August 31, 2001

Honorable Douglas W. Hillman
Senior United States District Judge
United States District Court (W.D. Michigan)
399 Federal Building
110 Michigan Street, N.W.
Grand Rapids, MI 49503

Re: Whether the Turtle Creek Casino site that is held in trust by the United States for the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the Indian Gaming Regulatory Act's general prohibition of gaming on lands acquired after October 17, 1988

Dear Judge Hillman:

The National Indian Gaming Commission (NIGC) has been asked by the District Court for the Western District of Michigan to consider whether the Turtle Creek Casino operated by the Grand Traverse Band of Ottawa and Chippewa Indians lies within one of the numerous exceptions to the general prohibition of gaming on lands acquired after enactment of the Indian Gaming Regulatory Act of 1988 (hereinafter " IGRA"), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701-21. See Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 46 F. Supp.2d 689 (W.D. Mich. 1999).

After some delay and after formal consultation with the United States Department of the Interior, the NIGC has considered that question and offers the following analysis in which it finds that the Turtle Creek site falls within one of the exceptions to IGRA's prohibition on gaming on Indian lands acquired in trust after October 17, 1988, as set forth at 25 U.S.C. § 2719. The United States Department of the Interior concurs in this decision.

PROCEDURAL BACKGROUND

In this case, the Grand Traverse Band of Ottawa and Chippewa Indians (hereinafter "GTB" or "Band") filed an action seeking a declaratory judgment concerning the legality of the Class III gaming at the Turtle Creek Casino in Whitewater Township in Grand Traverse County, Michigan. The United States filed a counterclaim seeking to declare the Turtle Creek facility illegal and to remove and confiscate gambling devices. The United States also asked for a preliminary injunction to stop further gaming at the facility. The State of Michigan intervened as

a party defendant.

The United States argued that Class III gaming on the Turtle Creek Casino site was illegal because the land on which the Casino was situated had been taken into trust after the enactment of IGRA which created a general rule forbidding gaming on lands acquired after that time. The United States reasoned that because the site had been taken into trust on August 8, 1989, nearly ten months after IGRA was enacted, that the land was subject to IGRA's prohibition of gaming on lands taken into trust after October 17, 1988. The United States argued that the only legal means of establishing gaming on such land was a Secretarial determination under section 2719(b)(1)(A) by the Secretary of the Interior together with the concurrence of the governor of the State of Michigan that gaming on the Turtle Creek site would be in the best interests of the GTB and its members and not be detrimental to the surrounding community. Otherwise, any gaming on the site was illegal. The United States also opposed the GTB's assertions that the site fell under any of the several exceptions to the general prohibition set out in section 2719.

The GTB asserted the applicability of the exception for "land taken into trust as 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). As succinctly summarized by the court, application of this exception requires a two-part determination: (1) whether the GTB is a "restored" tribe within the exception and (2) whether the Turtle Creek site is part of a "restoration of lands to such a restored tribe." Neither term is defined in IGRA.

Concerning the first part of the determination, the United States argued to the court that "restored" was a term of art that applied "only to a process of restoration by way of Congressional action or by order of the court, not by agency acknowledgment." *Id.* at 697. Therefore, the restoration of lands could only be by Congressional action, *id.* at 697, and because the GTB had been "acknowledged" under the administrative federal acknowledgment procedures ("FAP"),[1] the United States reasoned that the tribe could not be deemed to be "restored" within

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[1]The federal administrative process for acknowledgment of tribal entities has been developed over the years by the United States Department of the Interior. Although such applications were originally processed on an *ad hoc* basis, the Department promulgated regulations in 1978 governing that process. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 49 Fed. Reg. 39361-64 (Sept. 5, 1978) (codified at 25 C.F.R. Part 54). Such procedures were developed under the Secretary's general authority for maintaining the United States' relationship with Indian tribes. In 1994, Congress acknowledged the Secretary's authority in the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, 25 U.S.C.§ 479a and note, § 479a-1. This Act confirmed the Secretary of the Interior's responsibility on behalf of the federal government to recognize Indian tribes. *See* 25 U.S.C.§ 479a note. The Act requires the Secretary to keep a regularly updated list of all

the meaning of IGRA. In its argument, the United States relied on the "principle of statutory construction requiring a court to interpret statutes as a whole and avoid constructions that would render words or provisions superfluous or meaningless." *Id.* at 697. Applying that principle, section 2719(b)(1)(B)(ii), a separate provision for lands obtained by a tribe that is "acknowledged" under the FAP,[2] would be rendered superfluous.

On March 18, 1999, the court issued an Opinion and Order denying the United States's Motion for a Preliminary Injunction. The court generally disagreed with the arguments of the United States, stating:

> [T]he government has failed to demonstrate that a consistent alternate definition of "restore" has been used to apply only to the restoration of Indian tribes through legislative or court action.
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> [T]he argument of the United States is at odds with the previously unmentioned third exception of § 2719(b)(1)(B). Subsection (b)(1)(B)(i) excepts from the § 2719(b) procedures [requiring a two-part determination by the Secretary of Interior and concurrence by the Governor] those lands taken into trust as part of "a settlement of a land claim." If as the government asserts, the exceptions were intended by Congress to be mutually exclusive, a tribe acknowledged by the Secretary which subsequently settled a land claim would implicitly be barred from asserting the [(i)] exception, despite the unequivocal and unrestricted language of the subsection excepting lands taken into trust as part of "a settlement of a land claim."

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recognized tribes and to publish that list on an annual basis. 25 U.S.C.§ 479a-1. The Act further provides that "a tribe which has been recognized in [this manner] may not be terminated except by an Act of Congress." 25 U.S.C. § 479a note. The legal significance of the List is highlighted in the House Report accompanying that Act, which notes that "'[r]ecognized' is more than a simple adjective; it is a legal term of art." It explains further that: federal "recognition" does the following: (1) confirms that the Tribe is a "domestic dependent nation" capable of a "government-to-government relationship" with the United States; (2) "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax; and (3) "establishes tribal status for all federal purposes." H.R. Rep. No. 103-781, at 2-3 (1994). Also in 1994, the Department substantially revised its regulations. *See* 59 Fed. Reg. 9293 (Feb. 25, 1994) (now codified at 25 C.F.R. Part 83).

[2]Section 2719(b)(1)(B)(ii) exempts casino sites from the general prohibition of gaming on lands acquired after October 17, 1988 where the land was "taken into trust as part of . . . the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process."

Grand Traverse Band at 699-700. Similarly, the court saw no merit in the United States's view that the "restoration" of the tribe and the land at issue must have been accomplished simultaneously by Congress or by order of the court, not by acknowledgment first and acquisition later of land in trust. The court stated:

> Fully eight years after the Band was acknowledged under the process, the IGRA created an exemption for lands initially acknowledged by the Secretary. The government's interpretation of the exclusivity of the provision would impose an additional, unanticipated consequence of having used the acknowledgment process rather than Congressional action for obtaining recognition–that the tribe would be limited under the IGRA to the first land taken into trust following acknowledgment (12.5 acres in 1983).
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> Such a *post facto* consequence is unreasonable if Congress has not clearly expressed such an intent. I conclude that no such intent is apparent here. Instead, it is perfectly sensible that "acknowledged" and "restored" tribes may on occasion overlap.

Grand Traverse Band at 699. Based on its analysis, the court denied the preliminary injunction sought by the United States.

Meanwhile, the GTB had argued that the NIGC has primary jurisdiction over issues as to the legality of gaming on Indian lands. The GTB asked the court to stay the litigation and refer the question of the applicability of the prohibition to the NIGC. The court granted the stay requested by the Band "pending a determination by the NIGC of whether the Turtle Creek casino falls within one of the cited exceptions to § 2719[,]" finding "the NIGC's determination of the factual and statutory issues will be of considerable assistance to this court." *Id.* at 707, 708.

The United States was given leave to seek relief from the stay if the NIGC failed to issue a decision within 18 months at which time the court would proceed to the merits. At the expiration of that time period, the NIGC had not completed an opinion. After informally discussing the matter with the parties and the Department of the Interior this past spring, the NIGC decided to move forward with an opinion. The court gave the NIGC a new deadline of August 31, 2001, for an opinion.

The NIGC has now reviewed the merits of the question of whether the Turtle Creek casino is subject to the general prohibition on gaming on lands acquired in trust after October 17, 1988.

APPLICABLE LAW

In IGRA, Congress designed a comprehensive regulatory scheme for the conduct of gaming

activities on Indian lands. Congressional findings indicate that "the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). On the basis of these findings and to fulfill several statutory responsibilities, Congress established the National Indian Gaming Commission and gave it jurisdiction to regulate several aspects of Indian gaming. 25 U.S.C. § 2704(a).

As several courts have noted, the Commission often bears the responsibility of determining the facts necessary to establish whether gaming is proper at certain locations.[3] For tribes to conduct gaming under IGRA, such gaming must be conducted on "Indian lands," as defined by the IGRA. The IGRA defines "Indian lands" to be:

> (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.A. § 2703(4). *See also* 25 C.F.R. § 502.12 (NIGC's implementing regulation further defining Indian lands).

A determination of whether a tribe is conducting gaming on Indian lands, however, is not necessarily the end of the inquiry. Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after enactment of IGRA on October 17, 1988, unless one of the numerous exceptions apply. Accordingly, for lands taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to

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[3]See, e.g., Miami Tribe of Oklahoma v. United States, 927 F.Supp. 1419, 1422 (D.Kan. 1996) (holding that NIGC had authority to determine whether particular lands were within the tribe's jurisdiction for purposes of determining whether they constituted "Indian lands" within the meaning of the statute); Akiachak Native Community v. Monteau, No. 96-CV-2302, slip op. at 11(D.D.C. Jan. 18, 2001) (remanding to NIGC "to render decisions as to whether [certain parcels] are 'Indian land' under the IGRA"); Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001) (Indian lands determination by Secretary was entitled to no deference because the NIGC was not consulted about that determination). The Commission's authority to review such questions arises, *inter alia*, from the Commission's responsibility to "monitor," "inspect and examine all premises," and "inspect . . . and audit all papers, books and records" involving certain gaming "located on Indian lands." 25 U.S.C. § 2706(b)(1)-(4).

determine whether a tribe can conduct gaming on such lands.

For the purposes of reviewing the Turtle Creek site, the following exceptions are particularly relevant. First, the section 2719 prohibition does not apply to lands when there has been a "Secretarial determination." If the Secretary of the Interior, after consultation with certain tribal, state and local officials, determines that a proposed gaming establishment is in the best interest of the applicant tribe and would not be detrimental to the surrounding community, and if the Secretary has the concurrence of the governor of the state in which the lands are located, the Secretary's determination lifts the prohibition. 25 U.S.C. § 2719(b)(1)(A).

Second, the general prohibition does not apply to lands located in a state other than Oklahoma that are within the Indian tribe's "last recognized reservation within the State or States" within which the tribe is presently located. 25 U.S.C. § 2719(a)(2)(B).

Finally, the prohibition does not apply when:

> 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.

25 U.S.C. § 2719(b)(1)(B).

ANALYSIS

The question that the court asked the NIGC to address is a narrow one: whether the lands at issue are subject to the prohibition on gaming on lands acquired after October 17, 1988.

Method of Analysis

In examining this question, the NIGC solicited and reviewed information and/or submissions from the United States Department of Justice, the State of Michigan and GTB, each of the parties involved in the litigation which has been pending since 1996. In developing its opinion, the NIGC did not employ formal adjudicative procedures. At the time of the court's ruling, the NIGC had no formal adjudicatory procedures in place for determinations under section 2719. The NIGC believes that the parties and the court expected the NIGC to use the informal process routinely used by the NIGC and the Department of the Interior to make Indian lands determinations, giving relevant parties an opportunity to comment and reviewing their

submissions. The State of Michigan, intervenor in the litigation, provided a lengthy submission through Keith D. Roberts, Assistant Attorney General in Charge, Lottery and Racing Division, Office of the Michigan Attorney General. Submission of the State of Michigan (July 5, 2001).

The NIGC also had the benefit of reviewing the pleadings and opinion in the litigation in federal district court. During the five years this litigation has been pending, each of the parties has had ample opportunity to develop and refine their legal and factual positions. Indeed, the State of Michigan unsuccessfully appealed the district court's stay order to the United States Court of Appeals for the Sixth Circuit. Grand Traverse Band v. U.S. Attorney; State of Michigan, Intervenor, No. 99-1584 (6th Cir. May 1, 2001) (per curiam).

In a February 2000 Memorandum of Understanding with the United States Department of the Interior, a copy of which is attached to this opinion, the NIGC agreed to consult with the Department of the Interior when it addresses questions about Indian lands under IGRA. In reaching its conclusion, the NIGC abided by the terms of the MOU and consulted with the Department of the Interior, giving the Department an opportunity to weigh in on this decision. After reviewing the opinion, the Department of the Interior concurred with that opinion.

The NIGC reviewed several expert reports and other documents. In support of its argument that Turtle Creek site is central historically to the economic and cultural existence of the Band, the Grand Traverse Band submitted numerous documents. These include an affidavit and a report of Dr. James M. McClurken, an anthropologist specializing in ethnohistory of indigenous tribes of the Great Lakes Region. Dr. McClurken's report, entitled "Occupation and Use of Grand Traverse Bay's East Shore by the Grand Traverse Band of Ottawa and Chippewa Indians" and dated December 8, 2000 was accompanied by two large binders of supporting historical materials. The Department of Justice also submitted materials, including an expert report by Helen Hornbeck Tanner, entitled "The Grand Traverse Band's 1836 Treay Reservation and the Unrelated Turtle Creek Land." In addition, counsel for the Band submitted its own analysis.

The NIGC recognizes that, because this opinion was not reached through formal administrative adjudication or formal rule-making, the opinion is not entitled to the fullest measure of deference available to the agency had it developed specific formal procedures for handling this determination. Nevertheless, the NIGC has exercised care, experience and informed judgment, has made full inquiry of interested parties, and has employed its expertise in interpreting the agency's own organic statute, IGRA, in offering an opinion that it hopes will provide guidance to the litigants and the courts. See United States v. Mead Corp., 121 S.Ct. 2164 (2001).

Of the three exceptions initially thought to be relevant in this case, including the exceptions for a

Secretarial determination,[4] the exception for a "last recognized reservation,"[5] and the exception for "restored lands" for a "restored tribe," only the last exception merits extended discussion.

Relevant Facts

After review of the materials available to it, the Commission finds the facts to be as follows. The Band was recognized by the United States for purpose of signing a series of treaties between 1795 and 1855. The history of the Band is similar to that of other tribes that ceded lands to the United States through treaties. The GTB was among the tribes that ceded lands to the United States under the Treaty of 1836.[6] Ceded under that treaty was the portion of the lower peninsula of western Michigan that is north of the Grand River as well as the eastern portion of the Upper Peninsula.[7] The Band was party to another treaty in 1855 that reduced certain responsibilities of the federal government to the signatory tribes.[8] The series of treaties granted the Band both

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[4]The GTB has submitted an application for a Secretarial determination under 25 U.S.C. § 2719(b)(1)(A). Outstanding issues, such as preparation of an environmental analysis under the National Environmental Policy Act, appear to remain unresolved and thus a Secretarial determination is not readily obtainable in the near future.

[5]GTB initially argued that the Turtle Creek Casino lay within the boundaries of the "last recognized reservation" within the state. After conducting its own historical research, however, James M. McClurken, the GTB's expert, determined that "[t]he eastern boundary of the Grand Traverse Reservation, as recorded on the General Land Office maps . . . is approximately 1.5 miles west of the present site of Turtle Creek Casino." James M. McClurken, Occupation and Use of Grand Traverse Bay's East Shore by the Grand Traverse Band of Ottawa and Chippewa Indians (Dec. 8, 2000) at 27. The expert for the United States concluded as well that the casino site was 1.5 miles outside the boundary of the former reservation. Helen Hornbeck Tanner, The Grand Traverse Band's 1836 Treaty Reservation and the Unrelated Turtle Creek Land (undated Draft Document) at 69. ("The Turtle Creek parcel . . . is situated a mile and a half from the separate piece of land [that was] added to the description of the 1836 Treaty reservation by the General Land Office in 1840."). Based on the unanimity of the expert analysis, it cannot now be maintained that the Turtle Creek site is within the 1836 reservation.

[6]Treaty of Washington, 7 Stat. 491, March 28, 1836.

[7]*See* Treaty of Washington, Art. I for the legal description of the cession.

[8]Article 5 of The Treaty of 1855, Treaty with the Ottawa and Chippewa, 11 Stat. 1621, did not "terminate" the tribes that signed the Treaty of 1836. As interpreted by the federal district court in United States v. Michigan, 471 F. Supp. 192, 264 (W.D. Mich. 1979), "[Article 5] was intended to accomplish two goals: to relieve the United States of the burden of convening general councils in the event local matters required attention in the future, and to satisfy the Ottawa and Chippewa's desire to be treated separately. Article 5 had no impact on the governmental structure of the bands. There was no change in the way in which the Indian agents

reservation lands and other forms of compensation. The Band continued to have a government-to-government relationship with the United States until 1876. At that time, the Bureau of Indian Affairs administratively severed the federal government's relationship with the Band.

The Band has since re-established its government to government relationship with the federal government. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298-13303 (2000). The Band has been listed by the Secretary of the Interior as a federally-recognized Indian tribe since 1980. See 45 Fed. Reg. 19321-19322. The State of Michigan also recognizes the Band as a tribal government and entered a tribal-state gaming compact with the Band that has been federally approved. See 58 Fed. Reg. 63262 (Nov. 30, 1993).

Since re-establishing its relationship with the federal government, the Band has sought to restore its land base. On January 17, 1984, the Department of the Interior declared a 12.5 acre parcel as the Band's initial reservation. 49 Fed. Reg. 2025 (Jan. 17, 1984). Between March 1988 and July 1990, the Band made it a priority to obtain land. The Department of the Interior took several parcels in trust for the Band during this period. The Turtle Creek site was taken into trust by the Secretary of the Interior for the benefit of the Band on August 8, 1989. The casino site[9] is within

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dealt with them after the treaty, except that they were never convened again as one group."

[9]The casino property is described as situated in the Township of Whitewater–

> That part of the West ½ of the Southeast 1/4 lying South of the Railroad Right of Way, Section 32, Town 28 North, Range 9 West, excepting for the following parcel being retained by Grantor: Beginning point of excepted parcel is the Southwest corner of the above-described parcel; thence North along the North/South quarter line 300 feet; thence East parallel with the South section line 300 feet; thence South parallel with the North/South quarter line 300 feet to the South section line; thence West along the South section line 300 feet to the point of beginning of such excepted parcel.
>
> EXCEPTING AND RESERVING TO THE GRANTOR herein, its successors and assigns, an undivided one-half of all oil, gas and mineral rights, underground storage rights, and rights pertaining thereto.
>
> subject to easements and building and use restrictions of record and further subject to reservations of record if any, and subject to

the cession of the Treaty of 1836, near Williamsburg. McClurken Report at 2. The Band began operating the casino there in 1996.

Because the Turtle Creek Casino site was taken into trust on August 8, 1989, it is subject to the general prohibition on gaming lands acquired after October 17, 1988, unless one of the many exceptions applies. The Band argues that it meets the exception for the restoration of lands for an Indian tribe that is restored to federal recognition set forth at 25 U.S.C. § 2719(b)(1)(B)(iii).

While there is not substantial disagreement about the historical facts at issue, there is considerable disagreement about the application of the standard of law to those facts. To maintain the analytical model used by the district court, the analysis below will first address the question of whether the GTB is "an Indian tribe that is restored to Federal Recognition" and will then address whether the Turtle Creek lands were "taken into trust as part of the restoration of lands" for such a tribe. 25 U.S.C. § 2719(b)(1)(B)(iii).

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. Arguments have been made as to whether "restoration" should be interpreted under a plain-meaning dictionary definition to include any tribe that re-attains federal recognition and lands by whatever method, or whether the "restoration" is a legal term of art that applies only to tribes that have obtained federal recognition through a specific Congressional act.

The Band had a government-to-government relationship with the United States until 1876 at which time BIA officers improperly terminated the federal trust relationship by administrative action. The clear import of acknowledgment of the GTB under federal acknowledgment procedures was to "undo" the effect of the improper administrative action and to resume a proper government-to-government relationship between the GTB and the federal government. The result was "restoration" under the plain meaning of that term. Accordingly, it is difficult to argue that the GTB is not a "restored tribe" if the term should be interpreted according to its plain meaning.

> easement over the West 33 feet as referenced in Liber 667, Page 720. Further subject to the right of way of State Highway M-72. (Recorded September 15, 1989 in Liber 0785, Page 635, Register of Deeds, Grand Traverse Co., Michigan)

On August 8, 1989, the BIA Acting Area Director for the Minneapolis Area Office approved the deed [for acceptance into trust] pursuant to authority delegated by the Under Secretary of the Interior in Department Release No. 2784 of March 16, 1987, Part DM 8, and 230 DM 3, noting that the conveyance was made pursuant to the Indian Reorganization Act.

Indeed, in Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F.Supp.2d 155 (D.D.C. 2000), a federal district court disagreed with the Secretary of the Interior's argument that the technical meaning of the term "restoration of lands" included only those lands that were available to a restored tribe as part of its legislative restoration to federal recognition by Congress. Instead, the court found that the plain meaning of "restoration of lands" could be construed as those lands that place a tribe back in its position prior to termination. Id. at 163. The court also found that the Department's requirement for specific legislative direction regarding restored lands sought "to graft a procedural and temporal limitation onto section 2719(b)(1)(B)(iii)."

Another interpretation has been urged, that the term "restoration" is a legal term of art that applies only to tribes that have been recognized by Congress in official legislation. Under this theory, the clause ought to be interpreted to read: "the restoration of lands for an Indian tribe that is restored to Federal recognition [by Act of Congress]."

This interpretation has some weight. The term "restoration" has frequently been used by Congress when it re-asserts the government to government relationship with a tribe. See, e.g., Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-277, 94 Stat. 317 (1980) (codified at 25 U.S.C. §§ 761-768); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. § 711).

On the other hand, Congress has used a variety of terms in referring to those tribes that are "restored" to federal recognition. See H. Rep. No. 103-621, 103rd Cong. 2d Sess. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act (hereinafter "Little Traverse House Report"); S. Rep. No. 260, 103rd Cong., 2d Sess. (1994), Reaffirming and Clarifying the Federal Relationshops of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Indian Tribes (hereinafter "Little Traverse Senate Report"). Indeed, the Senate used "unacknowledged" to describe the status of the Pokagon Band before its government to government relationship with the federal government resumed. The Senate Report states: "The Pokagon Band have submitted extensive documentation to the Committee which demonstrates how inequitable historical treatment by the federal government and wide fluctuations in federal Indian policy account for their *present day unacknowledged status*." Little Traverse Senate Report at 4 (emphasis added). By Congressional actions, tribes have been "restored," "affirmed,"and "reaffirmed."

At times, the language in IGRA is exceedingly precise. Indeed, in the immediately preceding clause, Congress apparently did not presume that "acknowledged" was a term of art. 25 U.S.C. § 2719(b)(1)(B)(ii). If Congress had believed that "acknowledged" was a term of art, it likely would have created an exception for "the initial reservation of an acknowledged Indian tribe." Instead, Congress indicated precisely what it meant by the term "acknowledged;" it drafted the

exception to include "the initial reservation of an Indian tribe acknowledged *by the Secretary under the Federal acknowledgment process*." 25 U.S.C. § 2719(b)(1)(B)(ii) (emphasis added). Congress's precision as to the method of acknowledgment in that section can be understood that it did not believe that it was using a term of art as to the method of how a tribe is restored to the status of federal recognition.

A structural analysis of the subsection also lends some support to the plain meaning approach. Indeed, one could reasonably interpret the exception for "restored" tribes to be slightly broader than the exception for "acknowledged tribes" that precedes it. Because it is the last exception in a short list of exceptions, one might conclude that Congress intended to the make this last exception as a catchall provision that seeks to sweep in other circumstances where an exception is warranted but that are not explicitly included under the other exceptions. A catchall provision at the end of a list is not unusual in Congressional enactments or in IGRA. See 25 U.S.C. § 2710(d)(3)(C)(i) - (vii) (a list of subjects that may appear in a Tribal-state compact, concluding with "any other subjects that are directly related to the operation of gaming activities").

Because the language does not itself offer a clue as to whether Congress intended the plain meaning approach or thought it was using a term of art, and because reasonable minds can differ on the question, the NIGC concludes that the provision is ambiguous.[10] While an agency must give effect to the unambiguous intent of Congress, it must take a different approach in circumstances such as this in which the statute is susceptible to more than one meaning. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). Under such circumstances, the agency must resort its specialized expertise and attempt to apply the statute in a rational manner and as it deems best in light of its experience.

As lower courts and the Supreme Court have often recognized, the federal courts have an obligation to construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 718 (10th Cir. 2000). Indeed, as the D.C. Circuit Court of Appeals has ruled, "if [a law] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in original). The risk is that a narrow interpretation of the clause risks unfairly prejudicing tribes not intended to be prejudiced by

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[10]Related provisions of IGRA have been found ambiguous by courts. See Kansas v. United States, 249 F.3d 1213, 1228 (10th Cir. 2001) (noting that "IGRA sheds little light on the question of whether under the [circumstances of the case] the tract constitutes "Indian lands"); Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001) (noting that IGRA does not define the term, "reservation," and therefore that Chevron would apply to any Commission construction of that term).

section 2719.

The courts are not entirely in agreement as to the effect of this rule of construction on interpretations by expert federal agencies. Compare Ramah Chapter of the Navajo Nation v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (canon of construction of liberal interpretation trumps agency interpretations) with Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (deference due expert agencies makes application of canons of construction inappropriate). Nevertheless, in the context of IGRA, there is limited authority in the legislative history for applying this canon of construction. See Congressional Record, September 26, 1988, H 8153 (Rep. Udall, IGRA's primary House sponsor, calling on Courts to apply "the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.").

Moreover, IGRA limits the sovereign rights that were recognized by the United States Supreme Court in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). Congress has generally been required to make its intention known in a clear manner when it seeks to limit the rights that a tribe would otherwise have. See, e.g., Menominee Tribe v. United States, 391 U.S. 404 (1968) (congressional act terminating the federal relationship with the Menominee tribe held not to terminate the tribe's hunting and fishing rights). While IGRA affirms the right of Indian tribes to game on their own lands, the general prohibition in section 2719 serves as a limitation on that right. The Commission believes that Congress normally speaks clearly when it intends to limit a tribal right. The ambiguity in the provision should not be read in an unduly restrictive manner; such an interpretation could prejudice a tribal right that Congress did not intend to be prejudiced.

Having concluded that the provision is ambiguous, however, we need not construct an interpretation for all circumstances; we merely must consider how section 2719 should be applied in this context. We believe that such decisions must be made on a case-by-case basis.

The GTB presents a unique case in several respects. First, it is one among several tribes whose ancestors were signatories to the Treaties of 1836 and 1855 that have resumed a government-to-government relationship. See United States v. Michigan, 471 F.Supp. 192 (W.D. Mich. 1979). The tribal entities that were the successors to the signatories of the Treaty of 1836, including the GTB, were deemed to have continued as tribal entities after signing the treaties and throughout the period before again being "recognized," "acknowledged," "affirmed" or "reaffirmed" by the United States. See, e.g., Little Traverse Senate Report at 1 (setting out the history of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians, "descendants of, and political successors to, the tribes who were the signatories to the 1836 Treaty of Washington and the 1855 Treaty of Detroit"). That the Senate Report indiscriminately uses the terms "recognized," "acknowledged," "affirmed" or "reaffirmed" indicates that Congress did not

distinguish among these terms when dealing with the Michigan tribes. The Report also notes that "three other tribal governments who are the descendants of the same signatories have been recognized by the federal government as distinct Indian tribes" in reference to GTB. *Id.* at 1. Whether by executive action under the acknowledgment regulations, 25 C.F.R Part 83, or by acts of Congress in "recognizing" a tribe," the federal government imposes upon itself the same new duties with respect to each tribe and its members. Hence, to attempt to distinguish between these tribes according to the method by which they attained the same status under federal law would be to maintain an unnecessary difference in such circumstances.[11]

Moreover, it could be seen as contrary to other explicit Congressional guidance. Congress has imposed a duty to treat Indian tribes with uniformity and to avoid distinctions among tribes where legislation does not clearly create such distinctions. The Technical Corrections Act of 1994 added the following subsection to Section 16 of the Indian Reorganization Act:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations. Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (§ 25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. § 476(f).

In light of the indiscriminate use of synonyms for recognition by Congress when dealing with the Michigan tribes, it seems unnecessary to create distinctions between tribes that obtained Congressional "restoration" as opposed to Departmental "acknowledgment."[12] Congress has

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[11]The Solicitor of the Interior Department collected numerous statutes that "use a variety of synonymous and descriptive words, rather than a single formulation or term of art, to reestablish a federal tribal relationship." *See* Memorandum from the Solicitor to the Secretary of the Interior, Pokagon Band of Potawatomi Indians, at 5-7, Sept. 19, 1997.

[12]The Department of the Interior recognizes its own authority to "acknowledge" tribes that have never been "terminated" by an Act of Congress. *See* 25 C.F.R. § 83.3(e). The use of the term "acknowledgment" denotes the process under which the Department reviews applications from previously "recognized" tribes as well as from tribal entities that have never had a government to government relationship with the United States. Congress, however, has not limited its actions only to those tribes that in the view of the Department of the Interior are

restored to recognition tribes in circumstances identical to other tribes acknowledged under the FAP. In fact, in doing so, Congress has referred to acknowledgment under the FAP of tribes in identical or similar circumstances in support of its own actions. See Little Traverse House Report and Little Traverse Senate Report. Because the underlying rationales for recognition do not differ, it is unnecessary to create additional distinctions. See William. W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 24 Am. J. Legal Hist. 331 (1990) (tracing the history of "recognition" from a cognitive concept to a legal and jurisdictional concept under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*).

From a review of the statutes and Congressional reports, it is clear that tribes in very similar circumstances regained government-to-government relationships through the FAP, or by acts of Congress. Absent a clear statement by Congress, it makes little sense now to treat similarly situated tribes in Michigan differently. For the reasons given in the foregoing analysis, the GTB is a "restored" tribe within the meaning of the exception.

Having determined the GTB to be "restored," the next issue is whether the casino site is "land taken into trust as part of . . . the restoration of lands for an Indian tribe" under § 2719(b)(1)(B)(iii). In enacting an exception for restored lands for restored tribes, Congress likely did not intend to substantially undercut the general prohibition on gaming on lands acquired after IGRA's passage. Although Congress did not limit the definition of restored lands to former reservation boundaries as it did, for example, in section 2719(a)(2)(B), we believe the phrase "restoration of lands" is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history.

Moreover, the application of this provision to land previously taken into trust by the Secretary of the Interior presents unusual circumstances. In most cases, the Department of the Interior will evaluate a land-into-trust application for gaming purposes with full knowledge of the importance of the trust acquisition on the tribe's right to conduct gaming. Furthermore, the Secretary will have ample opportunity to advise the tribe as to the legality of gaming on the land.

Under these unusual circumstances, the NIGC finds the following evidence important. The Band has assembled substantial evidence tending to establish that the Turtle Creek site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition. Further, the trust acquisition of the site was in the late 1980s, within the approximate time period as the restoration of other land holdings, the acknowledgment of the tribe and the approval of the tribal constitution.

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ineligible under the FAP due to previous termination.

The site is within the area ceded to the United States by the ancestors of the present GTB. When the Band was acknowledged in 1980, neither the Band nor the United States as trustee for the Band held title to any lands.[13] Supplemental Affidavit of William Rastetter ("Rastetter Affidavit") at ¶ 7 (Exhibit H). Some initial lands were taken into trust in 1983. In 1984, it asked the Department to declare a 12.5 acre parcel as its initial reservation. In March of 1988, the Secretary of the Interior approved the Band's Constitution. Between March 1988 and July 1990, the Band made it a priority to restore its land base. Consequently during this period the Department acquired several parcels of land in trust for the Band. The Department took into trust the Turtle Creek site on August 8, 1989. The Band asserts, and the court accepted, that these trust acquisitions were part of the Band's earliest attempts to build a reservation. Grand Traverse at 702. Thus, the Band viewed the Turtle Creek site as part of its core land area.

When the Band was recognized through the acknowledgment process, the Department found that the Band occupied at least three areas in the Grand Traverse Bay Area. One of these was the east shore of the bay in Grand Traverse County where the Turtle Creek site is located.

> Although the petition, and my research, have focused on Peshawbestown, Northport, and Omena, there are a number of other communities within the general region which may have been incorporated and which the petition in some way implies it is including. One such set in on the east shore of the bay, Elk Rapids, Kewadin and Rapid City, and possibly Acme and Bates. Elk Rapids, it may be recalled, was the site of one of the "original" bands in the area. The other set is south of Leelanau County, in Antrim and Benzie counties, including Honor, Glen Arbor, Glen Haven, Barker's Creek and possibly Provement and Frankfort. The petition cites population figures for these from Holst's 1939 survey, mentions the Elk Rapid group in the 1830's and has included a 1934 petition signed by Elk Rapids people. The latter is identical to the format and date with the Grand Traverse Petition and was done on the same date in Traverse City (GTB 1934.)

October 3, 1979 Recommendation and Summary of Evidence for the Proposed Finding for Federal Acknowledgment of the Grand Traverse Band of Ottawa, p. 18. The Turtle Creek site lies in the east bay area not far from Elk Rapids. The Band has a housing development and an 80-acre youth camp in this area.

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[13]In IGRA, Congress did not limit restoration, as it did in 1934 to "surplus lands of any Indian reservation heretofore opened, to sale . . . or any form of disposal" under 25 U.S.C. § 463, possibly demonstrating that Congress intended to benefit landless tribes such as the GTB. The 1836 Treaty granted the GTB (and other signatories) a reservation for a term of only five years; the 1855 Treaty provided parcels for individuals only. Thus, the Band was landless.

Dr. McClurken reports that the Turtle Creek Casino is located about a mile west of the town of Williamsburg, two miles south of Elk Lake, and five miles from the Lake Michigan shoreline. Historically, the Band occupied the East Grand Traverse Bay shore. Dr. McClurken's Report discusses that the Turtle Creek Site was at "the heart of the regional complex of natural resources that Grand Traverse Band members have relied upon throughout their occupation of the region." McClurken Report at 2.

Dr. McClurken catalogues in great detail the diversity of trees, plants, grasses, roots and animals that were abundant in the area and on which the Band relied for food, shelter, tools and medicine. Id. at 4-7. He further notes that the significant numbers of trails and village sites present, including two villages within the immediate vicinity of the Turtle Creek site, rendered the resources of the area easily accessible to Band members. Id. at 7-9. Thus, according to Dr. McClurken, the Turtle Creek site did not lie at the fringes of the Band's ceded territory. Nor was it a site that would have been visited only infrequently by Band members. As the map at the beginning of Dr. McClurken's report shows, the site was part of a tightly circumscribed area that formed the core of Grand Traverse territory, and which constituted only a tiny portion of the Band's overall ceded lands. In the late 19th Century, Band members acquired fee-simple title to land in the vicinity of the Turtle Creek site. Id. at 28. Dr. McClurken reports that throughout history and into modern times, Band members have occupied the Turtle Creek area.

As noted previously, the NIGC reviewed the reports of two experts in connection with the litigation. On the issue of whether the Turtle Creek casino site is located on a former reservation, the experts agree: it was not. The experts differ, however, concerning the significance of the site to the GTB. The expert for the GTB, James M. McClurken, concluded "that the lands on the east shore of Grand Traverse Bay, an area that encompasses the Turtle Creek site, historically comprised the core of Grand Traverse Band territory and provided natural resources central to the Band's continued existence." McClurken at 3. The expert hired by the U.S. Department of Justice, Helen Hornbeck Tanner, characterized the site as "part of the homeland of the Grand Traverse Band that lay toward the hinterland, . . . across the bay from the peninsula they considered their reservation."

In addition to the historical nexus of the Band to the land, it is noteworthy that the Band was restored in 1980, before the enactment of IGRA. The Band established its initial reservation before the enactment of IGRA and therefore before the significance of an initial reservation under the acknowledgment process was fully understood. Today, restored tribes understand the significance of establishing the initial reservation. Many tribes are counseled to wait to request initial reservation status until it has taken into trust all parcels that it might want to be included in its initial reservation. However, the Grand Traverse Band, newly recognized, quickly established its initial reservation since IGRA did not exist to counsel otherwise. Shortly after the Band was restored to Federal recognition, the Band sought to put this land into trust.

The region surrounding the casino site also has a modern nexus to the tribe. It is located within the "service area" for which tribal members are entitled to receive services by the BIA. The "service area" is the area in which the BIA provides services to members of a tribe who may not live on tribal land. See 58 Fed. Reg. 8882, February 17, 1993, "Notice of Near-Reservations Designations." In that Notice the BIA explained that such areas are "appropriate for the extension of BIA financial assistance and/or social services." The Notice further explains, "In the absence of officially designated "near-reservation" areas, such services are provided only to Indian people who live within reservation boundaries." *Id.* Included in that Notice is the Grand Traverse Band and the "near-reservation" locations given are: "The counties of Grand Traverse, Charlevoix, Leelanau, Benzie, Manistee and Antrim in the State of Michigan." The Turtle Creek casino is located in Grand Traverse County, within the tribe's service area.[14]

At the time of termination, Band members lived not far from the Turtle Creek site. For most of the Band's recorded history, it has lived and worked in this general area. It appears that the local

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[14]This is consistent with an Interior Department decision deeming certain ceded land "restored land. " In 1997 the Solicitor of the U.S. Department of the Interior found a proposed casino site that was both within ceded lands and within the Pokagon Band's "service area" to be "restored land" within the ambit of the IGRA exception. Memorandum from the Solicitor to the Secretary, Pokagon Band of Potawatomi Indians, September 19, 1997. The context of that analysis was the determination that the restored land exemption applied to land proposed to be taken into trust under the Pokagon Restoration Act. Although within an area ceded under a different treaty, not under the Treaty of 1836 (the Pokagon Band occupied southwestern Michigan and northern Indiana, the area immediately south of the cession under the 1836 Treaty), the history of the Pokagon Band with respect to its relationship to the federal government is identical to that of the GTB.

Regarding the status of the Pokagon land, the Pokagon Restoration Act specified that the Secretary of the Interior acquire land in trust for the Band, but did not impose any geographical or acreage limitations on the Secretary's authority to do so. 25 U.S.C. § 1300j-5 ("The Secretary shall acquire real property for the Band. Any such real property shall be taken by the Secretary in the name of the United States in trust for the benefit of the Band and shall become part of the Band's reservation."). Nor did the Act specify how the IGRA would apply. Similarly, with respect to the GTB, there exists no specific administrative or legislative direction concerning application of the IGRA and only Section 5 of the IRA (25 (U.S.C. § 465) and the regulations at 25 C.F.R. Part 151 for guidance in acquiring land in trust.

The GTB was "acknowledged" before enactment of the IGRA. Although the Pokagon restoration took place after enactment of the IGRA and therefore Congress could have addressed its application, the Pokagon legislation did not do so. The United States has moved to dismiss a challenge to the decision of the Secretary to take land into trust for gaming for the Pokagon Band. Taxpayers of Michigan Against Casinos v. Norton, No.1:01CV00398 (D.D.C.)

community has known for years that this land is closely tied to the Band. In light of this showing of continuous interest in this area, the Band has regained the beneficial title to land that it may have ceded but did not abandon. In regaining its beneficial use (the fee being held by the United States) to land that has been at the heart of the Band's culture throughout history and particularly within the context of its restoration process, the Commission believes that the Turtle Creek site constitutes land that has been not merely obtained but, in some sense, "restored" to the Band under Section 2719(b)(1)(B)(iii).

CONCLUSION

For the foregoing reasons, the NIGC concludes that the Turtle Creek casino site constitutes restored land for an Indian tribe that has been restored to federal recognition under 25 U.S.C. § 2719(b)(1)(B)(iii) rendering it within an exception to the general prohibition of gaming on lands acquired in trust after October 17, 1988. In the peculiar circumstances relevant here, such lands constitute lands that were taken into trust as part of the "restoration of lands for an Indian tribe that is restored to federal recognition."

Very truly yours,

Kevin K. Washburn
General Counsel

Attachment: February 2000 Memorandum of Understanding Between the National Indian Gaming Commission and the United States Department of the Interior

cc: Charles Gross, Assistant United States Attorney, counsel for the United States
Keith D. Roberts, Assistant Attorney General, counsel for the State of Michigan
Riyaz Kanji, John Petoskey, counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

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