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October 27, 2006

The Honorable Dirk Kempthorne
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Kempthorne:

As a Member of Congress who supported the enactment of the Indian Gaming Regulatory Act (IGRA) in 1988, it was my view that IGRA would provide "rules of the game" which would be applied in an even-handed fashion to recognized tribes, while also ensuring that a mechanism would exist for consideration of the potential impact of Indian gaming on local communities. It was for that reason, that since returning to Congress last year, I have not sought to intervene on behalf of any of the interested parties in the Ione Band of Miwok Indians request for a restored lands determination. It has been my position that the rule of law should be the only factor in the ultimate resolution of this issue before the Department of the Interior.

However, as the Representative from the 3rd Congressional District in the State of California, I have attempted to follow the major developments concerning the application filed by the Ione Band of Miwok Indians with the Indian Gaming Regulatory Commission within the Department of Interior. In this regard, a legal opinion dated September 19, 2006, drafted by Carl J. Artman, Associate Solicitor, Division of Indian Affairs has come to my attention. The opinion relates to the question of whether lands near and partially within the boundaries of Plymouth California, which are the subject of a fee-to trust application, would qualify as "Indian lands" within the meaning of IGRA. Approval of the application would allow the Ione Band of Miwok Indians to conduct gaming if the lands were acquired in trust by the Department of the Interior.

As you are aware, IGRA contains a general rule which prohibits gaming on lands acquired after October 1988. However, at 25 U.S.C. Sec. 2719(b)(1) the Act contains exceptions to this rule that allow gaming on certain "after acquired" or "newly acquired" lands if:

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

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

I would bring to your attention that the legal opinion drafted by the Associate Solicitor came to the conclusion that the exception contained in (B)(iii) should be applicable to the petition filed by the Ione Band of Miwok Indians concerning the land in question. My primary concern after reading the opinion is that it does not appear to address several critical legal issues raised in correspondence provided the department by both the California Governor's Office, and counsel representing Amador County. This is particularly troubling in light of the fact that the Associate Solicitor has drawn a conclusion which denies the state and county the role envisioned in one of the primary exceptions to general prohibition against Indian gaming. The absence of any indication in the legal opinion that the issues raised by these officials were considered would have the practical effect of removing them from the decision making process altogether. Therefore, I would take this opportunity to raise several prominent questions that I felt were not adequately addressed in the Associate Solicitor's legal opinion

1. In order to be a "restored tribe" there must be evidence of a prior loss of recognition. Is it the view of the Department of the Interior that the omission of a tribe from the Bureau of Indian Affairs list of tribes is sufficient to demonstrate an "empirical act" tantamount to termination under Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney 369 F. 3d 960 (6th Cir. 2004)?

2. Where the underlying legal issue concerns whether the Secretary will be obligated under 25 USC Sec. 2719(b)(1)(A) to consult with state and local officials, and officials of other nearby Indian tribes, is it the policy of the Department of the Interior to look upon empirical acts which do not rise to the level of an affirmative action by the Secretary as being sufficient to terminate the federal government's relationship with a tribe?

3. Would mere acts of omission not rising to the level of an affirmative act by the Secretary suffice as a termination of the recognition of a tribe where the legal effect of accepting the act of omission would be to deny the required consultation between the Secretary and the state and local officials, and officials of other nearby Indian tribes under 25 USC Sec. 2719(b)(1)(A)?

4. What type of documentary evidence does the Department of the Interior require to demonstrate that a termination of the recognition of a tribe has occurred?

5. Where there is no affirmative act by the Department of the Interior to terminate the recognition of a tribe, can you provide judicial authority which supports the proposition that the omission of a tribe from the Bureau of Indian Affairs list is sufficient to constitute the termination of the recognition of that tribe?

6. In regard to the restoration of a tribe whose federal recognition has been terminated is there a formal Federal Acknowledgement Process? Specifically,

   a. Are there regulations governing this process?
   b. If so, is there a comment period for interested parties?
   c. Is there a publication by the Secretary of his/her final determination in the federal register

7. If the answer to question 6 above is yes, what would be the effect of a failure to follow the formal Federal Acknowledgement Process with respect to the restoration of a previously terminated tribe?

8. In regard to the question of "restored lands" within the meaning of IGRA, do you contest the standard in Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 46 F. Supp. 2d 689 (W.D. Mich. 1999) that for land to be properly restored for purposes of 25 U.S.C. Sec. 2719(b)(1)(B)(iii) that there must be "evidence clearly established" that the land was of "historic, economic and cultural significance" to the tribe in question?

9. Would the likelihood that a tribe once used the land in question, and was supposed to be granted land somewhere, including the subject land, under an unratified treaty be sufficient proof of the requisite connection to constitute restored lands?

10. In respect to the "temporal relationship" requirement between the acquisition and the tribal restoration, where a tribe's alleged restoration to federal recognition appears to be independent of each other and not part of one continuous transaction, would the standard be satisfied?

11. Do you contest the reasoning of the D.C. Circuit in the *City of Roseville v. Norton,* 348 F. 3d 1020 (D.C. Cir. 2003) that before the Secretary can lawfully

acquire the Subject Land in trust for gaming under the "restored lands" exception, the Secretary must determine that doing so is necessary to provide "equitable relief of restitution" to the tribe? Since restitution is an equitable remedy do you agree that such a determination requires the Secretary to balance the interests of other affected parties such as the state and county governments that would be impacted by the decision?

In conclusion, I would request that in addition to providing responses to these questions that the Department of the Interior will respond to the specific arguments made in the enclosed letters from the Governor of the State of California and counsel for Amador County. I would also ask that you incorporate your response into any final determination that is made concerning the application by the Ione Band of Miwok Indians of California relating to the lands near and partially within Plymouth California. In reading the September 19, 2006 legal opinion by the Associate Solicitor it appears to me that due recognition was not given to the legal issues raised in these letters. It is also apparent that selective pleading with respect to a narrow legal issue was allowed to determine the outcome of the larger issue concerning the ability of the State of California and Amador County to have the opportunity for input concerning the impact of the application on the local community. Your willingness to fully respond to the arguments presented by these affected parties in any final legal determination by the Department will make it possible for us to assure everyone involved that there has been an even handed application of the rules of the game.

Sincerely,

Daniel E. Lungren
Member of Congress