United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JUL 13 2007

In reply, please address to:
Main Interior, MS 6513

MEMORANDUM

To: Carl J. Artman
Assistant Secretary – Indian Affairs

From: Kaush Arha
Associate Solicitor, Indian Affairs

Subject: Elk Valley Indian Lands Determination

The Tolowa Indians of the Elk Valley Rancheria (Elk Valley, Tribe or Tolowa Indians) have a fee-to-trust application pending before the Department of the Interior (DOI) for 203.50 acres of land one mile south of the Rancheria. The land, known as "Martin's Ranch," is located in Del Norte County, California, along state Highway 101. The Tribe requested an opinion to determine whether this land constituted "Indian lands" within the meaning of the Indian Gaming Regulatory Act (IGRA) such that it could conduct gaming on this land if it is acquired in trust by the Secretary. The Tribe submitted an analysis of the restored lands exception under Section 20 of IGRA (25 U.S.C. § 2719. Our office and the Office of General Counsel for the National Indian Gaming Commission (NIGC) 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, along with the Smith River Rancheria, comprises the modern day descendants of the Tolowa people. Del Norte County is part of their aboriginal territory. The Federal government-to-government relationship with the Tribe was restored as a result of the Court's 1983 approval of the Stipulation for Entry of Judgment in *Hardwick v. United States*, Civil No, C-79-171D SW (N.D. Cal) and subsequent approval of the Stipulation for Entry of Judgment (Del Norte County) on March 2, 1987, in the same case. The stipulation established a process for DOI to take title to any property still owned by Indians on the restored Rancheria. The Rancheria consists of 200 acres used by the Tribe. On December 27, 1994, the Tribe organized a new government under the provisions of the Indian Reorganization Act and the Secretary approved its Constitution. Article II-Territory provides: "[t]he jurisdiction of the Elk Valley Rancheria shall extend to the [Hardwick] boundaries . . . and to such other lands as may be hereafter acquired by or for the Tribe, whether within or without said boundary lines." At the time, the Tribe owned no land within the Rancheria.

The Tribe submitted the following information in support of its claim that the parcel in question was restored: Legal Description of Property, Heizer Report; Declaration of Dale A. Miller, Chairman Elk Valley Rancheria; Elk Valley Rancheria Constitution and Bylaws; Aerial Photograph; Treaty Q (Unratified); Grant Deed, MOU between County of Del Norte and Elk Valley Rancheria Regarding Payments In Lieu of Property Tax; and MOU between County of Del Norte and Elk Valley Rancheria regarding law enforcement, impact payments, building standards and taxation.

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.

Jurisdiction and Exercise of Governmental Authority

Since the land subject to the Tribe's application is off-reservation, although only one mile south, the Tribe has the burden of establishing it has jurisdiction and exercises "governmental power" over the parcel in order for the land to qualify as "Indian lands." *See* 25 U.S.C. § 2703(4)(b) and 25 C.F.R. § 502.12(b). "Tribal jurisdiction" is a threshold requirement for 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); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D.Kan.1998); *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).

Tribes are presumed to have jurisdiction over their members and lands. 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); *see also, United States v. Wheeler*, 435 U.S. 313, 323 (1978). There are no treaties or statutes applicable here that would limit the tribe's jurisdiction.

When a tribe already owns land off-reservation, the Department must analyze whether the tribe is exercising governmental authority over that land. There is no presumption that a tribe exercises governmental powers over off-reservation land held in trust for it or its members. Tribes and their members that have off-reservation trust lands may conduct a wide variety of activities on those lands that are indistinguishable from the surrounding non-Indian community. Not every tribal governmentally controlled activity on off-reservation trust land is a manifestation of the exercise of governmental authority.

In situations such as the present one, in which the tribe seeks to acquire it in trust for the express purpose of conducting gaming, it is not necessary for the Department to speculate as to whether the tribe will exercise governmental authority over it. Gaming under the Indian Gaming Regulatory Act (IGRA) is a unique activity that only Indian tribal governments can conduct in their distinctly governmental capacity. *See* 25 U.S.C. § 2701(1)(generating tribal governmental revenue), § 2701(4)(tribal self-sufficiency and strong tribal governments), § 2702(1) (promote strong tribal governments), § 2703(3) (generate tribal revenue), § 2710(b)(1)(tribal power to license and regulate gaming), § 2710(b)(1)(B)(governing body to adopt ordinances), § 2710(b)(2)(B)(net revenues can only be used to fund governmental operations and programs, provide general welfare, promote tribal economic development donate to charities and help fund operations of local government agencies), and § 2710(d)(negotiate and compact with a state). Consequently, when the land is acquired in trust, and the tribe conducts and regulates such gaming, it will exercise governmental authority.

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 land falls within exceptions listed in 25 U.S.C. § 2719(b). Section 2719(b)(1)(B)(iii) – "restoration of lands for an Indian tribe that is restored to Federal recognition" – is the relevant exception. To determine whether the Tribe meets it the Secretary must determine, first, whether the Tribe is a "restored" tribe and, second, whether the land 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 to implement IGRA.

The U.S. District Court for the Western District of Michigan was one of the first courts to address the definition of "restored" and "restoration." *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp.2d 920 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004). The court held that both "restored" and "restoration" should be given their ordinary dictionary meaning and the Band's history showed it was 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 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 Elk Valley Tribe is similar. The Tolowa negotiated a treaty with the United States in 1852, although the U. S. Senate never ratified it or any of the other eighteen treaties negotiated with other tribes. Treaties need not be consummated 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 also*, 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 landless Indians in California. 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 . . . .

Pursuant to this authorization, the United States purchased what is now known as the Elk Valley Rancheria for the Elk Valley Tolowa. The United States held the property in trust for the benefit of the Elk Valley Tolowa but legal title to the land remained in the United States. Additionally, in 1935, the Secretary conducted a referendum on the Rancheria to allow the Indians to decide whether the provisions of the Indian Reorganization Act would apply. The conduct of the referendum also suggests a government-to-government relationship with the Tribe.

In 1958, Congress initiated a policy of terminating the Federal supervision of Indian tribes and enacted the California Rancheria Act (72 Stat. 619, amended 78 Stat. 390), which, established a process for terminating the Federal trust relationship with the Elk Valley Rancheria and 43 other rancherias in California. During the 1970s, members of the Elk Valley Rancheria joined other Indian community groups to challenge the Act for illegally terminating their status as Indians and tribes. ("*Tillie Hardwick*" case, cited above).

On March 2, 1987, the District Court ordered the Secretary of the Interior to publish a Federal Register notice that the United States maintained a government-to-government relationship with the Elk Valley Tribe. The Court also held that the Rancheria had never been lawfully terminated and, therefore, the boundaries of the Rancheria still existed. Finally, the Court established a process for the Secretary to take trust title to any property still owned by any Indian on the Rancheria.

The Elk Valley Tribe 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 Martin's Ranch 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 restoration of land. 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 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 Tribe acquired the Martin Ranch tract in 1998, ten years after passage of IGRA and eleven years after being restored in the *Hardwick* case. Previously, tribal members had sold most of the property within the Rancheria to non-Indians to avoid forced tax sales. Few parcels remained in Indian ownership. The tribal government entered a seven year lease agreement for gaming on the Rancheria with a tribal member, Betty Green. She was one of the Indians of the Rancheria who still owned a parcel of property that the United States had taken into trust under the *Hardwick* judgment.

The Tribe made several attempts to acquire land within or contiguous to the reservation boundaries prior to gaming on the Green allotment, however, the Tribe managed to acquire less then 15 acres. The Tribe submitted financial information demonstrating it did not have the ability to purchase land immediately upon restoration. It was not until 1995, after the Tribe commenced gaming on the Green allotment, that it could reacquire property to build a tribal land base.

Between the years of 1987-1998 the Tribe acquired seven parcels of land. The Tribe applied to have all of these parcels taken in to trust in April, 2001. Four of the parcels were taken in to trust in August, 2003. Two of the parcels were taken in to trust in April, 2004. These parcels were all within or contiguous to the Rancheria boundaries. The application for the remaining parcel, the Martin Ranch, is pending.

"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 "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 Rancheria 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, that is further evidence it is restored.

Martin's Ranch is located in the middle of many sites that were used by the Tolowa people. According to Kroeber's, "Handbook of the Indians of California," the subject property is located nearly equidistant between the northern and southern boundaries and close to the coast where much of the Tolowa activities occurred, i.e., villages, fishing and other food gathering.

The Tribe has submitted an archaeological survey of the Martin Ranch prepared by Leslie S. Heald, M.S., Cultural Resources Facility, Center for Indian Community Development, Humboldt State University. According to this survey, the parcel is within the area historically controlled by the Tribe.

As with other Northern California Tribes, the Tolowa people moved according to the seasons. At the time of historic contact in 1828, the Tolowa had eight major villages spread along the coast. The Tribe would remain in the coastal villages year-round, except in the fall when they fished for smelt at sandy beaches and then moved inland to collect acorns and catch salmon. *See* Archaeological Survey of Martin Ranch, p. 6. The Martin

Ranch parcel is located a half mile from the beach. On it sits a conical knoll prayer rock important to the Tribe's spiritual heritage.

The Elk Valley Rancheria currently has 98 enrolled members. Of those 98 members, 86 trace their ancestry directly to acknowledged Tolowa people. Seven of the nine members of the Tribal Council are direct descendants of Tolowa people. Additionally, many individual members of the Tribe trace their ancestry back to acknowledged Tolowa leaders.

The original Rancheria is now a residential area and the land within it is primarily owned by non-Indians. For the Tribe to advance its goal of restoring its land base, it had no choice but to go beyond the boundaries of the original Rancheria.

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, a circumstance similar to Elk Valley.).

As mentioned above, the Elk Valley Tribe was restored in 1987 but had no financial ability to purchase land until 1995. The Martin's Ranch parcel was acquired in 1998, eleven years after restoration. The Tribe applied to have the parcel taken in to trust in April, 2001 along with all but one of the other parcels listed below. The application is still pending.

Elk Valley Land Acquisitions

Parcel Name	Parcel location	Date Acquired	Date Applied for Trust	Date in Trust
Tribal Admin Offices	On-Reservation	1/26/1987	Apr-01	Aug-03
Green Residence	On-Reservation	10/12/1993	Apr-01	Aug-03

Community Center	On-Reservation	5/4/1995	Apr-01	Aug-03
Parking	On-Reservation	6/7/1995	Apr-01	Aug-03
Stary Ranch	Contiguous	9/5/1996	Apr-01	April-04
Stary Ranch	Contiguous	9/26/1997	Apr-01	April-04
Martin Ranch	1 mile south of the Rancheria	6/24/1998	Apr-01	Pending
Tribal Admin Offices	On-Reservation	8/29/2001	N/A	N/A

The fact that the Tribe applied to have all of the acquisitions taken into trust at the same time and that they were the first parcels requested by the Tribe to be acquired into trust is a clear indication of the Tribe's intent to reestablish a land base. All of the parcels that were within the original Rancheria were taken into trust soon after the applications were submitted. While the Secretary accepted the parcels that were within the original Rancheria into trust quickly, the same is not true of the outside parcels or even the contiguous parcels. We cannot, however, penalize the Tribe for the length of time it takes for the parcel to be taken in to trust when there is a clear indication that the Tribe intended to acquire all of the lands in trust at one time.

Conclusion

IGRA permits tribes to conduct gaming on Indian lands only if they have jurisdiction over those lands and exercise governmental power. The Elk Valley Tribe is a restored Tribe with a historical connection to the parcel. The Tribe has entered into a Memorandum of Understanding with the County of Del Norte covering a range of governmental activities on the parcel and will do more once the parcel is taken into trust. The parcel was acquired within a reasonable amount of time after restoration, well within established precedents. Therefore, we conclude that if the Secretary of the Interior accepts the Tribe's land in to trust, it will qualify as Indian lands. At that time, the Tribe may lawfully conduct gaming on its proposed site.

If you have any questions, John Jasper, Attorney at DOI and John Hay, Attorney at NIGC, are assigned to this matter.