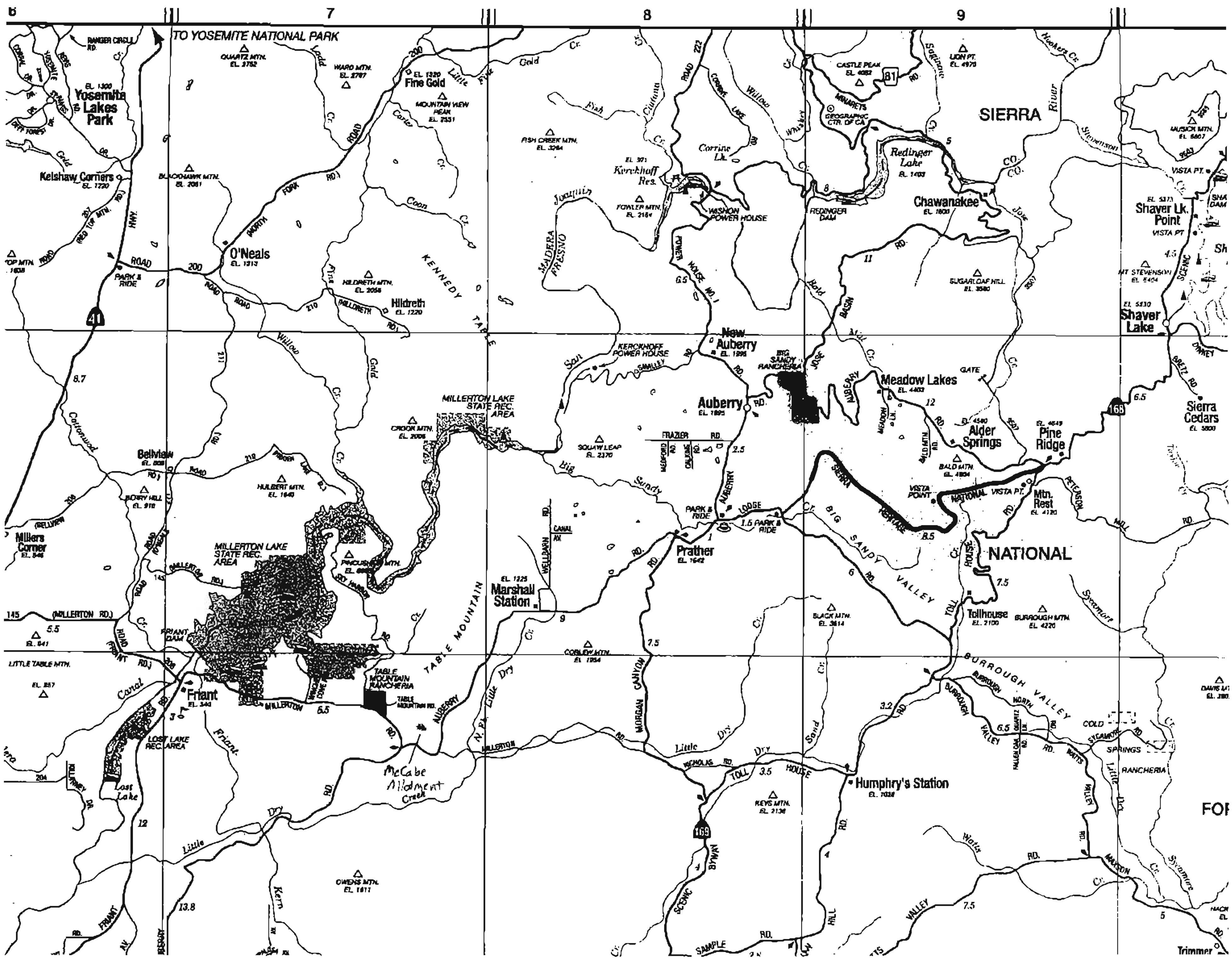

TO YOSEMITE NATIONAL PARK
Yosemite Lakes Park
Kelshaw Corners
O'Neals
Fine Gold
Hildreth
Millers Corner
Bellview
MILLERTON LAKE STATE REC. AREA
Friant
LOST LAKE REC. AREA
Lost Lake
TABLE MOUNTAIN RANCHERIA
TABLE MOUNTAIN
KENNEDY TABLE
Marshall Station
Prather
Auberry
New Auberry
BIG SANDY RANCHERIA
KERCKHOFF POWER HOUSE
WISHON POWER HOUSE
Kerckhoff Res.
Redinger Lake
REDINGER DAM
Chawanakee
SIERRA
Meadow Lakes
Alder Springs
Pine Ridge
Mtn. Rest
Shaver Lake
Shaver Lk. Point
Sierra Cedars
NATIONAL
Tollhouse
BURROUGH VALLEY
BIG SANDY VALLEY
Humphry's Station
MORGAN CANYON
McCabe Allotment Creek
Trimmer
FOR
MADERA
FRESNO
GEOGRAPHIC CTR. OF CA

Exhibit I

June 30, 2005

Judith Kammins Albietz, Esq.
Albietz & Samuels
2001 "N" Street, Suite 100
Sacramento, CA 95814

Dear Ms. Albeitz:

On December 29, 2004, you submitted on behalf of the Buena Vista Rancheria of Me-Wuk Indians ("Tribe")[1], a renewed request for an Indian lands determination. On May 17, 2000, a request for a determination had been submitted to the National Indian Gaming Commission (NIGC), but a final opinion was delayed due to a tribal leadership dispute.[2] We have determined that the lands on which the Tribe proposes to locate its gaming activities are "Indian lands" as defined in the Indian Gaming Regulatory Act (IGRA), and, therefore, the Tribe may legally conduct gaming on the land.

Background

The Buena Vista Rancheria of Me-Wuk Indians of California is a federally-recognized Indian tribe. The Tribe has been listed by the Secretary of the Interior as a federally-recognized Indian tribe since 1985. *See* 30 Fed. Reg. 6,055-6,059. The Tribe occupies a small land base located approximately 40 miles southeast of Sacramento, California. The Tribe has occupied the area known as Buena Vista since at least 1817. Tribal members have continuously occupied the Rancheria from as early as 1905. The Rancheria was purchased in 1927 with money appropriated by the Acts of June 21, 1906 (34 Stat. 325-328) and April 30, 1908 (35 Stat. 70-76).

---

1 It is important to note that the Tribe, and the land they occupy are often referred to as "the Rancheria." For clarity, whenever possible, we have attempted to use the term "Tribe" when referring to the political entity and "Rancheria" when referring to the Tribe's land base.

2 The NIGC has already approved a site specific Tribal Gaming Ordinance for the Tribe which constitutes a recognition of the Rancheria as Indian lands. Further, a written Indian lands opinion is not required before a Tribe may conduct gaming. However, the Tribe requested the Office of General Counsel to provide an opinion because of the controversy surrounding the proposed gaming operation.

The Acts specifically provided:

> That the Secretary of Interior be, and he is hereby, authorized to expend not to exceed one hundred thousand dollars to purchase for the use of the Indians in California now residing on reservations which do not contain land suitable for cultivation, and for Indians who are not now upon reservation in said State . . . and mark the boundaries of such Indian reservation in the State of California as the Secretary of the Interior may deem proper.

Act of June 21, 1906, Ch. 3504, 34 Stat. 323-333 (1906). On May 5, 1927, the United States acquired approximately 67.5 acres of land in Amador County, California, for the use of the Me-Wuk Indians settled at Buena Vista that is legally described as follows:

> Commencing at the Northeast corner of Section 19, Township 5 North, Range 10 East, M.D.B. and M., thence running West along Section line 578 feet; thence at right angles South 5280 feet; thence at right angles East 578 feet; thence at right angles North 5280 feet to a place of beginning.

The Tribe has proposed to build a gaming facility within the Rancheria on an area of approximately 11.76 acres within the set-aside land. Specifically, the gaming facility will be constructed on a portion of the East ½ of Section 19, T. 5N., R. 10 E., M.D.B.&M., Amador County, California, further described as follows:

> Commencing at a found 1 and ½ inch iron pipe with USIS Cap, monumenting the Northeast Corner of said Section 19, T.5 N., R. 10 E., M.D.B.&M; thence S. 02°03'22" W. (formerly S. 02°03'55" W.) a distance of 1546.50 feet, along the easterly line of said Section 19; thence leaving said easterly section line N. 87°56'22" W. a distance of 47.00 feet, to the True Point of Beginning of this description; thence 02°03'38"W. a distance of 950.50 feet, parallel with and 47.00 feet westerly from said easterly section line; thence N. 87°56'22" W. a distance of 166.00 feet; thence S. 02°03'38" W a distance of 127.00 feet, parallel with said easterly section line; thence S. 88°54'13" a distance of 330.50 feet; thence N. 02°03'38" E. a distance of 1079.65 feet, parallel with said easterly section line; thence S. 89°47'35" E. A distance of 496.26 feet, to the True Point of Beginning.

The Tribe primarily consisted of the Oliver family and their relatives. The tribal members who were on the land prior to the United States purchase are from the same family as those who continue to control the Rancheria today.

In 1958, Congress enacted the California Rancheria Act, Pub. L. No. 85-671 (1958), which authorized the termination of federal supervision and Indian status of many

of the rancherias in the state. As a consequence of the enactment, the residents of the rancherias were no longer dealt with as tribes by the United States government. Additionally, the United States government terminated the trust status of the rancheria lands, including those of the Buena Vista Rancheria, and distributed the lands in fee to the adult Indian residents. P.L. 85-671, 72 Stat. 619 (1958) as amended by P.L. 88-419, 78 Stat. 390 (1964). On April 4, 1961, the Secretary of the Interior approved a plan for the distribution of assets of the Tribe. Under the distribution plan, the United States deeded approximately 67.5 acres of the Rancheria land to Louis and Annie Oliver as joint tenants.

In 1979, Indian residents from the Rancheria joined Indians from sixteen other California Rancherias in a class action lawsuit to restore the reservation status of their land, asserting that their trust relationship had been illegally terminated under the Rancheria Act of 1958. See *Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Filed 1979). The plaintiffs sought, among other things, judicial recognition that "[t]he Secretary of the Interior is under a duty to 'unterminate' each of the subject Rancherias, and . . . to hold the same in trust for the benefit of the Indians of the original Rancheria;" and further that " [t]he Secretary of the Interior is under a duty to treat all of the subject Rancherias as Indian reservations in all respects[.]" *Hardwick*, Complaint at 27.

The litigation was ultimately settled. Settlement was achieved through stipulated judgment between the members of the class and the United States and then between the members of the class and the respective counties in which they lay.

The first stipulation, which was between the members of the class and the United States and was approved by federal court order on December 22, 1983, provides, in relevant part, as follows:

> 3. The status of the named individual plaintiffs and other class members of the seventeen Rancherias named and described in paragraph 1 as Indians under the laws of the United States shall be restored and confirmed. In restoring and confirming their status as Indians, said class members shall be relieved of Sections 2(d) [subjecting any property so distributed to taxation] and 10(b) [terminating services provided to Indians] of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indians because of their status as Indians, if otherwise qualified under applicable laws and regulations.
>
> 4. The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities or groups of the seventeen rancherias listed in paragraph 1 as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria

> Act, and said Tribes, Bands, Communities and groups shall be included on the Bureau of Indian Affairs' Federal Register list of recognized tribal entities pursuant to 25 CFR, Section 83.6(b). Said Tribes, Bands, Communities or groups of Indians shall be relieved from the application of section 11 [revoking constitutions under the Indian Reorganization Act[3]] of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indian Tribes, Bands, Communities or groups because of their status as Indian Tribes, Bands, Communities or groups.
>
> * * *
>
> 10. The Secretary of the Interior, named individual plaintiffs, and other class members agree that the distribution plans for these Rancherias shall be of no further force and effect and shall not be further implemented; however, this provision shall not affect any vested rights created thereunder.

Hardwick, Stipulation and Order, Dec. 22, 1983.

The stipulation with the United States left "for further proceedings" the question of whether to restore the former boundaries of the Rancherias. *Id.*, Paragraph 5 at 4. ("The court shall not include in any judgment entered pursuant to this stipulation any determination of whether or to what extent the boundaries of the Rancherias listed and described in paragraph 1 shall be restored and shall retain jurisdiction to resolve this issue in further proceedings herein.").

In 1987, the members of the class from the Buena Vista Rancheria entered into another Hardwick Stipulation for Entry of Judgment regarding Amador County. The 1987 Stipulation provides that:

> The original boundaries of the [Buena Vista Rancheria] as described in paragraph 2.B.1 above [Exhibit A to the Stipulation for Entry of Judgment, filed herein on August 2, 1983, and made the judgment of this Court on December 22, 1983, in Order Approving Entry of Final Judgment] are hereby restored, and all land within these restored boundaries of the [Buena Vista Rancheria] is declared to be "Indian Country." (emphasis in original)

[3]25 U.S.C. § 461 et seq.

Hardwick, Stipulation and Order (Amador County) Para. 2.C., at 4, May 14, 1987. Although the United States was not among the parties that signed the 1987 stipulation, which was primarily designed to resolve issues surrounding the payment of real property taxes to Amador County, the 1987 Stipulation was accepted by the federal court and was entered as a judgment.[4] *Hardwick*, Stipulation and Judgment, filed May 14, 1987. The effect of the judgments was that all lands within the Rancheria boundaries, as they existed immediately prior to the illegal termination, were declared to be "Indian Country" as defined by 18 U.S.C. § 1151. Amador County expressly agreed to treat the Rancheria like any other federally recognized Indian reservation. Thus, the Rancheria consists entirely of the original reservation land base of approximately 67.5 acres.

Applicable Law

The IGRA explicitly defines "Indian lands" 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).

NIGC regulations have further clarified the Indian lands definition, providing that:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either --
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Further, IGRA gives tribes the exclusive right to regulate gaming on Indian lands, specifically providing that:

---

4 While the United States, as co-defendant, did not sign the 1987 stipulation, it did however sign the underlying stipulation that restored the Tribe in 1983. In that stipulation the United States agreed and the Court held that it would not determine the boundaries of the Rancheria yet, but, "shall retain jurisdiction to resolve this issue in further proceedings herein." The stipulated judgment that plaintiff and defendant Amador County finalized in 1987, was one of the "further proceedings" anticipated by the 1983 stipulation. For these reasons, the United States considers itself bound by both stipulations.

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701 (5). IGRA further clarifies the jurisdiction of Tribes as to the different class of gaming stating that:

> (1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.
> (2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

25 U.S.C. § 2710(a)(1)(2). The requirements for Class III gaming likewise state:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are--
> (A) authorized by an ordinance or resolution that
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands ...
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1)(A)(C).

Analysis

The NIGC Office of General Counsel (OGC) has revised its analytic approach to Indian lands within reservation boundaries. The analysis used through the past few years included a two-part determination whenever an Indian lands questions was raised – OGC looked first to determine whether the lands constituted Indian lands; OGC then looked to whether the tribe exercised jurisdiction over those lands. This two-part analysis was driven by the outcome in *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213 (10th Cir. 2001)(*Miami III*). That Court held the NIGC's failure to focus on the threshold question of whether the tribe possessed jurisdiction over a tract of land rendered the ultimate conclusion arbitrary and capricious. *Id.* Despite this holding, the NIGC has concluded that, in some instances IGRA's preemptive effect negates the need for a complete jurisdictional analysis. IGRA specifically defines Indian lands as any "[l]ands within the limits of an Indian Reservation." This finding is a prerequisite for a tribe to be able to conduct gaming under IGRA. IGRA gives tribes the exclusive right to regulate gaming on Indian lands if the Indian lands in question are within "such tribe's jurisdiction." A tribe is presumed to have jurisdiction over its own reservation. Therefore, if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists.

OGC's new approach was outlined in our recent opinion regarding gaming on fee land at the White Earth Reservation in Minnesota (See Memorandum to NIGC Acting General Counsel Re: Tribal jurisdiction over gaming on fee land at White Earth Reservation, dated March 14, 2005). In that opinion, we opined that the State of Minnesota lacked jurisdiction over gaming on the White Earth Reservation because the gaming took place within the exterior boundaries of the reservation; the gaming was therefore Indian gaming under IGRA, which pre-empts state jurisdiction. As the White Earth Band was undisputedly the only tribe exercising jurisdiction over the land at White Earth, that Tribe met IGRA's requirement that it be the tribe with jurisdiction over the Indian lands at issue. As a result of our analysis on White Earth we have taken this opportunity to revisit and revise our analytic approach.

It is still appropriate under the second 2703(B) definition of Indian lands to conduct a separate jurisdictional analysis when determining whether a tribe exercises governmental powers. This is because a necessary prerequisite to the exercise of governmental powers is the theoretical and inherent authority to exercise such power. However, with respect to the first definition of Indian lands – that the lands are within the reservation boundaries, we conclude that the preemptive effect of IGRA eliminates the need for a separate jurisdictional analysis.

The issue here is, therefore, whether a gaming operation conducted on the Rancheria would be on Indian lands. If the Rancheria is considered a reservation under the definition of Indian lands, the Tribe may game on those lands.

1. IGRA Preempts The Field Of Gaming On Indian Lands

Generally, there exists a presumption that federal law does not pre-empt State regulation, particularly in a field that States have traditionally occupied. *See New York v. FERC*, 535 U.S. 1, 17-18 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (First, "[i]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress".). The presumption against federal preemption disappears, however, in the face of Congress's "clear and manifest purpose" to the contrary. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[5] Such purpose is evidenced when the field of regulation has been

[5] "Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co.* v. *Varnville Co.*, 237 U.S. 597; *New York Central R. Co.* v. *Winfield*, 244 U.S. 147; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U.S. 538. It is often a perplexing

substantially occupied by federal authority for an extended period of time. *United States v. Locke*, 529 U.S. 89, 108 (2000); *Flagg v. Yonkers S&L Ass'n*, 396 F.3d 178, 183 (2nd Cir. 2005).

Indian affairs has a long history of Federal authority taking precedence over State jurisdiction. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester* v. *Georgia*, 6 Pet. 515; 1 Stat. 469; 4 Stat. 729). As recently expressed by the U.S. Court of Appeals for the Ninth Circuit:

> The policy of leaving Indians free from State jurisdiction is deeply rooted in our Nation's history. *Rice v. Olson*, 324 U.S. 786, 789 (1945). In determining the extent of State jurisdiction over Indians, State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973). If faced with two reasonable constructions of Congress's intent, this Court resolves the matter in favor of the Indians. *Id.* at 174.

Gobin v. Snohomish County, 304 F. 3d 909 (9th Cir. 2002), *cert. denied* 538 U.S. 908 (2003).

IGRA is an heir to this history. The legislative history of the Act incorporates this history. The Senate Report on S. 555, which became IGRA, states:

> It is a long- and well-established principle of Federal-Indian law as expressed in the United States constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

S.Rep. No.446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075.

More explicitly, IGRA's legislative history shows clear Congressional intent that the Act be preemptive. The Senate Report declares:

> S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance

---

question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except to the extent that state and federal regulations collide. *Townsend* v. *Yeomans*, 301 U.S. 441; *Kelly* v. *Washington*, 302 U.S. 1; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177; *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202; Rice v. Santa Fe Elevator Corp., 331 U.S. at 230.

> competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Id. at 3076.[6]

Case law also acknowledges IGRA's preemptive effect. The U.S. Court of Appeals for the Eighth Circuit, in which the White Earth reservation falls, has directly addressed this question. In *Gaming Corp. of America v. Dorsey & Whitney*, 88 F. 3d 536 (8th Cir. 1996), the Eighth Circuit held that IGRA completely preempted state law where the dispute—a management company's suit against a tribe's legal representatives—arose from the tribe's issuance of gaming licenses, which is covered by IGRA. "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law," the court ruled. *Id.* at 544. Likewise in *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), the Eighth Circuit held that the question of whether an activity is pre-empted by IGRA is determined by whether it occurs on Indian lands:

> As our opinion in *Dorsey* explained at length, the IGRA established a comprehensive regulatory regime for tribal gaming activities on Indian lands. Both the language of the statute and its legislative history refer only to gaming on Indian lands. See, e.g., 25 U.S.C. § 2701; S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, 3071-3083. The Indians' long-standing rights and interests in controlling activities on their tribal lands, and the States' correspondingly limited power to regulate activities on tribal lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force.

Id. at 1108. In short, the court ruled States' powers are pre-empted where IGRA applies, and IGRA applies on Indian lands.[7]

In *Coeur d'Alene Tribe v. Idaho*, 842 F.Supp. 1268 (D. Idaho 1994), *aff'd* 51 F.3d 876 (9th Cir. 1995), *cert. denied* 516 U.S. 916 (1995), *rehearing denied* 516 U.S. 1018 (1995), the federal district court reasoned that IGRA allows state gaming regulations to apply on an Indian reservation. The authority of the state to conduct gaming was not absolute, however. Rather, the scope of State regulation was to be determined by

---

[6] *See also* Additional Views of Mr. Evans, S.Rep. No. 446, 100th Cong., 2d Sess. 36 (1988) ("Finally, this bill should be construed as an explicit preemption of the field of gaming in Indian Country.").

[7] There is some case law to the contrary. The federal district court for the Eastern District of Washington held in 1996 that IGRA did not prevent the State of Washington from conducting the state lottery on lands within the Yakama Indian Reservation. *Confederated Tribes and Bands of the Yakama Indian Nation v. Lowry*, 968 F. Supp. 531 (E. D. Wash. 1997) (order granting motion to dismiss; 968 F. Supp. 538 (E.D.Wash.1997) (Order denying motion for reconsideration); *vacated* 176 F.3d 467 (9th Cir. 1999). That decision was vacated by the Ninth Circuit in 1999, however, albeit on the grounds that the State was immune from the Tribe's suit based on the State's Eleventh Amendment sovereign immunity. Because the action was "so clearly barred" by the Eleventh Amendment, the Ninth Circuit deemed it inappropriate to determine "the more complex issues" raised by the case.

negotiated compacts between tribes and the States, the court held. The state lottery was Class III gaming, the court said. *Id.* Lacking compacts, neither the tribes nor, more to the point, the State could conduct a lottery on the reservations, the court concluded. This reasoning confirms IGRA's preemptive character, allowing state regulation only under IGRA's provisions.

Accordingly, since IGRA is preemptive as to gaming on Indian lands, our analysis of the legality of Indian gaming starts and stops when we answer the question – Is this gaming on Indian lands?

2. The Rancheria is a Reservation

Because the Rancheria is a reservation under the IGRA definition of Indian lands, we conclude that the Tribe may conduct gaming on it.

It is well established that Rancherias are "for all practical purposes" reservations. *See* Solicitor's Opinion, M-28958 (April 26, 1939), 1 *Op. Sol. On Indian Affairs* 891 (U.S.D.I. 1979). The Buena Vista Rancheria has a history similar to that of the Pinoleville Indian Community. The Pinoleville Rancheria was terminated according to the Rancheria Act and subsequently restored in the *Hardwick* settlement stipulations. *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1043-1044 (N.D. Cal. 1988). In *Pinoleville* the Rancheria challenged a County imposed moratorium on new industrial uses on the Rancheria. The court considered the effect of the *Hardwick* judgments on the Tribal Council's power to regulate, and determined that "the clear and fundamental intent of the judgment [was] to restore *all* land within the original Rancheria as Indian Country and Mendocino Country's express undertaking [was] to treat the *entire* Rancheria as reservation[.] *Id.* at 1046 (emphasis in original). The court held that the Tribal Council had the authority to zone non-Indian fee land within the boundaries of the Rancheria. *Id.* at 1045. The court also cited a letter from the Bureau of Indian Affairs which stated: "[i]t is our opinion that the Pinoleville Indian Community has the authority to enact an ordinance which restricts land use by anyone within their exterior boundaries when such use has been deemed detrimental to the health or welfare of the Pinoleville Indian Community. B.I.A. letter at 1 (emphasis in original)." *Id.* at 1042. Thus, Rancherias restored by the *Hardwick* stipulated judgments are treated by the County and the Bureau of Indian Affairs like any other Indian reservation.[8]

Numerous other courts have also concluded that rancherias are the equivalent of reservations. *See City of Roseville v. Norton*, 348 F.3d 1020, 1021 (D.C. Cir. 2003) (stating that the Auburn Indian Restoration Act (AIRA) authorized the creation of a new

[8] Furthermore, when discussing the status of the Robinson Rancheria (not a *Hardwick* Rancheria), the court in *Duncan* v. *United States*, 667 F.2d 36, 41, 229 Ct. Cl. 120, 128 (1981), *cert. denied*, 463 U.S. 1228 (1983), held that "Congress clearly contemplated that this land have the same general status as reservation lands." *See generally* United States Department of the Interior, Federal Indian Law 609 (rev. ed. 1958) (it is not necessary that Congress use the word "reservation" to create Indian reservation lands); *United States v. McGowan*, 302 U.S. 535, 538-39 (1938).

"reservation" for the restored tribe and that parcels of land became the tribe's reservation by operation of law); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (stating "rancherias are small Indian reservations"); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 657 (9th Cir. 1975) (stating California Rancherias are Indian reservations).

Finally, the *Hardwick Stipulation for Entry of Judgment* entered into between Amador County and the Indians of the Buena Vista Rancheria, specifically states that the Rancheria is "Indian Country" and that the Rancheria shall "be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation, . . ." *Hardwick*, Stipulation and Order, April 21, 1987.

Therefore, the lands within the Rancheria are likewise within the limits of a reservation. Further, because the lands at issue qualify as a reservation they need not be taken into trust. Subsection (A) defines Indian lands to include "all lands within the limits of any Indian reservation." *See* 25 U.S.C § 2703(4)(A). IGRA does not require that lands within the boundaries of a reservation be held in trust. By providing that "all lands" within a reservation are Indian lands, it is clear that Congress did not intend to include an additional requirement that the lands also be held in trust to be qualified under IGRA.

Subsection (B) categorizes lands as Indian lands if they are 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. *See* 25 U.S.C § 2703(4)(B). The Indian lands definition is subject to the requirements of subsection (B) only if subsection (A) does not apply. Because Subsection (A) does apply (the Rancheria is a reservation), we need not address subsection (B).

3. The Proposed Gaming Facility is located within the Rancheria

The land at issue in this matter is fee land within the exterior boundaries of the Buena Vista Rancheria. The land thus falls within the "limits" of the reservation and meets the definition of Indian lands under IGRA, 25 U.S.C. § 2703(4)(A), and NIGC's regulations, 25 C.F.R. §502.12(a).

In different circumstances, we would engage in a more lengthy analysis. For example, if the land at issue were trust land, outside the limits of the reservation, we would need to engage in a two-part analysis: (1) examining if the land were held in trust or subject to restriction, and (2) determining whether the Tribe exercised governmental power over that land. *See* 25 C.F.R. § 502.12(b). Furthermore, in order to prove the Tribe's exercise of actual governmental power, we would also need to prove theoretical jurisdiction. *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213 (10th Cir. 2001) (*Miami III*). Since the land at issue at Buena Vista is not trust land, however, we need examine only one issue: whether the land is within the limits of the

reservation. Finding that it is within the exterior boundaries of the reservation, we conclude that the land constitutes Indian lands and that IGRA therefore applies.

We do, however, need to evaluate jurisdiction in the sense that we need to determine whether the Tribe is the tribe that exercises jurisdiction over the land at the Rancheria. IGRA states that a tribe may engage in Class II gaming "on Indian lands within such tribe's jurisdiction" if, among other things, the tribe has an ordinance approved by NIGC's Chairman. 25 U.S.C. §2710(b)(1). The requirements for conducting Class III gaming likewise state: "Class III gaming activities shall be lawful on Indian lands only if such activities are (A) authorized by an ordinance or resolution that (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands...." 25 U.S.C. §2710(d)(1).

The context of IGRA's prescriptions as to jurisdiction—that land be within "such tribe's jurisdiction" and ordinances adopted by "the Indian tribe having jurisdiction over such lands"—indicates that Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land. *See, e.g., Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984), *cert. denied sub nom. Elvrum v. Williams*, 471 U.S. 1015 (1985) (member of either Quileute or Quinault tribes is permissible devisee of Quinault Reservation land, since both tribes exercise jurisdiction over Reservation, and members of both tribes may be considered member of "tribe in which the lands are located" for purposes of Indian Reorganization Act § 4). The Buena Vista Rancheria ratified its Constitution on August 24, 2004. The Tribal Constitution specifically denotes the Tribe's jurisdiction to cover all lands within the boundaries of the Rancheria. Therefore, the Tribe clearly retains jurisdiction to regulate gaming on lands within its boundaries.

Because the Tribe is undisputedly the only tribe that exercises jurisdiction over the Rancheria, the Tribe meets IGRA's requirements that it be the tribe with jurisdiction over the Indian lands at issue.

Conclusion

We conclude that the proposed gaming operation is located on lands considered "Indian lands" pursuant to 25 U.S.C. § 2703(4)(A).

The Department of the Interior, Office of the Solicitor, concurs in our opinion. If you should have any additional questions regarding this matter, please call John Hay.

Very truly yours,

//s//
Penny J. Coleman
Acting General Counsel

cc: Director, Office of Indian Gaming Management

Exhibit J

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 Department's 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 "the restoration of lands for an Indian tribe that is restored to Federal recognition." 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 court's 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 "Whether 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 Act's general prohibition on lands acquired after October 17, 1988." (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 "Hatch 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)." 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 Tribe's statutory reservation. The Department took the Hatch tract into trust for the tribes in 1998.

In the 1999 opinion, we examined two exceptions to IGRA's requirement for a two-part determination and the Governor's 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 "restored lands" 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 Tribe's 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 Department's 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 Department's favor on three of four claims. However, the district court also ruled that the Department had adopted an unduly narrow interpretation of the "restored lands" 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 "restoration of lands" 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 "restoration of lands" 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 Department's requirement for specific legislative direction regarding restored lands sought "to graft procedural and temporal limitation onto section 2719(b)(1)(B)(iii)." 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 "an unduly restrictive analysis" 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 "the term 'restoration' 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." Id. at 164, quoting Grand Traverse at 700.

Legal Analysis

Lands that are taken into trust as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition" 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 "restored" within the meaning of IGRA. Second, the land to be acquired must be "restored" within the meaning of IGRA.

At issue here is the Department's interpretation of "restored" as applied to land in the context of 25 U.S.C. § 2719(b)(1)(B)(iii). Two district courts have opined that the Department's interpretation of this subsection is too narrow. The court in Confederated Tribes found that the Department failed to apply the canons of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 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 Department's 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 Department's 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 "the restoration of lands for an Indian tribe that is restored to Federal recognition" is ambiguous. If "Congress has directly spoken to the precise question at issue," 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 "part of the ambiguity of the provision stems from the use of the phrase: "that is restored to federal recognition." Id. at 162. The court opined that the question boils down to whether the word "restored" in the phrase "Indian tribe that is restored" 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 "the varying possibilities highlight the ambiguity of § 2719 (b)(1)(B)(iii)." Id.

The courts in both Confederated Tribes and Grand Traverse Band found that the terms "restore" 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-Webster's Collegiate Dictionary at 999 (10th ed. 1999) (the word restored is generally understood as "to bring back to or put back into a former or original state"). The Grand Traverse court held that the language of the "restoration of lands" exception "implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event." Id. at 701. As explained by the court: "Congressional 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 'restore' or 'restoration' been shown to have occurred." 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 "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit ..." 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 Congress's obligation to act on behalf of these "dependent and sometimes exploited Indian nations." 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 "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Id. at 1444-45, Coos at 116 F.Supp.2d 155, 157.

3. Department's Interpretation of § 2719(b)(1)(B)(iii)

Both the court in Confederated Tribes and Grand Traverse applied the dictionary definition to

"restored." Confederated Tribes at 162, Grand Traverse at 696. The dictionary definition of "restore" 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 . . . . Webster's 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 Congress' 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 "good public policy" 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 Governor's 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 Governor's 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 Governor's 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 tribe's

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 "restored." 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 "restored," 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 Hillman's finding in Grand Traverse that § 2719(b)(1)(B)(iii) could 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." 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 "Confederated Tribes") 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 court's ruling, the Tribes supplemented the record with "The Hatch Tract: A Traditional Siuslaw Village Within the Siletz Reservation, 1855-75." December 4, 2000, Dr. Stephen Dow Beckham ("Beckham Supplemental Report"). In his report, Dr. Beckham writes:

The Hatch tract was first identified as a "Suislaw Village" by Capt. John F. Reynolds of the U.S. Army in July 1856. The site, known as Ka'aich, was the location of the ceremonial lodge of the Earth Lodge Cult, a version of the Ghost Dance, in 1877. A part of the Ka'aich 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 Ka'aich, the site of the tribal cemetery, was allotted to Tom Johnson, a Lower Umpqua India. These are non-taxed Indian properties. The heirs Jesse Martin's 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 "i"

Dr. Beckham's 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 Tribes' 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. Beckham's 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 "non-taxed Indian land" 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 Department's 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 "Indian burial and cemetery ground." Id. In 1945 the Superintendent wrote to the Commissioner of Indian Affairs that "we 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." 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 "a 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." 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 "restored lands."

We agree with NIGC's interpretation in its GTB Decision that:

Congress likely did not intend to substantially undercut the general prohibition on gaming on lands acquired after IGRA's 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 "restoration of lands" 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 Tribes and Congress had no reason to believe that this could limit the Tribes' future economic development. The court in the Coos decision found that Department's requirement for specific legislative direction regarding restored lands sought "to graft a procedural and temporal limitation onto section 2719 (b)(1)(B)(iii)." 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 "service area" 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' 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' 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' 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' 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' 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 Secretary's decision deviated from prior agency practice without reasoned explanation; and (4) the Assistant Secretary's 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 "restored land" and Tribal-State Compact approval' 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 "restored land" 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 "restored land" 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 "restored" its plain, dictionary meaning. Id. at 696. However, the court said that even if the "government's definition could be considered plausible, a conclusion I reject, the Band's 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 statute's 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 Ass'n 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 agency's 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 Department's 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. Whittlesey's 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.

1441 L. Street NW Suite 9100, Washington DC 20005 Tel.: (202) 632-7003 Fax: (202) 632-7066
E-mail with Questions, Comments, or Suggestions Privacy Statement

Exhibit K

Hotel Online
News for the Hospitality Executive

Caesars Entertainment and The Big Sandy Band of Western Mono Indians Developing $200 million Hotel / Casino Just North of Fresno, California

The Fresno Bee, Calif.
Knight Ridder/Tribune Business News

Feb. 18, 2004 - Gaming giant Caesars Entertainment in Las Vegas and The Big Sandy Band of Western Mono Indians will announce plans today for a $200 million casino on tribal land about 10 miles northeast of Fresno.

Caesars and tribal officials have signed a preliminary agreement for the development and management of the casino. A final agreement is expected in 90 days.

The casino would include a 250- to 300-room hotel, more than 75,000 square feet of gaming space, 2,000 slot machines and about 20 gaming tables.

The 40-acre parcel that will include the development is northeast of Friant near Auberry, but officials for Caesars and the tribe would not detail a specific site. The development would be about 15 miles from Mono Wind Casino, operated by the tribe in eastern Fresno County.

"It's a great opportunity for the Big Sandy Rancheria tribal members to reach an agreement with such a bona fide and reputable entertainment management group," tribal Chairwoman Connie Lewis said in a statement.

Caesars is one of the world's leading gaming companies, with $4.5 billion in annual revenue, 29 casinos and 54,000 workers. The company's casino resorts operate under the Caesars, Bally's, Flamingo, Grand Casinos, Hilton and Paris brand names.

Robert W. Stewart, senior vice president of corporate communications for Caesars Entertainment, said company officials are excited about the association with the Big Sandy tribe and the opportunity to expand into California.

"We are always looking for new development opportunities, and we believe the California market represents a great opportunity for this

company," he said. "Fresno has grown up. It's a major market within California."

Caesars also is negotiating with the Pauma-Yuima Band of Luiseno Mission Indians for a casino on tribal land in northern San Diego County. The casino with Big Sandy Rancheria is expected first.

Stewart said the new casino will be unlike anything in the area.

By comparison, the new Chukchansi Gold Resort & Casino is a $150 million project with an 1,800-slot casino, seven restaurants and a 192-room hotel. Chukchansi opened in August.

"It's going to look beautiful," Stewart said of the multimillion-dollar project. "It certainly will have a full range of amenities; it's not just a gambling hall. It will have retail and first-class entertainment. You will be able to go there, have a good meal, do some shopping and see good entertainment."

There are several approvals that must be obtained for the project. The management agreement between Caesars and the tribe requires the approval of the National Indian Gaming Commission. The tribe also must amend its existing compact with the state or negotiate a new one for the project.

Stewart said the casino could be completed within two years after being approved.

Rick Contreras, Big Sandy tribal administrator, said the Caesars name and reputation will benefit the new casino.

"We are bringing something to the Valley that the other [local] casinos don't bring -- a brand name."

The new casino will carry one of Caesars' brand names.

"It could be Caesars. It could be Flamingo," Contreras said. "There will be some association to Big Sandy, but it will carry the brand name that Caesars brings."

The Caesars name also could help lure big-name entertainment acts for one- or two-night shows at the new casino, Contreras said.

The casino's exact location has not been revealed.

The Big Sandy Band of Western Mono Indians owns 380 acres near Auberry and another 215 acres of "off-reservation" land that is within its jurisdiction, Contreras said. Forty of the 215 acres is trust land that is being considered for the casino.

Trust land is Indian property administered by the federal government for the tribe's benefit.

"The exact site is still being worked on, but we expect to have that within the next 90 days," Contreras said.

What will become of the Mono Wind Casino remains uncertain. One reason the tribe is being evasive about the exact location is because it expects opposition from nearby Table Mountain Casino, operated by Table Mountain Rancheria.

Table Mountain officials did not return calls Tuesday afternoon.

Along with more slot machines -- the new casino would mean a nearly sixfold increase in the number of slot machines offered by the Big Sandy Rancheria -- the new casino near Auberry is expected to bring jobs to an area plagued by double-digit unemployment.

A source knowledgeable about the casino business said a facility the size of the proposed resort likely would have a staff of more than 1,000 workers.

What impact another large-scale casino will have on local Indian gaming centers is unknown.

David Nenna, tribal administrator for the Tule River Indian Reservation, which operates the Eagle Mountain Casino near Porterville, said he expects the new facility would have little impact on his tribe's casino. He declined to comment on what its impact might be on neighboring casinos.

"I just hope that all due diligence is being done, that the tribe is staying vigilant and open with the surrounding communities and local government," Nenna said. "Wherever Indian gaming establishments go in across the country, there is much positive impact on local communities and in job creation."

But Nenna said all of the players -- residents, the tribe and government entities -- need to communicate and "address and mitigate any issues" as they arise before completing the project.

By Tracy Correa and Dennis Pollock

CAESARS ENTERTAINMENT INC

FORM 10-Q
(Quarterly Report)

Filed 5/10/2005 For Period Ending 3/31/2005

Address	3930 HOWARD HUGHES PKWY
	LAS VEGAS, Nevada 89109
Telephone	702-699-5093
CIK	0001070794
Industry	Casinos & Gaming
Sector	Services
Fiscal Year	12/31

Governor of the State of New York to execute tribal state gaming compacts and approved the use of slot machines as "games of chance." While the Company believes that it will prevail on these various matters, there can be no assurance that it will and, if it does not prevail, there can be no assurance that the damages assessed against the Company would be immaterial to the Company. See "Litigation" above.

On May 12, 2003, the Saint Regis Mohawk Tribe and the Governor of the State of New York signed a memorandum of understanding which outlined the terms under which the Tribe is authorized to proceed with the casino development. The Saint Regis Mohawk Tribe announced subsequently that it would withdraw from the memorandum of understanding and continue to negotiate with the State of New York to reach an agreement on the subjects contained in the memorandum of understanding. These negotiations are on-going.

As of March 31, 2005, the Company had $44 million invested in the development of this project, which is classified as other long-term assets on the Company's consolidated balance sheet. Of that amount, $18 million is to be reimbursed to the Company by the Tribe over a five year period commencing with the opening of the gaming facility. In the event the project is not completed, the total amount invested would be written off.

Big Sandy Band of Western Mono Indians

In August 2004, the Company signed formal agreements with the Big Sandy Band of Western Mono Indians that will govern the development, construction, and management of the planned casino resort near Fresno, California. Preliminary plans for the project call for development of a casino resort on more than 40 acres near Fresno in the San Joaquin Valley in Central California. The casino resort would become the second to directly serve the Fresno metropolitan area which has a population of approximately 1.2 million. The casino resort would initially include 200 to 250 hotel rooms, approximately 70,000 square feet of gaming space, at least 2,000 slot machines, approximately 40 gaming tables, restaurants, retail shops, and meeting space and entertainment facilities. The Big Sandy Tribe currently operates the Mono Wind Casino in Auberry, California, about 15 miles northeast of the proposed casino project site.

The management agreement for the casino resort is for an initial term of seven years, renewable upon the consent of both parties, and requires the approval of the NIGC and other regulatory bodies. In addition, the Big Sandy Tribe would have to amend its existing compact with the State of California, or negotiate a new compact for the new casino project. The project is also dependent on other regulatory approvals and contingencies. As of March 31, 2005, the Company has capitalized $1.2 million spent towards acquiring real estate related to this project and $2.3 million advanced to the Big Sandy Tribe for development costs approved by the Company and the Big Sandy Tribe. Pursuant to the Interim Loan Agreement between the Company and the Big Sandy Tribe, the $2.3 million advance is to be repaid upon the earlier of permanent financing or the casino opening date.

Caesars Wembley

In October 2004, the Company announced plans to develop and operate a casino resort in London, adjacent to the redeveloped Wembley National Stadium and the legendary Wembley Arena. The Company has since entered into definitive agreements for the pre-construction phase of the casino resort project. After certain conditions are met, the Company will enter in the Joint Venture Agreement with its prospective partner in the casino resort project, Quintain Estates and Development PLC. The parties anticipate that these conditions, which include obtaining necessary gaming licenses and consents, will be satisfied within approximately two years. In April 2005, permissive legislation was passed in the United Kingdom. Both parties are contemplated to own a 50 percent interest in the joint venture company. It is also contemplated that Caesars Wembley would be built on 13 acres in the 58-acre redevelopment area and will include a casino, a 400-room luxury hotel, a full-service spa and swimming pool, shops, convention and meeting facilities and a variety of restaurants, bars and lounges.

BIG SANDY BAND OF WESTERN MONO INDIANS SIGNS AGREEMENTS WITH CAESARS TO DEVELOP FRESNO CASINO

LAS VEGAS, September 16, 2004 - The leaders of the Big Sandy Band of Western Mono Indians and Caesars Entertainment, Inc. (NYSE: CZR), one of the world's leading gaming companies, have signed formal agreements that will govern the development, construction and management of the Tribe's planned new casino, to be built on Tribal land near Fresno, California. The total project cost is estimated at $250 million.

The management and related agreements establish the management fee that Caesars will receive from the Tribe; provide for payment of a development fee to the company; and assign obligations for funding the various portions of the project.

Plans for the Big Sandy project call for construction of a premier-quality casino resort on 48 acres of Tribal land near Fresno in the central San Joaquin Valley. The casino would become the second to directly serve the Fresno metropolitan area, which has a population of approximately 1.2 million.

The casino property initially would include 250 to 300 hotel rooms, more than 75,000 square feet of gaming space, at least 2,000 slot machines, approximately 20 gaming tables and a collection of restaurants, retail shops, meeting space and entertainment facilities. The company and the Tribe are discussing an appropriate brand for the casino.

"The Big Sandy Band of Western Mono Indians is proud to be working with one the largest casino operators in the world," said Big Sandy Rancheria Tribal Chairperson Connie Lewis.

"This collaboration will provide a new economic base for the Tribe and Fresno County. All parties involved will share in the economic benefits that this new casino will bring," Lewis added.

"We are pleased to be associated with the Big Sandy Tribe in this significant California gaming project," said Caesars Entertainment President and Chief Executive Officer Wallace R. Barr. "This casino resort will deliver millions of dollars of investment and thousands of local jobs to the region, in addition to providing substantial economic benefits to members of the Tribe."

Under the terms of the agreements:

- The Tribe and Caesars Entertainment will develop and construct the casino resort and other related facilities on Tribal lands.
- Caesars Entertainment will assist the Tribe in securing financing for the planned development.
- Caesars Entertainment will manage the casino and resort for an initial term of seven years, which is renewable upon the consent of both parties.
- Caesars Entertainment will receive a management fee of 30 percent of Net Total Revenue, as defined in the management agreement, from casino and resort operations. Net Total Revenue is analogous to the GAAP concept of pretax income.
- Caesars Entertainment will receive a one-time development fee of approximately $7 million for its assistance in planning and building the casino resort.

The Big Sandy Tribe currently operates the Mono Wind Casino in Auberry, California, about 15 miles northeast of the proposed Fresno-area casino.

The management agreement between Caesars Entertainment and the Tribe requires the approval of the National Indian Gaming Commission. In addition, the Tribe would have to amend its existing compact with the State of California, or negotiate a new compact for the new casino project. The project also is dependent on other regulatory approvals and contingencies.

About Caesars Entertainment

Caesars Entertainment, Inc. (NYSE: CZR) is one of the world's leading gaming companies. With $4.5 billion in annual net revenue, 28 properties on four continents, 26,000 hotel rooms, two million square feet of casino space and 52,000 employees, the Caesars portfolio is among the strongest in the industry. Caesars casino resorts operate under the Caesars, Bally's,

Flamingo, Grand Casinos, Hilton and Paris brand names. The company has its corporate headquarters in Las Vegas.

In July 2004, the Board of Directors of Caesars Entertainment approved an offer from Harrah's Entertainment to acquire the company for approximately $1.8 billion and 66.3 million shares of Harrah's common stock. The offer must be approved by shareholders of both companies and federal and state regulators before the transaction can close.

Additional information on Caesars Entertainment can be accessed through the company's web site at www.caesars.com.

NOTE: This press release contains "forward-looking statements" within the meaning of the federal securities law, which are intended to qualify for the safe harbor from liability provided thereunder. All statements which are not historical statements of fact are "forward-looking statements" for purposes of these provisions and are subject to numerous risks and uncertainties that could cause actual results to differ materially from those expressed or implied in the forward-looking statements. Forward-looking statements include the scope of the plan project, the expected economic results of the project, the length of time for receipt of various approvals and the construction costs and completion date. Additional information concerning potential risk factors that could affect the company's future performance are described from time to time in the company's reports filed with the Securities and Exchange Commission, including the company's Annual Report on Form 10-K for the year ended December 31, 2003 and reports on Form 10-Q for the quarters ended March 31, 2004 and June 30,2004. The reports may be viewed free of charge at the following website: www.sec.gov. The company undertakes no obligation to publicly update any forward-looking statement, whether as a result of new information, future events, or otherwise.

CONTACTS:
Caesars Entertainment
Media
Robert W. Stewart
702.699.5043
stewartr@caesars.com

Investors
Josh Hirsberg
702.699.5269
hirsbergj@caesars.com

Big Sandy Band
of Western Mono Indians
Connie Lewis
559-855-2103
bsr201@netptc.net

-top-

Hotel Interactive Top Story

Gaming

Close Window [X]

Casino Boom Underway, Study Says

8/15/2005

By Allan Richter

DENVER – Traditional and Native American casino development is expected to boom and exceed $4 billion, handily outpacing the $3 billion spent in 2003 and 2004 combined, new market research shows.

Developers are expected to plow more money into traditional casinos than Native American casinos, though development of the latter will hum along at a steady clip, according to the annual U.S. study by HREC - Hospitality Real Estate Counselors, a hotel and casino advisory firm.

Traditional casino projects either under construction or proposed are expected to account for more than $11 billion through 2009, while Native American casino projects amount to roughly $3 billion, the HREC study said.

HREC defines a traditional casino as land-based, dockside or riverboat operations subject to local, state and federal gaming laws. A Native American casino, owned or developed by a tribe, is subject to the Indian Gaming Regulatory Act of 1988 (IGRA), though a third party may operate it.

In another trend the survey unearthed, mega-resorts such as the new Wynn Casino and the $4 billion Project City Center, both in Las Vegas, continue to draw the most developer interest and capital. Among Vegas casinos following suit are the Venetian (Palazzo) and the Cosmopolitan.

The trends were identified in a study that pointed to a robust gaming industry, which HREC said has spurred some $14.5 billion in combined casino projects under construction or proposed for next year through 2009.

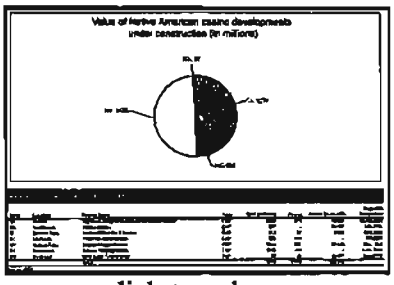
Most traditional casinos either being built or nearing construction is in Nevada, with Mississippi ranking second. In addition, HREC said, traditional casinos are said to be planned in 12 states.

Hotels are likely to ride the coattails of the aggressive casino development. The Venetian's new Palazzo tower project, for instance, will add more than 3,000 rooms and 100,000 square feet of gaming space at a cost of roughly $1.6 billion.

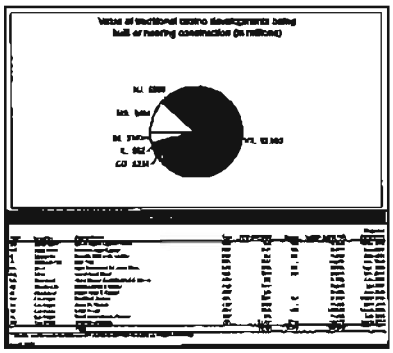
Such projects support "the trend toward creating an all-inclusive experience for guests," the report said.

In contrast to traditional casinos, expansion projects account for most Native American casino developments under construction, the HREC study said. Native American projects are underway in five different states.

At $325 million, most Native American casino development is in New York, though the largest single Native American project, the Big Sandy Band of Western Mono Indians Casino, costing $250 million, is in Fresno, California.



click to enlarge



click to enlarge

Allan Richter is editor in chief of Hotel Interactive and Hospitality Insider.

Exhibit 2

Memorandum

To: Philip N. Hogen, Chairman

Through: Penny J. Coleman, Acting General Counsel PJC

From: John R. Hay, Staff Attorney JRH

Date: September 6, 2006

Re: Gaming By the Big Sandy Rancheria on the McCabe Allotment

---

On December 22, 2004, the Big Sandy Band of Western Mono Indians ("Tribe") submitted to the NIGC a Request for Approval of Management Agreement between Big Sandy Entertainment Authority and QBS, LLC, regarding a proposed casino near Fresno, California. On April 19, 2005, the Tribe submitted documentation to support its assertion that the proposed casino site constituted "Indian lands" as defined by the Indian Gaming Regulatory Act ("IGRA").[1] In conjunction with the submission of a Management Agreement, the Tribe has requested that the NIGC provide an advisory legal opinion on whether the proposed casino location qualifies as Indian lands under IGRA.

---

[1] The Tribe's submission included the following attachments: A Plan For The Distribution Of The Assets Of The Big Sandy (Auberry) Rancheria (Effective Date, March 5, 1965); Stipulation for Entry of Judgment, San Joaquin or Big Sandy Band of Indians, et al. v. James Watt, et al. (March 25, 1983); BIA, Title Status Report (November 12, 2003); BIA, Tract History Report (February 10, 2004); Trust Patent from the United States of America to Mary McCabe (March 29, 1920); BIA, 1933 California Roll Book (excerpt)(November, 1986); Letter from Sacramento Indian Agency (April 24, 1935); Tribal Resolution No. 84-1 (March 19, 1984); Declaration of Dan Lewis (March 28, 2005); Deed to Restricted Indian Land Special Form (February 2, 1979); Lester McCabe, BIA Index and Heirship Card; Opinion of the Solicitor, Sampson Johns Allotment (September 26, 1996); Declaration of Sherril McCabe (April 7, 2005); Declaration of Tribal Council Member, Phyllis Lewis (March 31, 2005); Declaration of Tribal Administrator, Ric Contreras (March 31, 2005); Tribal Council Resolution No. 0604-03, Affirming Tribal Government Jurisdiction Over Indian Lands Of The Tribe (June 12, 2004); Permit to Enter Trust Lands of the Tribe; Tribal Jurisdiction and Government Services Ordinance, Ordinance No. 1204-01 (December 30, 2004); Map of McCabe Allotment; and Fresno County Assessor's Map, Book 138, Page 06 (June 25, 2003).

By letter dated September 9, 2005, the California Governor's Office of Legal Affairs submitted its views on the Indian lands determination. The Tribe responded to the State's arguments by letter dated October 7, 2005.

By letter dated February 1, 2006, the Table Mountain Rancheria submitted its views on the Indian lands determination. The Tribe has not responded to that submission.

The Office of General Counsel has evaluated all of the information submitted and determined that the McCabe Allotment would qualify as Indian lands under IGRA and, therefore, the Tribe may lawfully conduct gaming on this parcel.

Background

The Tribe is a federally recognized Indian tribe occupying the Big Sandy Rancheria near Auberry, California, approximately 35 miles northeast of Fresno. Pursuant to a tribal-state gaming compact with the State of California, the Tribe conducts class II and class III gaming in its reservation's Mono Winds Casino. The tribe is now developing a new gaming facility outside the boundaries of the reservation.

The parcel of land the Tribe proposes to conduct gaming on is an Indian allotment (hereinafter, the "McCabe Allotment") that has been continuously held in trust since 1920 for McCabe family members.[2] The current allottee, tribal member Sherrill McCabe-Esteves, has been the sole beneficial owner of the McCabe allotment since 1979. The Allotment is located 12 miles outside the Rancheria, in an unincorporated part of Fresno County. The allottee is leasing the parcel to the Tribe.[3] The lease has been submitted to the Bureau of Indian Affairs for review.

The McCabe Allotment is a 40.82[4] acre Indian allotment held in trust by the United States for the benefit of Big Sandy Rancheria tribal member Sherrill Anne McCabe (aka McCabe-Esteves). The McCabe Allotment was originally allotted out of the public domain to Mary McCabe, a member of the Tribe, in 1920 and immediately placed in trust.

Applicable Law

The IGRA explicitly defines "Indian lands" as follows:

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

---

[2] The parcel at issue is described as: The north half of Lot two of the northwest quarter of Section eighteen in Township eleven south of Range twenty-two east of the Mount Diablo Meridian, California, containing forty and eighty-two-hundredths acres.

[3] The lease was submitted to the Pacific Regional Office of the Bureau of Indian Affairs on December 20, 2004.

[4] The BIA trust status report indicates that this is a 40.82 acre parcel. However, a survey done by the Big Sandy Rancheria has found that this parcel is 48.20 acres. In all likelyhood this is simply a scriveners error, however, our opinion is limited to the legal description of the trust document.

(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).

NIGC regulations have further clarified the Indian lands definition, providing that:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either --
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Further, IGRA gives tribes the exclusive right to regulate gaming on Indian lands, specifically providing that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701 (5). IGRA further clarifies the jurisdiction of Tribes as to the different classes of gaming stating that:

> (1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.
> (2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

25 U.S.C. § 2710(a)(1)(2). The requirements for Class III gaming likewise state:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are--
> (A) authorized by an ordinance or resolution that
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands ...

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1)(A)(C).

Analysis

The McCabe Allotment is not within the Big Sandy Rancheria; it is held in trust for the benefit of tribal member Sherrill McCabe. Therefore, the McCabe Allotment constitutes Indian lands if the Tribe possesses jurisdiction and exercises governmental authority over it.

Jurisdiction

As a general matter, tribes are presumed to possess tribal jurisdiction within "Indian country." *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The Supreme Court has stated that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Historically, the term "Indian country" has been used to identify land that is subject to the "primary jurisdiction . . . [of] the Federal Government and the Indian tribe inhabiting it." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). The U.S. Code defines "Indian country" as:

> (a) all land within the limits of any Indian reservation...,
> (b) all dependent Indian communities..., and
> (c) all Indian allotments, the Indian titles to which have not been extinguished....

18 U.S.C. § 1151. *See, e.g., United States v. Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain Indian lands set apart for Indians under governmental care").

This situation is similar to the Sampson Johns Allotment over which the Quinault Tribe possesses jurisdiction. In 1996, the Department of the Interior, Office of the Solicitor concluded that an Indian allotment, located off-reservation and created from the public domain, constituted Indian lands for the purposes of IGRA. *See Opinion of the Solicitor, Sampson Johns Allotment* (September 26, 1996). In that case, the allotment was owned by a member of the Quinault tribe and was located 12 miles from the Quinault reservation. The opinion concluded that the Quinault Tribe possessed jurisdiction over the lands. The opinion noted that a tribe would possess jurisdiction over lands within Indian country unless the "land in question is not owned or occupied by tribal members and is far removed from the tribal community." *Id.*

Similar to the Sampson Johns Allotment, the McCabe Allotment is owned by a tribal member who is a descendent of the original allottee's family and the allotment has been held in trust continuously since 1920 and is located within 12 miles of the Tribe's Rancheria. Therefore, we can conclude that the Tribe has jurisdiction over the land.

Exercise of Governmental Authority

In order for the land to fit the definition of "Indian lands," we must decide whether the Tribe exercises governmental power over the parcel. *See* 25 U.S.C. § 2703(4)(B); *see also Narragansett Indian Tribe*, 19 F.3d at 703.

IGRA is silent as to how NIGC is to decide whether a tribe exercises governmental power. Furthermore, the manifestation of governmental power can differ dramatically depending upon the circumstances. For this reason NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Case law and NIGC opinions provide some guidance. The First Circuit in *Narragansett Indian Tribe* found that satisfying this requirement depends "upon the presence of concrete manifestations of [governmental] authority." *Narragansett Indian Tribe*, 19 F.3d at 703. Such examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.*

In *Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F. Supp. 523 (D.S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993), the court stated that several factors might be relevant to a determination of whether off-reservation trust lands constitute Indian lands. The factors were:

(1) Whether the areas are developed;
(2) Whether the tribal members reside in those areas;
(3) Whether any governmental services are provided and by whom;
(4) Whether law enforcement on the lands in question is provided by the Tribe; and
(5) Other indicia as to who exercises governmental power over those areas.

Id. at 528. The Court did not opine regarding the weight given any factor or whether the absence or presence of one factor was determinative.

In this case, the Tribe's Constitution provides that the Tribe has jurisdiction over any allotment of a tribal member. The Tribe provides governmental services to off-reservation Indian allotments owned or occupied by tribal members including the McCabe allotment and other allotments in the surrounding area. According to the Tribe, such services have included, for example, tribally and HUD funded housing services,

housing and facility maintenance, social, welfare and property maintenance services (including food and meal delivery, home repair, refuse removal, etc.).

The McCabe Allotment is largely vacant and undeveloped. However, the Tribe provides some governmental services to the allotment, including site inspection by tribal police officers, fence repair, maintenance, inspections for unauthorized grazing, and general supervision. The Tribe provided a sworn statement from Ric Contreras, Big Sandy Tribal Administrator, recounting a recent situation where a tribal employee noticed signs that cattle had been illegally grazing on the land. The Tribe took action to seal-off possible entries that cattle may have used to gain access to the property.

The Tribe has submitted a sworn statement from Sherrill McCabe, the allottee, stating that the "Tribe provides governmental services and benefits to the McCabe Allotment, including inspection by Big Sandy tribal patrol officers, fence repair, maintenance, monitoring for un-permitted grazing, and general supervision."

The Tribe submitted a sworn statement from Dan Lewis, a tribal security officer, stating that he "made regular visits to and inspections of the McCabe Allotment" for the purpose of looking out for "trespassers, squatters and any damage to or removal of objects from the land."

The Tribe has submitted copies of resolutions to show that it exercises jurisdiction over off-reservation Indian allotments. Tribal Council Resolution #0604-03, adopted June 12, 2004, requires that all off-reservation trust allotments display a sign stating: "NO TRESPASSING: PROPERTY UNDER JURISDICTION OF BIG SANDY RANCHERIA TRIBAL GOVERNMENT. ENTRANCE ONLY BY PERMISSION OF TRIBAL GOVERNMENT." (emphasis in original). According to the Tribe, these warning signs have been placed on the McCabe allotment.

According to the Tribe, in December of 2004, it began requiring non-Tribal visitors, such as contractors, surveyors, and others, to obtain a permit before entering off-reservation Indian allotments to conduct work on behalf of the Tribe or a tribal member allottee.

These actions identified above are concrete manifestations of the Tribe's exercise of governmental authority over the allotment.[5]

Conclusion

In our opinion, the McCabe trust allotment constitutes Indian lands under the Indian Gaming Regulatory Act. Therefore, the Big Sandy Rancheria may conduct Class II and III gaming activities on the land. It is important to note that this is an advisory opinion

[5] The State of California argues that the Tribe must exercise historical and exclusive jurisdiction to qualify as Indian lands under IGRA. This is an incorrect statement of law. At least since prior to the enactment of IGRA, the Tribe had the authority to exercise jurisdiction. In the specific circumstances described here, nothing more is required. Additionally, there is no requirement that the Tribe exercise governmental power over a historically significant period of time.

issued by the Office of General Counsel and not a final agency action. The Department of the Interior, Office of the Solicitor concurs with this opinion.

Exhibit 3

United States Department of the Interior

OFFICE OF THE SOLICITOR

SEP 25 1996

In reply, please address to:
Main Interior, Room 6456

Memorandum

To: Director, Indian Gaming Management Staff

From: Robert T. Anderson
Associate Solicitor, Division of Indian Affairs

Subject: Sampson Johns Allotment as "Indian Land" under IGRA.

Your office has requested an opinion as to whether the Quinault Indian Nation may conduct Class III gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988), on a parcel of land known as the Sampson Johns allotment. The Tribe has submitted a Class III gaming compact between the Tribe and the State of Washington which contemplates gaming upon the Tribe's reservation and upon a specific parcel of trust land known as the Sampson Johns allotment.

Pursuant to IGRA, the Secretary must approve a Tribal-State compact in order for the Tribe to legally conduct Class III gaming. As part of the Quinault Indian Nation-Washington State gaming compact, the Tribe and the State assert that publication in the Federal Register of the Secretary's approval of their compact constitutes a finding by the Department of the Interior that the Sampson Johns allotment is "Indian lands" which may be used for tribal gaming under IGRA. Prior to approving the compact, therefore, the Department of the Interior must determine whether the allotment is "Indian land[]" under IGRA.

Based on a review of the relevant evidence and applicable law, we conclude that the Quinault Indian Nation may conduct gaming on the Sampson Johns property because the land is "Indian land[]" as defined by IGRA, *i.e.* the land is trust land owned by Quinault tribal members and the Quinault Indian Nation exercises governmental power over the property. Therefore the Tribal -State gaming compact, including its provision regarding the Department of the Interior's finding that the intended gaming site is "Indian land[]" under IGRA, may be legally approved.

Background

The Quinault Indian Nation (hereinafter Quinault or Tribe) intends to locate their proposed gaming enterprise on an Indian allotment that the Tribe believes is within its jurisdictional area

and over which the Quinault Indian Nation exercises governmental authority. The Shoalwater Bay Tribe of Indians opposes the Quinault Tribe's proposed gaming site because the Shoalwater Bay Tribe recently purchased a neighboring parcel of land in fee simple, which it intends to use for gaming.[1] Shoalwater Bay has submitted a request to the Secretary to investigate Quinault's claim that it exercises governmental power over the allotment. See Material dated July 11, 1996 from the Shoalwater Bay Indian Tribe to Secretary Babbitt (On File with Our Office).

The proposed gaming site is part of lands allotted to Sampson Johns, an enrolled Quinault Indian, on September 7, 1900 out of the public domain.[2] See Trust Patent of February 5, 1916 (on file with our office). The land has been continuously held in trust since 1916 for the beneficial owners of the land and is currently held in trust by the United States for a number of Quinault tribal members, heirs and successors of Sampson Johns.[3] The specific parcel of land intended for gaming is recorded with the Bureau of Indian Affairs as allotment 130-1755-D. The parcel is owned by Emily J. Sherwood, an enrolled Quinault Indian.

The Quinault Tribe has submitted evidence to support its assertion that it exercises governmental power over the parcel in question. According to documents submitted by the Tribe, the land is located approximately twelve miles from the southern border of the Quinault Indian Reservation and is near or within the usual and accustomed hunting, fishing, and gathering territories of the Quinault Tribe. See Treaty with the Quinaielt, Etc., 1855, 12 Stat. 971 (1855).

The Tribe has also submitted sworn statements from Douglas Washburn and Ray Knutzen, Quinault Indian Nation Police officers, stating that tribal police have policed the Sampson Johns

---

[1] On August 14, 1992 the Sampson Johns allotment was subdivided into four separate tracts. See Letter of December 16, 1992 from the Acting Assistant Area Director, Portland Area Office, Bureau of Indian Affairs to the Superintendent, Olympic Peninsula Agency, Bureau of Indian Affairs (on file in our office). On January 17, 1996 the Bureau of Indian Affairs approved the sale of one of the four parcels consisting of 56.240 acres to the Shoalwater Bay Indian Tribe. Title to this parcel thus reverted to fee simple. See Deed of January 11th, 1996, Recorded on February 2, 1996 under No. 96 04172 (Shoalwater Bay Tribe Submission Appendix G).

[2] The United States mistakenly patented the allotment to Mr. Johns in fee simple, but on February 5, 1916 corrected the mistake by issuing a trust patent to Mr. Johns which replaced (cancelled) the fee simple patent. Trust Patent of February 5, 1916.

[3] Of the eleven heirs of Sampson Johns who owned an undivided interest in the Sampson Johns allotment, ten are enrolled Quinault tribal members. See Certification of Degree of Indian Blood for Verdi Charlene Smith Mcloud, Geneva L. Smith Underwood, Hazel Strom Smith, Donald Eugene Strom, Leon C. Strom, Theodore Strom II, Theodore Lester Strom, Emily Johns Sherwood, Vance Johns, Jr., Jason Strom (On File with Our Office).

allotment and have periodically responded to requests for police assistance on the land. Declaration of Douglas Washburn, Quinault Indian Nation Police Officer (January 3, 1995); Declaration of Ray Knutzen, Quinault Indian Nation Police Chief (January 2, 1995) (On File with Our Office).

The City of Ocean Shores, Washington, has written a letter indicating that among the local residents of the city, the Sampson Johns allotment is held to be Quinault land subject to the Nation's jurisdiction. The City indicates that primary jurisdiction on these lands is the responsibility of the Quinault Indian Nation. The City expects that the Tribe will have regulatory and enforcement responsibility over a tribal casino located on the trust land. Letter of August 20, 1996 to the Department of the Interior, from Michael L. Pence, City Manager (On File with Our Office). Additionally, the County of Grays Harbor has written a letter indicating that the land is considered territory that has been historically occupied by the Quinault Tribe and held in trust for the benefit of Quinault members for many years. The County states that the property is not taxed by Grays Harbor County and the Tribe has primary jurisdiction. See Letter of August 23, 1996 from Grays Harbor County Board of Commissioners (On file with Our Office).

The Constitution of the Quinault Indian Nation, adopted March 22, 1975, extends the jurisdiction and governmental power of the Tribe to:

> (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (I Kapp. 923) and to all persons acting within the boundaries of those reserved lands or waters; (b) all usual and accustomed fishing grounds, open and unclaimed lands reserved for hunting and gatherings and other lands necessary for the appropriate use of fishing and hunting grounds . . . (c) all lands or waters held by the United States in trust or reserved by the Quinault Nation for the use and benefit of any member of the Quinault Tribe when such lands or waters are not within the boundaries of an established Indian Reservation.

See Article I, Constitution of the Quinault Indian Nation.

The Tribe has submitted a lease document between the manager of a "flea market" on the property and a flea-market vendor. The lease agreement provides that enforcement of the lease provisions will be handled by the Quinault tribal authorities. See Lease between Charing Enterprise and David B. Velasquez-Manager at 3, 6, (October 30, 1995)(On File with Our Office). This document indicates that the occupants of the land who are parties to the lease have consented to Quinault tribal jurisdiction for enforcement of the Lease.

Legal Analysis

Indian gaming activities are regulated pursuant to the Indian Gaming Regulatory Act. IGRA allows Class II and III gaming on Indian lands which it defines as:

> (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).[4] While the Sampson Johns allotment is not within the Quinault reservation, it is held in trust by the United States for Quinault tribal members. Thus, the land is "Indian lands" if the Quinault Tribe exercises governmental authority over it. IGRA does not define the circumstances under which a tribe will be considered to exercise governmental power over trust land. The legislative history of the Act likewise provides no guidance on this issue.

Tribal jurisdiction is generally limited to Indian country. In 1948, Congress defined "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). Congress has employed the definition of Indian country in numerous statutes. See e.g. 16 U.S.C. §§ 3371(c) (Indian country as defined in 18 U.S.C. 1151); 3377(c)(preserving tribal jurisdiction on Indian reservations); 25 U.S.C. § 450h (a)(3) (Secretary may acquire land in trust within a tribe's reservation); 25 U.S.C. § 1322 (a) (State may assume jurisdiction in Indian country with a Tribe's consent); 25 U.S.C. § 1903 (10) (Reservation in Indian Child Welfare Act means Indian country as defined in 18 U.S.C. 1151 and lands which are held in trust by the United States for a Tribe or individual Indian); 25 U.S.C. § 3202 (8)(Indian country has the meaning given to the term by 18 U.S.C. 1151). However, IGRA's use of the phrase "Indian lands" rather than "Indian country" indicates that IGRA's jurisdictional reach is not precisely equivalent to statutes which refer to "Indian Country."

Indian tribes possess sovereignty over "their members and their territory." Montana v. United States, 450 U.S. 544 (1981). There is a presumption in favor of tribal jurisdiction over all land

---

[4] Section 20 of IGRA imposes restrictions on the ability of Indian tribes to conduct gaming on property acquired after October 17, 1988. See 25 U.S.C. § 2719(b). However, this provision is inapplicable to this case because the Sampson Johns trust status predates IGRA.

within tribal reservations, over dependent Indian communities and lands held in trust for a tribe or its members. See Indian Country, U.S.A., Inc. v. Oklahoma 829 F.2d 967 (10th Cir. 1987), cert. denied, sub nom., Oklahoma Tax Com. v. Muscogee (Creek) Nation, 487 U.S. 1218 (1988); see also DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425 (1975); see generally F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 229-59 (1982 ed.). Under certain narrow circumstances, however, there may be Indian country over which no tribe exercises governmental power. In those circumstances, the area would not be considered "Indian lands" as defined in the IGRA.

Tribal jurisdiction may be lacking when the land in question is not owned or occupied by tribal members and is far removed from the tribal community. See F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 346-48 (1982 ed.)(basis for tribal jurisdiction over allotments outside of reservations is tribal membership, or that allotments are clustered and thus part of a dependent Indian community); Cf., e.g., Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indians, 498 U.S. 505, 511 (1991)(usual tax immunities apply to tribal trust land within original reservation boundaries); Oklahoma Tax Com'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1991 (1993). Assertion of tribal jurisdiction over individual trust parcels, however, has been recognized when there is a tribal nexus to the lands or a political relationship with the owners of the lands. Mustang Production Co. v. Harrison, et al., 1996 WL 477560 (10th Cir. 1996); see also, Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW at 87-93 (1987).[5]

The Sampson Johns allotment identified in the Quinault compact is not located within the exterior boundaries of the Tribe's reservation, but was held in trust prior to the enactment of IGRA on October 17, 1988. In order for the Tribe to conduct gaming on the lands, the Tribe must show that it falls within IGRA's definition of Indian lands, *i.e.*, land that is held in trust by the United States for a tribe or individual and the Tribe exercises governmental power over the land. 25 U.S.C. § 2703(4)(B).

Exercise of Tribal Jurisdiction

In Cheyenne River Sioux Tribe v. South Dakota, 830 F.Supp. 523 (1993), aff'd, 3 F.3d 273

---

[5] The Shoalwater Bay Indian Tribe notes that in Miami Tribe v. United States, 927 F. Supp. 1419 (1996), the Miami Tribe was unable to establish jurisdiction over restricted Indian land because, among other reasons, the record was devoid of evidence that the owners of the land had consented to jurisdiction. Id. at 1428, citing Duro v. Reina, 495 U.S. 676 (1990)("A tribe's ... authority comes from the consent of its members."). However, Miami can be distinguished from the present inquiry because in Miami the beneficial owners of the restricted Indian allotment were not members of the Miami Tribe while the beneficial owners in this instance are members of the Quinault Indian Nation and subject to the tribe's jurisdiction as evidenced by the Tribal Constitution. In addition, the land at issue in Miami was located in an area from which the Tribe had been removed and disclaimed jurisdiction.

(8th Cir. 1993), the district court indicated that the determination regarding tribal jurisdiction would require evidence regarding:

> (1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

Id. It is important to note, however, that we do not view as necessary a showing that a tribe has in fact actually exercised governmental power over a tract of Indian country. Rather, it is only necessary that the Indian country be so situated as to allow the exercise of governmental power if a tribe chooses to do so. Of course, the fact that a given tribe has actually exercised such power and that neighboring governments recognize the legitimacy of such authority weighs in favor of a finding that the lands are "Indian lands" under the IGRA.

In the instant case, the Sampson Johns allotment was assigned to Sampson Johns, an enrolled Quinault Indian, on September 7, 1900 and he and his descendants continued to reside on the land for a time. See United States v. Washington, 294 F.2d 830 at 831 (9th Cir. 1961). Additionally, the land is located twelve miles from the southern border of the Quinault Indian Reservation, falls within the Tribe's constitutionally-defined area of tribal jurisdiction and is near or within the usual and accustomed hunting, fishing, and gathering territories of the Quinault Tribe. See 50 C.F.R. § 663.24; 50 Fed. R. 28786, 28795 (June 6, 1996). The Tribe regulates hunting and fishing over its members in this area, provides tribal police services and other services to the area, and is recognized by the City of Ocean Shores and the County of Grays Harbor as exercising regulatory and enforcement jurisdiction over the land. Users of the property have expressed their consent to Quinault tribal jurisdiction for enforcement of provisions of a lease. Therefore, we conclude that the Quinault Indian Tribe exercises tribal jurisdiction over the Sampson Johns allotment.

Conclusion

In our opinion, the Sampson Johns trust allotment constitutes "Indian lands" pursuant to the Indian Gaming Regulatory Act and the Quinault Indian Nation may conduct Class II and Class III gaming activities on the land. If you have any further questions in this regard, please contact Troy Woodward of my staff at (202) 208-6526.