MEMORANDUM

To: NIGC Chairman Deer

From: NIGC Acting General Counsel

Subject: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria

Date: August 5, 2002

On August 10, 2001, the Bear River Band of Rohnerville Rancheria (Tribe) submitted a revised Tribal Gaming Ordinance for review by the National Indian Gaming Commission (NIGC). The ordinance contained a definition of Indian land that included a specific parcel of land that had been taken into trust after October 17, 1988. The Indian Gaming Regulatory Act (IGRA) precludes gaming on land acquired after October 17, 1988, unless the land meets one of the statutory exemptions. 25 U.S.C. § 2719 (Section 2719). The Tribe withdrew the ordinance October 17, 2001, after the Office of General Counsel informally notified it that it had not proven that the parcel named in the ordinance met the "restored lands" exception, 25 U.S.C. § 2719(b)(1)(B)(iii), to IGRA's prohibition on gaming on after-acquired land.

Subsequently, the Tribe hired Dr. Lee Davis, an anthropologist, to research the Tribe's historical connection to the parcel. Dr. Davis, who directs San Francisco State University's California Studies Institute, produced a 420-page report on the Tribe's history (Davis Report).

On May 17, 2002, the Tribe submitted NIGC Resolution No. 02-48. Bear River Band of Rohnerville Rancheria Tribal Res. No. 02-48: Tribal Gaming Ordinance Amendment and Related Request for a "Restored Lands" Determination (Amendment and Related Documents), Tab. 1. Through the Resolution, the Tribe amended its original ordinance, which had been approved February 5, 1996, and which was still in effect. The sole amendment to the original ordinance is to the "Definitions" section, Article III, part m. The amendment deletes the ordinance's original definition of "reservation" and adds the site-specific definition of "Tribal lands" that had been proposed in the August 10, 2001, ordinance. In support of the amendment, the Tribe submits Dr. Davis's report, along with other documents, to corroborate the Tribe's contention that the land in question was "restored" for the purposes of Section 2719.

The Tribe's submission satisfies us that the land in question falls into the "restored lands" exception to Section 2719's prohibition against gaming on land acquired after October 17, 1988. The U.S. Department of the Interior has reviewed our opinion and concurs.

Background

At issue is a 60-acre parcel of land located approximately one-quarter mile off State Highway 101 north of Fortuna and approximately two miles southeast of Loleta in Humboldt County, California.

Memorandum MS-4522-MIB from Sacramento Area Director, Bureau of Indian Affairs (BIA), Ronald M. Jaeger, to Assistant Secretary Indian Affairs, through Director, Office of Trust Responsibilities, p. 2 (May 18, 1993) (Jaeger Opinion). The Tribe acquired the parcel in 1991. The BIA took the land into trust in 1994. The parcel is six (6) miles from the Tribe's original Rancheria—a 15.187-acre parcel located within Fortuna, in Humboldt County, California—whose boundaries had been re-established by court decision in 1986. Monteau, Peebles submission, Exh. A, p. 11.

The question of the Tribe's ability to conduct gaming on the parcel first arose when the Tribe submitted its original gaming ordinance for NIGC approval. On February 5, 1996, former NIGC Chairman Harold A. Monteau approved the ordinance, No. 95-04, which did not specify the land on which gaming would be conducted. Letter from Harold A. Monteau to Lionel R. Carroll, Sr., Chairperson, Bear River Band of the Rohnerville Rancheria (February 5, 1996). In his approval letter, however, Chairman Monteau observed that the BIA had indicated that the Tribe's only parcel of trust land was acquired after IGRA's enactment. Chairman Monteau therefore requested that the Tribe provide NIGC with documentation demonstrating either that the parcel fell under one of the exceptions to the general prohibition in 25 U.S.C. § 2719—which proscribes gaming on trust lands acquired after October 17, 1988—or that the Tribe had other lands that qualified as Indian lands.

Although not referenced in Chairman Monteau's letter, the Tribe, on October 30, 1995, had submitted to NIGC a letter asserting that the identified trust parcel fell under the restored lands exception to Section 2719 and, thus, was not subject to IGRA's prohibition against gaming on after-acquired lands. Letter from Marilyn B. Miles, Directing Attorney, California Indian Legal Services, to Michael D. Cox, General Counsel, NIGC (October 30, 1995).

In a letter dated June 23, 2000, United States Congressman Mike Thompson from California (D-1st) requested that NIGC provide a legal determination as to whether the lands the Tribe intended to use for gaming qualify as "Indian lands" over which the Band could lawfully conduct gaming pursuant to IGRA.[1] Letter from Congressman Mike Thompson from California (D-1st), to Montie Deer, NIGC Chairman (June 23, 2000).

In response to Congressman Thompson's request, the Tribe submitted to NIGC a letter setting forth its contention that the identified trust parcel fell under the restored lands exception to 25 U.S.C. § 2719. Letter from Scott Crowell, Crowell Law Offices, to Greg Bergfeld, Region Chief, NIGC (July 17, 2000).

In an effort to clarify the status of the Tribe's proposed gaming site, NIGC asked the Tribe to show that the land upon which it intended to conduct gaming was "Indian lands" as defined in IGRA, 25 U.S.C. § 2703(4), and NIGC regulations, 25 C.F.R. § 502.12, and that the land was restored. Letter from Todd J. Araujo, NIGC Staff Attorney, to Scott Crowell, Crowell Law Offices, (September 28, 2000). In response, the Tribe provided legal analysis and documents, including: chapters of the

[1] The letter indicates that, in 1997 while serving in the California State Senate, Congressman Thompson wrote to the NIGC and asked a similar question regarding Indian lands. We do not have the referenced letter on file.

Handbook of North American Indians discussing the history of the Wiyot, Mattole, Nongatle, Sinkyone, Lassik, and Wailaki; the Tribe's 1994 amended Constitution; and tribal ordinances.

On August 10, 2001, the Tribe submitted a revised gaming ordinance to NIGC that identified the land on which the Tribe would conduct gaming. During the week of October 8, 2001, the Tribe submitted additional information in support of its claim that the parcel in question was restored. That document included: a February 26, 1992, archaeological monitoring report; a July 28, 1993, archeological report; a June 30, 1990, cultural resources study; affidavits from two tribal members; newspaper articles; a student's report on the Wiyots and the Humboldt Frontier published in the "Humboldt Historian"; and documents showing that the Bureau of Indian Affairs designated Humboldt County a geographical service area for the Housing Improvement Program.

When NIGC indicated that these documents fell short of proving that the land was restored, the Tribe withdrew the ordinance. The Tribe has now submitted an amended ordinance with new documentation supporting the contention that the lands are "restored."

Applicable Provisions of IGRA

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are "within such tribe's jurisdiction." 25 U.S.C. § 2710(b). In addition, if the proposed lands are trust or restricted lands, rather than land within the limits of an Indian reservation, the tribe may conduct gaming only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

IGRA defines "Indian lands" 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* [emphasis added].

25 U.S.C. § 2703(4).

NIGC regulations further clarify the Indian lands definition:

> 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. Lands that do not qualify as Indian lands under IGRA generally are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The question whether a tribe "has jurisdiction" and "exercises governmental power" over land on which the tribe proposes to conduct gaming can arise under a variety of circumstances. *See, e.g., Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir.1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1217-18 (D.Kan. 1998) (*Miami II*) (a tribe must have jurisdiction to exercise governmental power); *State ex rel. Graves v. United States*, 86 F. Supp.2d 1094, 1099 (D.Kan. 2000), *aff'd and remanded, Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan. 1996) (*Miami I*).

In this matter, in order to determine whether the parcel at issue is Indian land, the NIGC must determine: (1) that the tribe has jurisdiction, and (2) if the proposed lands are trust or restricted lands outside the limits of an Indian reservation, that the tribe exercises governmental power over the proposed gaming lands. We consider the Tribe's proposed gaming site within this analytical framework.

Land Held In Trust

The proposed project is a class III gaming facility located on Singley Road, Loleta, Humboldt County, California. *See* Environmental Impact Analysis For A Proposed Gaming Facility At The Rohnerville Rancheria, S-1 (October 1999). Through a Community Development Block Grant from the U.S. Department of Housing and Urban Development, and with the assistance of the BIA, the Tribe in 1991 purchased a 60-acre parcel of land six (6) miles from the original Rancheria. On July 12, 1991, the Tribe executed a grant deed transferring the 60-acre parcel to the United States in trust for the Tribe. The Secretary accepted the Tribe's land into trust status on January 20, 1994. The proposed facility would be located on this 60-acre parcel. Because the land is "held in trust by the United States for the benefit of any Indian tribe," it satisfies the first part of the "Indian lands" definition: that the land be held in trust. 25 U.S.C. § 2703(4)(B).

Jurisdiction

Because the land at issue is off-reservation, the Tribe has the additional burden of establishing that it exercises "governmental power" over the parcel it intends to use for gaming purposes. *See* 25 C.F.R. § 502.12(b). "Tribal jurisdiction" is a threshold requirement to the exercise of governmental power. *See, e.g., Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir.1998) (In addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]); *Miami Tribe of Oklahoma v. United States,* 5 F. Supp.2d 1213, 1217-18 (D.Kan.1998) (*Miami II*) (A tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan.1996) (*Miami I*) (the NIGC implicitly decided that in order to exercise governmental

power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D.Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)); *see also Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994). As a threshold matter, we must therefore analyze whether the Tribe possesses jurisdiction over the trust parcel.

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. The *Venetie* court observed that Section 1151 reflects the two criteria the Supreme Court "previously . . . had held necessary for a finding of 'Indian country' … first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527. Prior to the enactment of section 1151 in 1948, the Court had already found that reservation lands and allotments satisfied those requirements. *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"); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). The *Venetie* court also observed that Congress used the term "dependent Indian communities" in Section 1151(b) to codify the Court's understanding, as expressed in *United States v. McGowan*, 302 U.S. 535 (1938), and *United States v. Sandoval*, 231 U.S. 28 (1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. *Venetie*, 522 U.S. at 530; *see, e.g., McGowan*, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); *Sandoval*, 231 U.S. at 45-49 (Pueblo Indian lands).

Several Supreme Court decisions hold or assume that tribal trust lands are Indian country although they are not part of a formal reservation. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court concluded that lands held in trust by

the United States for the Tribe were "validly set apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country, with the consequence that the State did not have the authority to tax sales of goods to tribal members that occurred on those lands. 498 U.S. 505, 511 (1991). The *Potawatomi* Court specifically rejected the contention that the tribal trust land was not Indian country because it was not a reservation, noting that no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges." *Id*; s*ee also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 452-453 and n.2 (1995) (treating tribal trust lands as Indian country); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-125 (1993) (same); *United States v. John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction"); *United States v. McGowan*, 302 U.S. 535, 539 (1938).

In the instant matter, consistent with *Venetie* and other Supreme Court decisions, the Tribe's trust land, although not a formal reservation, is "Indian country," within the meaning of section 1151. The land has been "validly set-aside for the tribe under the superintendence of the federal government." *United States v. McGowan*, 302 U.S. at 539, quoted in *Venetie*, 522 U.S. at 529.

It is unnecessary to decide whether the Tribe's trust lands are more properly categorized as an informal reservation under section 1151(a) or as a dependent Indian community under section 1151(b) because, regardless of category, the property in this case, owned by the United States in trust for the Tribe, is Indian country. The Tribe's trust lands come within at least one of the three statutory categories, because the trust lands possess the two characteristics of Indian country reflected in section 1151. *See Venetie*, 522 U.S. at 527.

Exercise of Governmental Power

Because the trust land is Indian country, we can conclude that the Tribe has jurisdiction over it. In order for the land to fit the definition of "Indian lands," we must next decide whether the Tribe also 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 provides 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 indicium as to who exercises governmental power over those areas.

Id. at 528.

The Tribe, through its counsel, has submitted a letter which details examples of its exercise of governmental power over the subject trust lands. Letter from Conly J. Schulte, Esq., to Penny Coleman, NIGC Deputy General Counsel (December 18, 2000). According to the letter, for approximately five (5) years the Tribe has posted a sign at the boundary of the trust lands that reads "Bear River Band of Rohnerville Rancheria." In addition, the Tribe has marked the trust land's exterior boundaries with fences.

The Tribe indicates that it has exercised a fundamental power of tribal government in its exclusion of nonmembers from the trust lands. The Tribe cites two examples. In 1991, 25 faculty members and students from Humboldt State University were ordered by the Tribal Chairperson to leave the trust lands after they were discovered examining Wiyot artifacts on a construction site. In 1994, the Tribal Chairperson and other tribal government officials ousted from the trust lands dozens of non-members who had entered the trust lands to view flooding.

As further evidence of its exercise of governmental authority over the trust land, the Tribe indicates that, after applying for and received funding from the U. S. Department of Housing and Urban Development, the tribal government directed and supervised the construction of 18 housing units on the trust lands. Enrolled Tribal members occupy all of these units. The Tribal government also oversaw the construction of roads on the trust lands, and acquired federal funding for the construction of a tribal government administration building on the trust lands. That building houses governmental administration offices, tribal council chambers, and serves as the center for the Tribe's governmental operations. The Tribe's exercise of governmental authority is also evidenced by its control over water utilities, the Tribal Environmental Department's monitoring of wetlands and wildlife on the Trust lands, Tribal governmental maintenance of the lands, and the Tribe's enactment of an ordinance to control stray dogs on the lands.

These "concrete manifestations of governmental authority" show that the Tribe in fact exercises governmental authority over the trust lands in question. We are satisfied that the parcel in question meets the statutory and regulatory definition of "Indian lands." However, a determination of whether the Tribe has Indian lands is not the end of the inquiry of whether the Tribe can conduct gaming on the land.

Lands Acquired in Trust by the Secretary After October 17, 1988

Under Section 2719(a) of IGRA, gaming is prohibited on lands acquired by the Secretary of the Interior into trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within one of the three exceptions of 25 U.S.C. § 2719. Accordingly, it is necessary to review the exceptions to determine whether a tribe can conduct gaming on after-acquired lands.

The Tribe contends that the proposed site meets the requirements of the third exception set forth at 25 U.S.C. § 2719(b)(1)(B)(iii)—"restoration of lands for an Indian tribe that is restored to Federal recognition"—and thus is outside the proscriptions on after-acquired land. To determine whether the Tribe meets the restoration exception under Section 2719(b)(1)(B)(iii), we must determine, first, whether the Tribe is a "restored" tribe and, second, whether the land was taken into trust as part of a "restoration" of lands to the Tribe.

"Restored" Tribe

The key terms, "restored" and "restoration" are not defined in the text of IGRA. Nor are they defined in the various federal regulations issued by the NIGC and the Department of the Interior to implement IGRA.

The U.S. District Court for the Western District of Michigan recently addressed the definition of "restored" and "restoration" in *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 2002 U.S. Dist. Lexis 7494 (April 22, 2002). At issue in the case was whether the Grand Traverse Band was a restored tribe and whether the parcel on which gaming was conducted was restored lands. The *Grand Traverse* court held that both "restore" and "restoration" should be given their ordinary meaning ("In no sense has a proprietary use of 'restore' or 'restoration' been shown to have occurred." *Id.* at 28). Applying the ordinary meaning of the words, the court concluded that the Band's history showed that the Band was in fact restored:

> In sum, the undisputed history of the Band's treaties with the United States and its prior relationship to the Secretary and the BIA demonstrates that the Band was recognized and treated with by the United States.... Only in 1872 was that relationship administratively terminated by the BIA. This history—of recognition by Congress through treaties (and historical administration by the Secretary), subsequent withdrawal of recognition, and yet later re-acknowledgment by the Secretary—fits squarely within the dictionary definitions of "restore" and is reasonably construed as a process of restoration of tribal recognition. The plain language of subsection (b)(1)(B)(iii) therefore suggests that this Band is restored.

Grand Traverse Band at *37-38.

An examination of the pattern of Bear River Band's history shows that it is similar to the pattern in the case of Grand Traverse Band. Because the Bear River Band is made up of Wiyot and Mattole Indians, an important part of the Bear River Band's history is the history of the Wiyot. In 1851 a treaty commissioner appointed by President Millard Fillmore negotiated a treaty with the Wiyot for a reservation. Davis Report at 205-211. While Congress refused to ratify the

treaty, Congress did not make it known until 1910 that the treaty, and 17 others that had been negotiated, had not been ratified. Davis Report at 219-229. In 1906 and 1908, Congress enacted legislation appropriating money to purchase property for landless Indians, the Wiyot among them, in California. Davis Report at 338. In 1910, the 15-acre Rohnerville Rancheria was established near Fortuna, California. *Id.*

In 1958, Congress enacted House Concurrent Resolution 108, which initiated a termination policy. Passage later that year of House Resolution 2824 and Public Law 85-671, known as the California Rancheria Act, called for the termination of Federal trusteeship on the Rohnerville Rancheria and 43 other rancherias within the State of California. The Rohnerville Rancheria was formally terminated in 1962.

During the 1970s, the Rohnerville Heights Indian Community joined with other Indian community groups that had been terminated by the California Rancheria Act. In the United States District Court for the Northern District of California, the communities filed suit against the Federal government for illegally withdrawing recognition under the Act. The litigation—known as the "Tillie Hardwick" case—alleged that the termination of seventeen California Rancherias had been illegal.

In 1983, the United States settled the *Tillie Hardwick* litigation. *Tillie Hardwick et al. v. United States*, Civil No. C-79-1710-SW (N.D. Cal. 1983) (unpublished). Through a stipulated judgment, the United States agreed to recognize the tribes' rights to receive federal Indian benefits and engage in government-to-government relations with the federal government. On June 11, 1984, pursuant to an order issued December 22, 1983, the Secretary of the Interior restored to Federal status seventeen California rancherias, including the Bear River Band of the Rohnerville Rancheria. 49 F.R. 24084 (1984).[2] On March 4, 1986, the United States signed a Stipulation to Restoration of Indian Country and Order that stipulated that the original boundaries of the Rohnerville Rancheria, among others, be as they existed immediately prior to the Rancheria Act.

In short, like the Grand Traverse Band, the Bear River Band has been recognized by the federal government, terminated, and again recognized. Accordingly, we find that the Bear River Band of Rohnerville Rancheria qualifies as "an Indian tribe that is restored to Federal recognition" under 25 U.S.C. § 2719(b)(1)(B)(iii).

Restoration of Lands

Having concluded that the Tribe is a restored tribe under IGRA, the question remains whether the land at issue was "taken into trust as a part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

Federal courts, U.S. Department of the Interior, and NIGC have recently grappled with the concept of restoration of land. In so doing, they have established several guideposts for a restoration-of-land analysis. First, "restored" and "restoration" must be given their plain,

[2] The Secretary is required to publish an annual list of federally recognized tribes. 25 U.S.C. § 479a-1.

primary meanings. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band II")*, 2002 U.S. Dist. LEXIS 7494, * 34 (W.D. Mich. 2002). *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt ("Coos")*, 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's restoration to federal recognition. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I")*, 46 F. Supp.2d 689, 699 (W.D. Mich. 1999); *Coos* at 164. The language of section 2719(b)(1)(B)(iii)—"restoration of lands for an Indian tribe that is restored to Federal recognition"—"implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event." *Grand Traverse Band II* at *43; *Grand Traverse Band I* at 701.

Nonetheless, there are limits to what constitutes restored lands. As NIGC stated in the Grand Traverse Opinion, "[W]e 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." NIGC Grand Traverse Opinion at p. 15; *see also* Office of the Solicitor's Memorandum Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt* (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied," p. 8).

The courts in *Coos* and *Grand Traverse Band I* and *II* noted that some limitations might be required on the term "restoration" in order to avoid a result that "any and all property acquired by restored tribes would be eligible for gaming." *Coos* at 164; *Grand Traverse Band I* at 700; *see also Grand Traverse Band II* at *39-40 ("Given the plain meaning of the language, 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"). All three courts proposed that land acquired after restoration be limited by "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration. *Id.* In this case, these factors lead us to conclude that the Tribe's land acquisition is a "restoration."

1. Factual Circumstances of the Acquisition

The Tribe acquired the 60-acre parcel in 1991. The Department of the Interior took the parcel into trust in 1994. The Tribe's acquisition arose in the following context:

The original Rohnerville Rancheria was purchased by the United States in 1910 and consisted of 15.187 acres located within the city limits of Fortuna, Humboldt County, California. The Tribe was terminated in 1962, and the 15 acres were divided into individual parcels and distributed to individual Indians. By the time the Rancheria's boundaries were re-established, after the 1983 *Tillie Hardwick* litigation in 1983, 6.75 acres remained in individual Indian ownership. The rest of the Rancheria had been acquired by non-Indians. (Monteau submission, Exh. A [1989 Application for Community Development Block Grant]).

A May 18, 1993, Memorandum from the Sacramento Area Director, BIA, to the Assistant Secretary, Indian Affairs, regarding the 60-acre off-reservation fee-to-trust acquisition supports this history. The Memorandum states that "the 15.52-acre tract then comprising the Rohnerville Rancheria had been subdivided into 20 small lots and subsequently conveyed to individual Indians in fee simple status by deeds. With the exception of six lots, this land had either been sold or lost for nonpayment of taxes by 1983." Jaeger Opinion, p. 2. The Jaeger Opinion further states that "[a]s a result of litigation against the United States, the Indians of the Rancheria had their Indian status restored, and they have been working toward establishment of a land base and tribal government over the last 10 years." *Id.*

These documents indicate that the BIA was mindful that the Tribe was without a land base when it granted the Tribe's off-reservation land acquisition request.[3] Nonetheless, the fact that officials within the BIA recommended that land be taken into trust for a landless Tribe does not in itself indicate that the land was, in fact, restored. "Restoration" denotes a taking back or being put in a former position. *Coos* at 162. It might mean "reacquired." *Id.* ("The 'restoration of lands' could be construed to mean just that; the tribe would be placed back in its former position by reacquiring lands.") In any event, "restoration" does not mean "acquired." We therefore must look further for indicia that the land acquisition in some way restores to the Tribe what it previously had.

2. Location

The parcel at issue on which the Tribe proposes to game is located outside the restored boundaries of the Rancheria as it existed immediately prior to termination under the California Rancheria Act. Jaeger Opinion at 5. Specifically, the proposed gaming site is six (6) miles from the boundaries of the former Rancheria. Monteau, Peebles submission, p. 10. The U.S. district court established the Rancheria's boundaries in 1986 when, pursuant to the original *Tillie Hardwick* decision, it determined the boundaries of the affected tribes. *Tillie Hardwick et al. v. United States*, Civil No. C-79-1710-SW (Order For Entry Of Judgment As To Humboldt County) (judgment entered according to the terms of the Stipulation For Entry of Judgment (Humboldt County)). In the order, the court declared that the boundaries were "[t]he original boundaries of the Rancheria, as they existed prior to their purported termination under the Rancheria Act...." *Tillie Hardwick et al. v. United States*, Civil No. C-79-1710-SW, at p. 2 (N.D. Cal. 1986) (Stipulation To Restoration For Entry Of Judgment (Humboldt County)) (unpublished).

That the proposed site is off-reservation does not preclude its being restored. *Grand Traverse Band I* at 702. However, there must be indicia that the land has been in some respect been recognized as the Band's. In *Grand Traverse Band II,* the court held that the lands at issue were restored because they lay within counties that had previously been ceded by the tribe to the United States. *Grand Traverse Band II* at 43-44. This ruling was consistent with its opinion in *Grand Traverse I,* in which the court stated that the land's location "within a prior reservation...is significant evidence that the land may be considered in some sense restored." *Id.*

[3] The Sacramento Area Director's recommendation that favorable consideration be granted to the Tribe's off-reservation land acquisition request was accepted by the Assistant Secretary, Indian Affairs. Memorandum from Assistant, Secretary, Indian Affairs, to Sacramento Area Director (December 28, 1993).

In its Grand Traverse Opinion, NIGC further found that restoration was shown by the Band's "substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." Grand Traverse Opinion at 15. The tribe's history included the ceding of that very ground to the United States by the ancestors of the present tribe in a 1836 treaty. *Id.* at 9-10, 16. As a result, NIGC concluded that the Band had a "historical nexus" to the land. *Id.* at 17.

The Davis Report and the Tribe's previous submission indicate that the Bear River Band of Rohnerville Rancheria consists of Wiyot, Mattole, Nongatl, and Bear River Indians. The Wiyot Tribe lived in the Humboldt Bay area around 900 B.C.E. and the Bear River Band Mottole lived south of that area beginning around 1300 B.C.E. Davis Report at 74 and 81-84; Albert B. Elsasser, "Wiyot" and "Mattole, Nongate, Sinkyone, Lassik and Wailaki," *Handbook of North American Indians*, Vol. 8 (Smithsonian Institution 1978).

More importantly for this legal analysis, however, the Davis Report shows that the Tribe has a historical nexus to the 60 acres specifically at issue here. Evidence presented in Davis's 400-page study of Wiyot and Mattole culture includes both a narrative description and map showing the Tribe's use of the area in which the 60 acres are located. Davis's map is based on a map created in 1918 by Llewellyn L. Loud, author of an article entitled "Ethnogeography and Archeology of the Wiyot Terriory."[4] Loud's map marked the territory of the Wiyot language with numbers delineating village sites. Amendment and Related Documents, Tab 13. Davis added to this map sites relevant to the restored-lands issue.

Davis's map shows, for example, that within a one (1) mile radius of the parcel are: a mythic pond that is the setting of an old tribal story; two (2) aboriginal villages, Howotkil and Wasala, that were major Wiyot settlements in 1850; and two major trails, Laloeka and Woxlok, that ran from the Eel River towards the north. Davis Report at 413-141. Within a three (3) mile radius of the parcel are: five (5) aboriginal villages, Tokwherok, Sweanawochkro, Miplok, Wochwochkor, and Hokonwoyok; and a town founded in 1870 after European contact, Indianola. *Id.* at 414. Between three (3) and four (4) miles from the parcel is Table Bluff, the site of a mythic flood in a Wiyot story telling of the re-population of the world. *Id.* at 415. Within a six (6) mile radius of the parcel are: the first Wiyot town established after European contact; eleven aboriginal villages, Welapl, Totukuk, Wotsalike, Tekwogok, Tolotpilik, Itegokshule, Kewigergoyok, Tswokerok, Tsolskoge, Kiegergodolil, Wotwetwok; and the Rohnerville Rancheria. *Id.* at 415.

Unlike the land at issue in *Grand Traverse Band*, the land taken into trust here was not part of a prior reservation. In 1851, a government representative sent by President Fillmore unsuccessfully tried to negotiate a treaty with a group known as the Eel River Wiyot. As an alternative, the representative, McKee Redick, negotiated a reservation with the white settlers. That reservation had as its northern boundary the Eel River and so did not include the parcel at issue. Congress never ratified McKee's treaty, however. Davis Report at 209-211. While the location of the land in a prior reservation has been found by the court to be determinative in the *Grand Traverse Band* case, a prior reservation is not required in order for the land to be deemed

[4] 14 American Archeology and Ethnology Journal, 222-437 (University of California 1918).

restored. Because the parcel is located in the middle of these many sites that were used by the Wiyot, we can assume that the parcel, too, was used by the Wiyot and by the Wiyot's descendents, the Bear River Band. The Tribe has therefore proven a historical and cultural nexus to the land sufficient to show that the parcel was not merely an acquisition but a restoration of previously used lands.

3. Temporal Relationship of Acquisition to the Tribal Restoration

The Tribe was restored, through the *Tillie Hardwick* decision, in 1984. The Tribe acquired the parcel at issue in 1991, seven years after the Tribe was restored. The BIA took the land into trust in 1994, ten years after the Tribe's restoration.

According to the Monteau, Peebles submission, after the Tribe's restoration, the Tribe intended "to reacquire lands within the restored boundaries of the Rancheria in order to provide housing for tribal members." Monteau, Peebles submission, p. 3. While some of the land within the Rancheria was owned by tribal members after termination, about half was not. The Tribe was unable to obtain the alienated land within the Rancheria or adjacent to it. *Id.*, *see also* Exh. 1(A). The Tribe therefore continued to look for land for housing purposes outside of the Rancheria's boundaries. The 60-acre parcel was the first land acquired after the Tribe's restoration.

There is a significant gap in time between the Tribe's restoration and the parcel's acquisition. This ten-year gap is similar to that in the case of the Grand Traverse Band's off-reservation acquisition, which was taken into trust nine years after Grand Traverse Band's acknowledgement through the administrative federal acknowledgement procedures. Also similar to *Grand Traverse Band,* the acquisition is the first and only land acquisition after the Tribe's restoration. Unlike *Grand Traverse Band*, on the other hand, the adopting of the Tribe's constitution was not cotemporaneous with the land acquisition. The Tribe's first constitution was adopted in 1989 (Monteau, Peebles submission, p. 1), two years before the acquisition, whereas the Grand Traverse Band's constitution was adopted the same year that the Band began acquiring its multiple parcels of property (*Grand Traverse Band I* at 702).

At the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored. In its Office of the Solicitor's Coos Opinion, the Department of the Interior found that a 14-year lapse between a tribe's restoration and the acquisition of land into trust did not foreclose a finding that the land was restored. Associate Solicitor Phil Hogen observed:

> …Congress allowed 14 years to elapse before restoring the Peterson Tract to 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 of 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 [footnote omitted]. 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….Thus, the

> Tribes quickly acquired the land as soon as it was available and within a reasonable amount of time after being restored.

Office of the Solicitor's Coos Opinion, pp. 13-14.

We conclude that the facts surrounding the timing of the acquisition support a determination of "restored land." A ten (10) year gap between the land's acquisition and the Tribe's restoration is a sufficient "temporal relationship" to establish lands as "restored." More important, the acquisition of the parcel was the first for this restored tribe.

In light of federal cases interpreting the restored lands exception, and the factual circumstances, location, and timing of the acquisition, we conclude that the Tribe's proposed gaming site was taken into trust as part of a "restoration" of lands to the Tribe. The Tribe has shown that the land has been acquired to address the issue of landlessness and that there is a historical and cultural nexus between the Tribe and the land.

Conclusion

IGRA permits tribes to conduct gaming on Indian lands only if they have jurisdiction over those lands, and only if they can and do use that jurisdiction to exercise governmental power which will enable the tribe, through appropriate ordinances, to satisfy the statute's substantial and detailed requirements for the regulation of gaming. After careful review and consideration, we conclude that the Tribe's trust land qualifies as Indian lands as defined by IGRA and NIGC regulations. A close examination of the documentation submitted shows that the Tribe had a historical and cultural connection to the land and that the land is therefore restored. The proposed gaming site therefore falls within the restored land exception to Section 2719. The Tribe may therefore lawfully conduct gaming on its proposed site pursuant to IGRA.