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MEMORANDUM

To: Carl J. Artman
Assistant Secretary – Indian Affairs

From: Kaush Arha
Associate Solicitor, Indian Affairs

Subject: Pomo of Upper Lake Indian Lands Determination

The Pomo Indians of Upper Lake Rancheria (Tribe or Upper Lake) have a fee-to-trust application pending before the Department of the Interior (DOI) on 60 acres of land one mile south of their Rancheria. The Tribe requested an Indian lands opinion to determine whether it could conduct gaming on this land if it is acquired in trust by the Secretary. The Tribe submitted information on the restored lands exception under Section 20 of the Indian Gaming Regulatory Act (IGRA)(25 U.S.C. § 2719). The land at issue (the "Parcel") is located in Lake County, California, along state Highway 20. We evaluated the Tribe's submission and determined that the land would fall within the "restored lands" exception to IGRA's prohibition against gaming on trust land acquired after October 17, 1988, if the lands were acquired in trust by the Secretary.

The Tribe comprises the modern day descendants of four pre-contact tribal groups that occupied the Upper Lake territory. The Tribe was restored in 1983 as a result of *Upper Lake Pomo Ass'n v. Watt*, C-75-0181-SW (N.D. Cal.). The Tribe brought the suit alleging that the Department's termination of the Federal relationship with it was unlawful and premature because the Department had failed to comply with the terms of the California Rancheria Act. (72 Stat. 619, as amended 78 Stat. 390`). The Stipulation for Entry of Judgment among the parties and subsequent Court Order established a process for DOI to accept back in trust title to property that had been distributed to the residents of the rancheria, holding that: "[t]he Secretary of the Interior is under a continuing obligation to restore to trust status lands . . . whenever possible." *Upper Lake Pomo, supra,* at 5. The Tribe organized a new government under the provisions of the Indian Reorganization Act in 2004. Their Constitution was approved after protracted negotiations with BIA.

The Tribe submitted the following information in support of its claim that the parcel is restored: Legal Description of Property with maps, graphics and aerial photos; Davis Report on History and Territory; Declaration of Carmella Johnson, Chairperson;

California Indian Legal Services correspondence to BIA dated 1979, 1980, 1982 and 1983 concerning a dispute about the Rancheria Constitution and BIA's responses dated 1997, 1998 and 2001.

Applicable Law

IGRA prohibits gaming on lands acquired after October 1988 unless:

> (B) lands are taken into trust as part of–
> (i) a settlement of a land claim,
> (ii) the initial reservation of an Indian tribe . . . or,
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1).

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.

25 U.S.C. § 2703(4).

Regulations have further clarified 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 Acquired in Trust by the Secretary After October 17, 1988

Under Section 2719(a) of IGRA, gaming is prohibited on lands acquired after October 17, 1988, unless the lands fall within exceptions listed in 25 U.S.C. § 2719(b). Subsection (iii) of Section 2719(b)(1)(B) must be analyzed to determine, first, whether the Tribe is "restored" and, second, whether the parcel is 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 IGRA. Nor are they defined in the various federal regulations issued by DOI and the NIGC to implement IGRA.

In *Grand Traverse Band of Ottawa and Chippewa Indians v. U. S. Attorney*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004), the U.S. District Court for the Western District of Michigan held that both "restored" and "restoration" should be given their ordinary dictionary meaning. Then that meaning should be applied to the Band's history and circumstances to see if it is restored. The Court did so and concluded:

> 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 the Band was recognized and treatied with by the United States . . . Only in 1872 was the 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) therefore suggests that this Band is restored.

Grand Traverse Band at 933.

The history of the Pomo of Upper Lake Tribe is similar. It negotiated a treaty with the United States in 1851, although the United States Senate never ratified it nor any of the eighteen treaties negotiated with California tribes. But treaties needn't be ratified to evidence recognition. *See, NIGC Cowlitz Opinion at 5* ("Because treaty negotiations can only take place between sovereign entities, the Federal Government's effort to sign a land cession treaty with the Cowlitz Tribe is evidence of a government-to-government relationship with the Tribe and constitutes Federal recognition."). *See, NIGC Cowlitz Opinion at 5n3* ("The BIA came to the same conclusion, determining that the 1855 treaty negotiations represented 'unambiguous Federal acknowledgment.'"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)("The Constitution, by declaring treaties already made,

as well as those to be made . . . with the Indian nations . . . admits their rank among those powers who are capable of making treaties.").

Moreover, in 1906 and 1908, Congress enacted legislation appropriating money to purchase property for Indians. The Indian Office Appropriation Act of 1906 appropriated $100,000.00 and authorized the Bureau of Indian Affairs to:

> Purchase for the use of the Indians of California now residing on reservations which does not contain land suitable for cultivation, and for Indians who are not now upon reservations in said State, suitable tracts or parcels of land, water, and water rights in said State . . . as the Secretary of the Interior may deem proper.

34 Stat. 325.

Pursuant to this authorization, the United States purchased and set aside the Upper Lake Rancheria for the Tribe. Legal title to the land remained in the United States, although it was acknowledged that the United States held the property in trust for the benefit of the Upper Lake Pomo. Additionally, in 1935, the Secretary approved a Constitution adopted and ratified under the Indian Reorganization Act. The Constitution was amended in 1941. The United States maintained a government-to-government relationship with the Tribe until 1958 when Congress initiated a termination policy and enacted Public Law 85-671 (72 Stat. 619). Known as the California Rancheria Act, this act authorized terminating the federal trusteeship on the Upper Lake Rancheria and 40 other Rancherias within the State of California. Distribution of the Rancheria land pursuant to the act to the residents rendered the Tribe landless, even though individual members retained some lots in fee.

In 1975, members of the Tribe joined other Indian community groups to challenge the Act for illegally withdrawing recognition and terminating their reservation. In 1979, the Federal defendants entered into a Stipulation for Entry of Judgment with the parties in the *Upper Lake Pomo* litigation. In the Stipulation the Department conceded that the Rancheria had never been lawfully terminated and, therefore, the boundaries of the Rancheria still existed, even though the Tribe as an entity no longer owned any of it, and agreed to publish a Federal Register notice saying the United States maintained a government-to-government relationship with the Tribe. The subsequent Court Order held the Secretary "is under a continuing obligation to restore to trust status lands of the Upper Lake Rancheria . . . whenever possible." The Court wrote "[i]t is the intent of this judgment that maximum flexibility be allowed in working out the administrative details of trust restoration" and any lands within the Rancheria boundaries acquired in the future "may be similarly restored to trust status." *Upper Lake Pomo, supra,* at p. 7.

The Pomo of Upper Lake had been recognized by the federal government, terminated, and again recognized, like the Grand Traverse Band. The Tribe 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 next question is whether trust acquisition of the parcel would be "land 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 and the DOI have grappled with the concept of land restoration. Guideposts now exist for restoration-of-land analysis. "Restored" and "restoration" must be given their plain dictionary meanings. "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. U. S. Attorney ("Grand Traverse Band I")*, 46 F. Supp. 2d 689, 699 (W.D. Mich. 1999); *Grand Traverse Band of Ottawa and Chippewa Indians v. U. S. Attorney*, 198 F. Supp. 2d, 920, 928, 935 *("Grand Traverse Band II")(W.D. Mich 2002), aff'd, 369 F.3d 960 (6th Cir. 2004). Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt ("Coos")*, 116 F. Supp. 2d 155, 161, 164 (D.D.C. 2000). 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 936; *Grand Traverse Band I* at 701. The Tribe's pending administrative fee-to-trust process under 25 C.F.R. Part 151 can restore lands.

The courts in *Coos* and *Grand Traverse Band I* and *II* noted that some limitations might be required on the term "restoration" 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 934-935 ("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"), *aff'd*, 369 F.3d 960 (6th Cir. 2004). 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.*

Factual Circumstances of the Acquisition

The two tracts that make up the Parcel were acquired on December 27, 2005, and January 8, 2006, by the casino management company contracting with the Tribe. While this acquisition is 23 years after being restored by the *Upper Lake Pomo* case, the Tribe argues that this delay was caused by the BIA, which refused to re-acknowledge the Tribe's 1935 and 1941 Constitution. Indeed, the Central California Agency of the BIA purported to temporarily suspend the government-to-government relationship with the

Tribe from 1997 until 2004 when the Tribe elected officers under a newly adopted Constitution.

As mentioned above, the Tribe is landless, although certain members of the Tribe still own some lots within the original Rancheria. For the Tribe to advance its goal of restoring its land base it went one mile beyond the boundaries of the original Rancheria with the assistance of private investors. Eventual returns on that investment shared by the Tribe will allow it to further restore its land base, as intended by the Court in the *Upper Lake Pomo* case.

The Tribe made several attempts to acquire other land during the last 23 years it has been restored, but lacked legal authority to do so according to the BIA. It was not until 2005, after the Tribe had its new Constitution ratified, that it could partner with investors to reacquire property. The Tribe immediately applied to have the Parcel taken in to trust in 2006 and the application is pending. Land within the restored former Rancheria was not available so they chose a site one mile south and a half mile from the tribal headquarters. Acquisition of the Parcel for gaming purposes has the support of the local and congressional delegation. A Memorandum of Understanding has been executed with the county government to address issues such as gaming impact costs.

Courts have held that "restoration" denotes a taking back or being put in a former position. *Coos* at 162. It means "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 simply "acquired." We therefore must look further for indicia that the land acquisition in some way restores to the Tribe what it previously had.

Location and history

As mentioned previously, the Parcel is located one mile south of the original Reservation boundaries as it existed immediately prior to the termination under the California Rancheria Act.

Restored lands may include off-reservation parcels, however, there must be indicia that the land has in some respects been recognized as having a significant relation to the Tribe. *Grand Traverse Band I* at 702. In *Grand Traverse 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 936. 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.* If the site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition, then that is further evidence it is restored. The Parcel is located in the middle of the area used by the Pomo people for thousands of years. According to Dr. Davis's "History and Territory of the Habematolel Pomo of Upper Lake," the subject property is located "not

nearby or peripheral – it is central . . . [to the] aboriginal territory . . . centrally within the sacred territory . . . as practiced in their religion, located at Coyote's mythic village of Maiyi; it is less than a mile from the Ghost Dance Roundhouse . . . is exactly at the junction of four long-distance intertribal trails . . . two miles from Bloody Island were the Indians were massacred by the U.S. Military . . . centrally within the Clear Lake Indian Reservation as described in the 1851 treaty (which was never ratified) and it is 0.91 miles from the cemetery of the modern Upper Lake Rancheria." *Id.* at p. 227.

Given the close proximity to the original Rancheria, the available historical information, and the archaeological evidence, we conclude there is substantial evidence the site has been important to the Tribe throughout its history and remained so immediately on resumption of federal recognition.

Temporal Relationship of Acquisition to the Tribal Restoration

DOI opined in the *Coos* case, *supra*, that a fourteen-year lapse between a tribe's restoration and the acquisition of land did not foreclose a finding the land was restored. ("The mere passage of time should not be determinative" and "the Tribes quickly acquired the land as soon as it was available and within a reasonable amount of time after being restored."). Likewise, the NIGC in its Mechoopda lands opinion found that a nine-year lapse between restoration and acquisition was sufficient "temporal relationship." (At the time the Mechoopda lands opinion was issued, the land had not yet been taken in to trust, which is the situation here.).

As mentioned above, the Tribe was restored in 1983 but had no legal or financial ability to purchase land until 2005. The Parcel was acquired by its business partner immediately after the Tribe was legally capable. The Tribe applied to have the Parcel taken in to trust immediately after the purchase. These circumstances evidence a strong, temporal relationship.

Conclusion

The Pomo Indians of the Upper Lake Rancheria is a restored Tribe with a historical connection to the Parcel. Acquisition was within a reasonable amount of time, given the delay in obtaining legal authority to do so. IGRA permits tribes to conduct gaming on Indian lands if they have jurisdiction over those lands and exercise government power. Governmental authority will be exercised once the fee-to-trust process is complete. The Tribe has entered into a Memorandum of Understanding (MOU) with the Lake County government addressing civil jurisdiction and development of the property. The Tribe and their business partner have posted "No Trespassing" signs and exclude private individuals from the property. Moreover, the prospective development of a gaming ordinance and the regulation of the proposed gaming operation are indicators of the exercise of governmental power. If the Secretary accepts the land into trust, it will qualify as Indian lands under IGRA. Then the Tribe may conduct

gaming. The National Indian Gaming Commission, Office of General Counsel, concurs with this opinion.

If you have any questions about this matter please do not hesitate to contact me or my staff attorney, John Jasper.