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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REDDING RANCHERIA, Plaintiff, v. KENNETH SALAZAR, et al. Defendants.	Case No. C 11-1493 SC **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: December 2, 2011 Time: 10:00 a.m.

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I Introduction

The Secretary of the Interior ("Secretary") possesses broad authority to promulgate regulations, including regulations implementing the Secretary's duties under the Indian Gaming Regulatory Act ("IGRA"). In particular, the Secretary possessed the authority to promulgate regulations governing the implementation of IGRA's prohibition on gaming on trust lands acquired after its passage, and the exceptions to that general prohibition. The challenged regulations reflect a reasonable interpretation of IGRA's "restored lands" exception. And the Department of the Interior ("Interior") reasonably applied the "restored lands" exception to determine that Plaintiff Redding Rancheria could not meet the exception's temporal requirement because the request for land to be taken into trust at issue in this case was Plaintiff's third or fourth post-restoration request and Plaintiff was and is gaming on other lands.

Plaintiff's Memorandum in Support of it's Motion for Summary Judgment (Doc. No. 17) ("Pl.'s Mem.") offers little support for the claims set forth in Plaintiff's Complaint. (Doc. No. 1). As discussed in greater detail below, Plaintiff is incorrect that the National Indian Gaming Commission ("NIGC") possesses exclusive authority to promulgate regulations under IGRA. And Plaintiff's arguments relating to the permissibility of the challenged regulations are fatally undermined by Plaintiff's failure to recognize that: (1) IGRA's "restored lands" exception's ambiguity vests the Secretary with substantial discretion; and (2) the Secretary's regulations do not render the exceptions to IGRA that are at issue in this case "mutually exclusive." The Secretary, at a minimum, (1) possessed the implicit authority to promulgate the challenged regulations and (2) promulgated regulations that interpret IGRA in a permissible manner. Finally, Interior reasonably considered and rejected Plaintiff's argument that its third or fourth post-restoration request to have land taken into trust should be considered Plaintiff's first such request.

II. The Secretary Possesses the Authority to Promulgate Regulations, Particularly Regulations Implementing 25 U.S.C. § 2719, under IGRA.

As discussed in Defendants' memorandum, the Secretary possessed the authority to promulgate the 25 C.F.R. Part 292 regulations. Defendants' Memorandum in Support of their Motion for Summary Judgment at 9-23 (Doc. No. 19) ("Defs.' Mem."). Plaintiff's argument to the

contrary is based upon the flawed premise that because IGRA explicitly delegates rulemaking authority to the NIGC and does not include a similar explicit delegation of authority to the Secretary, "the promulgation of the Regulations by the Secretary is in conflict with Congress' delegation of authority to the NIGC." Pl.'s Mem. at 25. But IGRA, and 25 U.S.C. § 2719 in particular, imposes many duties upon the Secretary. See Defs.' Mem. at 10-15. Therefore, as discussed below, IGRA provided the Secretary with ample authority to promulgate the challenged regulations.

This case is governed by Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) and its progeny. See Defs.' Mem. at 7-9. Under Chevron, a court must first determine whether "Congress has directly spoken to the precise question at issue." Id. at 842-43. Where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. But if Congress did not specifically address the matter, the court "must respect the agency's construction of the statute so long as it is permissible." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). Under this second step in the Chevron analysis, "[t]he sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.'" Mayo Found. for Med. Educ. & Research v. United States, __ U.S. __, 131 S. Ct. 704, 712 (2011) (citing Chevron, 467 U.S. at 843). Even where Congress has not expressly delegated authority to implement particular provisions of a statute, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citation omitted).

IGRA's explicit delegation of rulemaking authority to the NIGC did not void the Secretary's general rulemaking authority. In Morton v. Mancari, the Supreme Court held that "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." 417 U.S. 535, 551 (1974). Plaintiff claims that, under Morton, IGRA, as the later and more specific statute, voids the statutes vesting the Secretary with general

authority to promulgate regulations. Pl.'s Mem. at 26. But IGRA coexists with the Secretary's general authority to promulgate regulations under 25 U.S.C. §§ 2 and 9 and 5 U.S.C. § 301. Indeed, with one exception, IGRA cannot be read to explicitly conflict with, and divest the Secretary of, his general authority to promulgate regulations. See 25 U.S.C. § 2711(h) ("The authority of the Secretary under section 81, relating to management contracts regulated pursuant to this Chapter, is hereby transferred to the Commission.").[1] IGRA need not, and therefore must not, be interpreted to conflict with or void the Secretary's general authority to promulgate regulations, including those set forth in Part 292.

Congress vested neither the NIGC nor the Secretary with exclusive rulemaking authority under IGRA. To the contrary, Congress delegated different responsibilities under IGRA to the NIGC and the Secretary. These duties are not confined to 25 U.S.C. § 2719, the section of IGRA that is at issue in this case. See Defs.' Mem. at 9-11 (citing 25 U.S.C. §§ 2710(b)(3)(B); 2710(d)(3)(c); 2710(d)(8); 2710(d)(7)(B)(vii); 2704(b)(1)(B); 2707(e). And the Ninth Circuit has determined that some of these provisions provided the Secretary with the authority to promulgate regulations. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998).

As Defendants established, 25 U.S.C. § 2719 also provides the Secretary with the authority, and the responsibility, to interpret the scope of the exceptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988. Defs.' Mem. at 11-15.[2] In order to apply these exceptions, and to fill a gap in the statute as to the meaning of applicable terms, it is necessary for Interior to interpret terms such as "last recognized reservation," "initial reservation," and "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719. As discussed below, because these terms are ambiguous, courts "may not disturb an agency rule [interpreting

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[1] IGRA's general grant of authority to the NIGC is unsurprising, as IGRA *established* the NIGC. 25 U.S.C. §§ 2704(a); 2706(b)(10). It was unnecessary for IGRA to create such authority for the Secretary, because the Secretary possesses authority to promulgate regulations, including regulations relating to acquiring trust lands. See, e.g., 25 U.S.C. §§ 2, 9, 465.

[2] Plaintiff is incorrect that Section 2719 refers to the Secretary only twice. Pl.'s Mem. at 27-28. It contains fourteen explicit references and several implicit references. 25 U.S.C. § 2719.

them] unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" Mayo Found.,131 S. Ct. at 711 (citations omitted).

The Secretary's authority and responsibility to interpret the exceptions to IGRA's general prohibition on gaming vests the Secretary with the authority to fill gaps in 25 U.S.C. § 2719 through regulation. Defs.' Mem. at 11-19. Plaintiff recognizes that Congress, as well as several courts, have "concluded that the Secretary has the authority to interpret the provisions of the IGRA." Pl.'s Mem. at 29. Plaintiff attempts to minimize this fact's significance by asserting that the Secretary's authority to interpret IGRA's exceptions is limited to evaluating whether to take land into trust under other statutes. Id. Plaintiff is incorrect that Congress, by granting the Secretary authority under IGRA, somehow prohibited the Secretary from exercising this authority under IGRA.[3] See, e.g., 25 U.S.C. § 2719(b)(1)(A) (requiring the Secretary to determine whether "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community"); Dept. of Interior and Related Agencies Appropriations Act of 2001, § 134, Pub. L. 107-63, 115 Stat. 414 (clarifying that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988.").

The cases cited by Plaintiff offer no support for the assertion that the Secretary's authority to interpret IGRA is somehow limited to actions that the Secretary takes under other authorities. Pl.'s Mem. at 29. To the contrary, Citizens Exposing Truth About Casinos v. Kempthorne, determined that the Secretary is entitled to Chevron deference in interpreting IGRA's "initial reservation" exception. 492 F.3d 460, 465, 471 (D.C. Cir. 2007). Plaintiff, like the state of Oregon, "argues that the lack of a specific delegation of authority to interpret the term 'restoration of lands' implies congressional intent to withhold such authority from the Secretary." Oregon v. Norton, 271 F. Supp. 2d 1270, 1277 (D. Or. 2003). Norton rejected this argument, finding that "gaps," such as

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[3] Assuming, arguendo, that the Secretary's "authority to interpret provisions of the IGRA arises from the Secretary's obligations under the IRA, ILCA, and their implementing regulations" it is difficult to see how this prevents the Secretary from promulgating regulations interpreting IGRA. See Pl.'s Mem. at 29. Plaintiff would, curiously, apparently endorse *ad hoc* interpretations of IGRA as long as they are untethered to any formal definition or standard.

the ambiguous "restored lands" exception "in statutory language are wholly consistent with the routine delegation of powers granted to agencies which have considerable and specialized expertise." Id. As the Secretary possesses sweeping authority, including the authority to interpret IGRA, "the Secretary possesses the authority to interpret the meaning of 'restore' and 'restoration of lands,' [and therefore] the court must defer to her interpretation unless it is unreasonable." Id. at 1278 (citing Chevron, 467 U.S. at 844). Significantly, the court noted that "the Supreme Court held that the application of Chevron deference depends on the extent of the authority delegated by Congress rather than the categorization of the decision-making process." Id. at 1278 n. 5. Plaintiff is also incorrect that Norton limits the Secretary's authority to interpret IGRA to situations where the Secretary is taking land into trust under other statutes. Norton addressed "whether a parcel of land **held in trust** for [the tribe] may be considered land restored to the Tribe and thus eligible for gaming under the" IGRA. 271 F. Supp. 2d at 1271-1272 (emphasis added). Norton is consistent only with an interpretation of IGRA that vests the Secretary with authority to interpret the statute by promulgating regulations regarding Section 2719.

"When Chevron deference is owed, Chevron's demands are clear. If the statutory text is ambiguous, an agency is given the discretion to promulgate rules that interpret the ambiguous provisions." Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 168 (3rd Cir. 2008). Cf., Mead Corp., 533 U.S. at 230 ("[T]he overwhelming number of our cases applying Chevron deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). The authority Section 2719 provides to the Secretary, and the Chevron deference accorded to his interpretation of Section 2719's gaps, dictates that the Secretary possesses the authority to promulgate regulations concerning Section 2719.

Plaintiff's claim that the Secretary lacks the authority to promulgate regulations under Section 2719 because courts have expressed reluctance to delegate rulemaking authority to both NIGC and the Secretary is likewise without merit. Pl.'s Mem. at 25 (citing Texas v. United States, 497 F.3d 491 (5th Cir. 2007) and Colo. River Indian Tribes v. NIGC ("CRIT"), 466 F.3d 134 (D.C. Cir. 2006)). Texas is unavailing because, among other things, it addressed a narrower grant of statutory authority than the one provided in Section 2719. 497 F.3d at 500 ("IGRA permits limited

secretarial intervention only as a last resort, and only after the statute's judicial remedial procedures have been exhausted."). Section 2719 instead calls for the broad exercise of Secretarial authority to implement ambiguous terms such as "restoration of lands" and to make determinations regarding the potential benefits and harms that might be caused by a gaming proposal. 25 U.S.C. §§ 2719(b)(1)(A) and (2)(B)(ii). Regardless, the Ninth Circuit determined that the section of IGRA that was at issue in Texas authorizes the Secretary to "address the problem [in negotiating gaming compacts posed by states' sovereign immunity] **by regulation**." Spokane Tribe, 139 F.3d at 1301 (emphasis added). CRIT's determination that the NIGC's regulation of class III minimum internal control standards exceeded its authority provides even less support for Plaintiff's argument that the Secretary lacks rulemaking authority. 466 F.3d at 137-8. Notably, the court based its conclusion, in part, on "the fact that the Secretary of the Interior - rather than the Commission - approves (or disapproves) tribal-state compacts regulating class III gaming." Id. at 138. Therefore, CRIT does not indicate that the Secretary lacks the authority to promulgate regulations such as those concerning Section 2719. Both Texas and CRIT are consistent with the rule that, even where Congress has only implicitly delegated the power to administer a congressionally-created program, agencies may make rules to fill gaps in the statute. See Chevron, 467 U.S. at 843-844; United States v. Eberhardt, 789 F.2d 1354, 1361 (9th Cir. 1986) ("Congress must be assumed to have given Interior reasonable power to discharge its broad responsibilities for the management of Indian affairs effectively.").

Plaintiff is correct that 25 U.S.C. §§ 2 and 9 should be interpreted along with IGRA to determine whether the Secretary possessed the authority to promulgate the challenged regulations. Pl.'s Mem. at 27. But instead of prohibiting the Secretary from promulgating regulations, 25 U.S.C. § 2719 works in conjunction with the Secretary's general authorities to vest the Secretary with authority to promulgate the challenged regulations. The cases Plaintiff relies upon actually support the proposition that Sections 2 and 9, along with another statute that provides the Secretary with a specific duty or authority, provide the Secretary with authority to promulgate regulations. See Pl.'s Mem. at 27; N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 748-9 (10th Cir. 1987) (Sections 2 and 9, along with a "Treaty [that] does not expressly mention hunting or fishing rights" provides authority to issue regulations relating to hunting and fishing); Santa Rosa Band of Indians v. Kings Cnty., 532

F.2d 655, 665 (9th Cir. 1975) (Indian Reorganization Act, "which authorizes the Secretary to purchase land for the 'purpose of providing land for Indians' and to take the title to such lands in trust," along with Sections 2 and 9, provides authority to promulgate regulations).

As discussed above, the Secretary possesses the authority and responsibility to interpret 25 U.S.C. § 2719. This case is therefore similar to Eberhart, where the Ninth Circuit held that Sections 2 and 9 generally authorized Interior to issue fishing regulations, even "in the absence of specific legislation giving Interior authority to regulate Indian fishing." 789 F.2d at 1360.[4] 25 U.S.C. §§ 2 and 9, when considered in conjunction with IGRA, provide the Secretary with the authority to promulgate the regulations at issue.

II. The Secretary's 25 C.F.R. Part 292 Regulations, Particularly the Regulations Implementing the "Restored Lands" Exception, Should be Upheld Because they Interpret 25 U.S.C. § 2719 in a Permissible Manner.

Under the first step in Chevron, a court should determine whether "Congress has directly spoken to the precise question at issue." 467 U.S. at 842-43. Plaintiff argues that the Secretary's regulations implementing IGRA's "restored lands" exception are contrary to the unambiguous language of the exception. As discussed below, the "restored lands" exception is ambiguous. Moreover, the challenged regulations do not implement the exception in an impermissible manner.

Because Congress did not specifically address the scope of the "restored lands" exception, the court "must respect the agency's construction of the statute so long as it is permissible." Brown & Williamson Tobacco Corp., 529 U.S. at 132. Under this second step in the Chevron analysis, "[t]he sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.'" Mayo Found., 131 S. Ct. at 712 (citing Chevron, 467 U.S. at 843). See also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (citing Chevron, 467 U.S. at 844) (court may reverse an agency's construction of a statute only if it is "arbitrary,

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[4] In Organized Vill. of Kake v. Egan, 369 U.S. 60, 69 (1962), the Supreme Court found that the Secretary lacked authority to promulgate regulations that were inconsistent with other statutes. In contrast, and as recognized by the Ninth Circuit, in Kake's companion case of Metlakatla Indian Cmty. v. Egan, 369 U.S. 45 (1962), the Court found that Sections 2 and 9, in conjunction with "the 1891 Act establishing the Metlakatla Reservation, to be used by the Indians 'under such rules and regulations * * * as may be prescribed' by Interior, might provide authority for the fishing regulations." Eberhardt, 789 F.2d at 1360 (citation omitted).

capricious, or manifestly contrary to the statute.").

A. IGRA's "restored Lands" exception is ambiguous.

The Secretary had the authority to promulgate the challenged regulations because IGRA's "restored lands" exception is ambiguous. Defs.' Mem. at 19-21. Plaintiff's memorandum contends that the regulations are void because they interpret IGRA's exceptions, particularly the "restored lands" exception, in an impermissible manner. Plaintiff's misapplication of IGRA appears to flow in part from its mistaken assumption that IGRA's "restored lands" exception is unambiguous. Pl.'s Mem. at 6-19. Plaintiff is correct that courts must "give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 843. However, as discussed below, the"restored lands" exception is ambiguous.

IGRA's "restored lands" exception allows gaming on lands acquired in trust after October 17, 1988 if those lands are 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). "[N]o statutory provision defines the terms 'restore' or 'restoration of lands' and no provision expressly limits the Secretary's authority to interpret these terms." Norton, 271 F. Supp. 2d at 1277. Therefore, the statutory language is ambiguous, and a court "may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" Mayo Found., 131 S. Ct. at 711.

Plaintiff's claim that the "restored lands" exception is unambiguous is based upon a misapplication of Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y. for W. Dist. of Mich., 198 F. Supp. 2d 920 (W.D. Mich. 2002); Pl.'s Mem. at 14-16. In Grand Traverse, the court interpreted two subsections of 25 U.S.C. § 2719 (b)(1)(B), the "restored lands" and "initial reservation" exceptions. The latter provides that IGRA's general prohibition on gaming does not apply to lands taken into trust as part of "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). Michigan argued that a tribe could qualify for the "initial reservation" exception only if it was "acknowledged by the Secretary." Grand Traverse, 198 F. Supp. 2d at 929. Michigan also argued that a tribe could qualify for the "restored lands" exception only if it was restored "by way of Congressional action, not by agency acknowledgment." Id. Under Michigan's interpretation, "[b]ecause the Band

uncontestedly was acknowledged by the Secretary under subsection (B)(ii), . . . it may not be considered restored under subsection (B)(iii)." Id. The court rejected this argument, determining that the "plain meaning" of the terms "restored" and "restoration" do not limit the process to Congressional actions. Id. Grand Traverse therefore stands for the proposition that the "restored lands" exception does not bar a tribe that was acknowledged by the Secretary, rather than through Congressional action, from taking advantage of the "restored lands" exception under certain circumstances. Grand Traverse does not establish that the "restored lands" exception is unambiguous with respect to any issue that is material to Plaintiff's claims.

To the contrary, the cases Plaintiff cites establish that the "restored lands" exception is ambiguous. A phrase is ambiguous if it "is susceptible of multiple interpretations." Vega v. Holder, 611 F.3d 1168, 1170 (9th Cir. 2010). The Court in Grand Traverse found that the "restored lands" exception is susceptible to many interpretations with respect to the critical issue in this case:

> 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. For example, land that could be considered part of such restoration might appropriately be limited by the . . . temporal relationship of the acquisition to the tribal restoration.

Grand Traverse, 198 F. Supp. 2d at 935 (emphasis added). Likewise, Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt ("Confederated Tribes"), determined that "[t]he varying possibilities [of interpreting the "restored lands" exception] highlight the ambiguity of section 2719(b)(1)(B)(iii)." 116 F. Supp. 2d 155, 162 (D.D.C. 2000).

At a minimum, the "restored lands" exception is ambiguous with respect to the limitations that may be placed upon a tribe's ability to exercise the exception. Therefore, the sole question for the Court is whether the limitations imposed by the regulations at issue reflect a permissible construction of the statute. Mayo Found., 131 S. Ct. at 712. See also, Norton, 271 F. Supp. 2d at 1277 ("I find the statutory language ambiguous and turn to the question of whether the Secretary's interpretation is based on a permissible construction of the statute.").

B. The challenged regulations give effect to both IGRA's "restored lands" and "last recognized reservation" exceptions.

As discussed in Defendants' memorandum, the challenged regulations permissibly interpret

IGRA's "restored lands" exception. Defs.' Mem. at 21-23. Plaintiff appears to argue that IGRA unambiguously mandates that exceptions to its general prohibition on gaming be interpreted in a manner that avoids rendering the exceptions "mutually exclusive." See Pl.'s Mem. at 13-19. It is irrelevant whether Plaintiff is correct that the Congress unambiguously expressed an intent to prohibit the exceptions from being interpreted in a mutually exclusive manner. As discussed below, the challenged regulations do not interpret the exceptions in such a manner. Therefore, even under Plaintiff's interpretation of IGRA, the challenged regulations interpret the interplay between the multiple exceptions to IGRA's general prohibition on gaming in a permissible manner.

Plaintiff is simply incorrect that Interior's regulations render the exceptions to IGRA that are at issue in this case "mutually exclusive." Plaintiff requested that Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust under IGRA's "restored lands" exception. See Administrative Record ("AR") 6151. Plaintiff's letters in support of its application set forth Plaintiff's theory that Plaintiff's current gaming facility is supported under 25 U.S.C. § 2719(a)(2)(B), IGRA's "last recognized reservation" exception. See Pl.'s Mem. at 13 (citing AR6095). Plaintiff's argument that Interior's regulations implementing the "restored lands" exception are invalid hinges upon Plaintiff's conclusion that Interior interpreted IGRA's "restored lands" and "last recognized reservation" exceptions in a manner that renders the exceptions "mutually exclusive." Pl.'s Mem. at 18-19. Plaintiff contends that Interior's regulations render these two exceptions mutually exclusive because they prohibit a tribe from having land taken into trust for gaming purposes under both exceptions. Pl.'s Mem. at 13-14 (claiming that the regulations "prohibit[] the Tribe from having land taken into trust for gaming purposes under both the ["last recognized reservation"] Exception and the . . . Restored Lands Exception."). Plaintiff's argument fails because Interior's regulations do not prohibit a tribe from taking advantage of both exceptions.

25 C.F.R. § 292.4, which implements the "last recognized reservation" exception does not bar a tribe that has used the "restored lands" exception from having additional land taken into trust:

> For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.
>
> (a) If the tribe had a reservation on October 17, 1988, the lands must be located

> within or contiguous to the boundaries of the reservation.
>
> (b) If the tribe had no reservation on October 17, 1988, the lands must be either:
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> * * *
>
> (2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

25 C.F.R. § 292.4. Significantly, Section 292.4 does not reference, much less condition gaming upon, whether a tribe previously had land taken into trust for gaming under the "restored lands" exception. Therefore, a tribe could rely on 25 C.F.R. § 292.12(c)(1) as the basis for its first land-into-trust application without restricting its ability to subsequently have land taken into trust under the "last recognized reservation" exception. The exceptions are therefore not mutually exclusive.

It is therefore irrelevant whether Grand Traverse, or any of the other cases relied upon by Plaintiff, established that IGRA unambiguously prohibits its exceptions from being interpreted as "mutually exclusive." Cf., Pl.'s Mem. at 18-19. As discussed above, in Grand Traverse, the court rejected Michigan's argument that "[b]ecause the Band uncontestedly was acknowledged by the Secretary under subsection (B)(ii), . . . it may not be considered restored under subsection (B)(iii)." Grand Traverse, 198 F. Supp. 2d at 929. Michigan's interpretation of the "initial reservation" and "restored lands" exception would have rendered those exceptions mutually exclusive. As the challenged regulations do not render the "last recognized reservation" and "restored lands" exceptions mutually exclusive, Grand Traverse cannot be read to preclude Interior's interpretation of the "restored lands" exception.[5]

It merits noting that the other cases Plaintiff cites do not support its argument that Interior must not interpret IGRA's exceptions in a manner that renders the exceptions "mutually exclusive." The cases suggest that Interior should interpret the exceptions in a manner that gives each exception independent meaning. See Pl.'s Mem. at 16-17 (citing to Confederated Tribes's application of the

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[5] The regulations also do "not limit restoration of land to one parcel of land or one request to have land taken into trust." Contra Pl.'s Mem. at 16. The regulations allow for a tribe to have land taken into trust for gaming even after it has made multiple requests for land to be taken into trust as part of its restoration. 25 C.F.R. § 292.12(c)(2) (tribe can establish temporal connection by showing that it "submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands").

canon of construction providing that each provision of a statute be interpreted, if possible, to "have independent bite." 116 F. Supp. 2d at 163-64). Likewise, Plaintiff's citation to Roseville indicates that interpretations of IGRA generally should not leave any provision of IGRA "bereft of meaning." Pl.'s Mem. at 17-18 (citing City of Roseville v. Norton, 348 F.3d 1020, 1028 (D.C. Cir. 2003)).[6] Accord Grand Traverse, 198 F. Supp. 2d at 930 (courts should "interpret statutes as a whole and avoid constructions that would render words or provisions superfluous or meaningless."). Interior's regulations satisfy this test as well. 25 C.F.R. §§ 292.4 and 292.12(c) implement the "restored lands" and "last recognized reservation" exceptions in a manner that renders each exception meaningful. For example, a tribe could use the "restored lands" exception to have land outside of the tribe's last recognized reservation exception taken into trust. 25 C.F.R. § 292.12(c). Additionally, a tribe could use the "last recognized reservation" exception to have gaming land taken into trust that does not qualify for the "restored lands" exception. The regulations therefore implement the two provisions in a manner that vests each exception with independent meaning.

The regulations interpreting IGRA's "restored lands" and "last recognized reservation" exceptions both (1) interpret each exception to give it independent meaning and (2) allow a tribe to satisfy both exceptions under appropriate circumstances. As discussed below, the regulations interpret the "restored lands" exception in a permissible manner that provides tribes with the opportunity to use the exceptions to IGRA in a manner that places recently restored tribes in a comparable position to tribes that were recognized long before the passage of IGRA.

C. The absence of explicit statutory limitations upon the "restored lands" exception's scope vests Interior with discretion in promulgating regulations implementing the exception.

Plaintiff inappropriately seeks to restrict Interior's ability to interpret IGRA's "restored lands" exception. Plaintiff argues that the Secretary's regulations implementing the "restored lands" exception to IGRA should be invalidated because the regulations impose restrictions that are

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[6] Roseville did not address the interpretation of the "restored lands" exception at issue. 348 F.3d at 1025 ("[t]o the extent that the Secretary's interpretation of the 'restoration of lands' provision may include nuances regarding its application to Indian lands not acquired pursuant to a restoration act, the court has no occasion to reach the issue of deference to her interpretation").

"beyond the plain language of" IGRA's "restored lands" exception. Pl.'s Mem. at 7-8, 18. Imposing such a restriction on Interior's ability to promulgate regulations would be inconsistent with precedent applying IGRA prior to Interior's promulgation of the regulations at issue, including the very precedent relied upon by Plaintiff. Moreover, it would violate the analysis set forth in Chevron, 467 U.S. 837, and its progeny.

Plaintiff's suggestion that any restriction on a tribe's ability to have land taken into trust for gaming purposes is invalid unless explicitly set forth by statute is inconsistent with the cases Plaintiff cites. See Pl.'s Mem. at 8, 18. The "restored lands" exception contains no explicit temporal requirement. Yet, as Plaintiff recognizes, Grand Traverse nonetheless suggests that interpreting the exception to include a temporal requirement is appropriate. Pl.'s Mem. at 8-9. See Neb. ex rel. Bruning v. U.S. DOI, 625 F.3d 501, 510 (8th Cir. 2010) ("courts have articulated a three-factor test to determine whether a parcel was taken into trust as part of the restoration of land to a tribe; under this test, 'land that could be considered part of such restoration might appropriately be limited by . . . **the temporal relationship of the acquisition to the tribal restoration**.'") (citing Grand Traverse, 198 F. Supp. 2d at 935) (emphasis added). Accordingly, Interior's regulations implementing the ambiguous "restored lands" exception are not invalid because they provide a framework for applying the exception that goes beyond the words of the exception.

Because the "restored lands" exception is ambiguous, Congress "impliedly left to the agency the task of developing standards to carry out the general policy of the statute." Norton, 271 F. Supp. 2d at 1277 (citation omitted). Therefore, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. (quotation omitted); Mayo Found., 131 S. Ct. at 712 ("The sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.'") (citation omitted). As the "restored lands exception" contains an "implicit delegation of authority to the Secretary to provide meaning to the terms 'restore' and 'restoration' of lands," it was reasonable for the Secretary to promulgate regulations interpreting those terms. Norton, 271 F. Supp. 2d at 1278.

D. The challenged regulations should be upheld, regardless of whether they are inconsistent with prior judicial and agency interpretations of IGRA, because they represent a permissible interpretation of IGRA.

Interior may change its interpretation of a statute. Nat'l Cable & Telecommc'n Ass'n v. Brand X Internet Servs., ("Nat'l Cable") 545 U.S. 967, 981 (2005) ("An initial agency interpretation is not instantly carved in stone.") (citation omitted). Likewise, Interior may adopt an interpretation of a statute that conflicts with prior judicial opinions. Id. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). The challenged regulations should be upheld, regardless of whether they conflict with judicial or agency opinions issued prior to their promulgation, because they constitute a permissible interpretation of IGRA.

Plaintiff asserts that the challenged regulations must be overturned if they are inconsistent with judicial opinions issued before the regulations were promulgated. Pl.'s Mem. at 19. But the precedent relied upon by Plaintiff is consistent with the well-established rule that, even prior to formal notice and comment rulemaking, an agency's interpretation of a statute it administers is entitled to deference. Grand Traverse, 198 F. Supp. 2d at 927 (stating, prior to deferring to NIGC's interpretation of the "restored lands" exception, that "because the NIGC did not employ formal adjudicatory procedures, the NIGC's determination is not entitled to the level of deference set forth in Chevron . . . Nevertheless, 'the well reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (citations omitted). Norton, 271 F. Supp. 2d at 1278 ("Having found that the Secretary possesses the authority to interpret the meaning of 'restore' and 'restoration of lands,' the court must defer to her interpretation unless it is unreasonable."); City of Roseville v. Norton, 219 F. Supp. 2d 130, 162 (D.D.C. 2002) (applying less deferential standard to agency's legal opinion under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), aff'd by Roseville, 348 F.3d at 1025. Plaintiff again misinterprets the standard of review for evaluating an agency's regulations.

As discussed above, IGRA's "restored lands" exception is ambiguous. "[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. Chevron's premise is that it is for agencies, not courts, to fill statutory gaps." Nat'l Cable, 545 U.S. at 982. Therefore, courts should:

> hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

Id. at 982-983.[7] The cases Plaintiff relies upon do not unambiguously foreclose Interior's interpretation of the "restored lands" exception.

As discussed above, Interior's regulations implementing the "restored lands" and "last recognized reservation" exceptions do not render the exceptions mutually exclusive. It is unquestionably permissible to impose conditions, including a temporal requirement, upon a tribe's ability to rely on "restored lands" exception. See Grand Traverse, 198 F. Supp. 2d at 935; Norton, 271 F. Supp. 2d at 1274. And it is irrelevant whether any other interpretation of the exception would also be appropriate. Cf., Pl.'s Mem. at 17 (arguing that Plaintiff's interpretation is "appropriate" or "more plausible"). Simply put, the opinions interpreting 25 U.S.C. § 2719 prior to the promulgation of the challenged regulations do not unambiguously foreclose the regulations.

Plaintiff's contention that the challenged regulations are invalid because they depart from prior agency interpretation is similarly meritless. Nat'l Cable, 545 U.S. at 981; Chevron, 467 U.S. at 863-4 ("that the agency has . . . changed its interpretation of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). That an agency may modify its interpretation of a statute is commanded by the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"), as an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-864. "That is no doubt why in Chevron itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy." Nat'l Cable, 545 U.S. at 981-982.

In fact, the Supreme Court recently clarified that an agency regulation that departs from prior agency interpretation is subject to the same standard of review as any regulation. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1810 (2009) ("We find no basis . . . for a requirement that all agency

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[7] Plaintiff's suggestion that this court should apply the doctrine of *stare decisis*, Pl.'s Mem. at 19, is inappropriate because the opinions Plaintiff cites were issued by neither the Supreme Court nor the Ninth Circuit. Hart v. Massanari, 266 F.3d 1155, 1171, 1176 (9th Cir. 2001).

change be subjected to more searching review. The [APA] mentions no such heightened standard. And our opinion in State Farm neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."). Agencies do not need to "make clear 'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive'" as well as 'why the new rule effectuates the statute as well as or better than the old rule.'" Id. (citation omitted). Therefore, the fact that the challenged regulations deviate from prior agency interpretation of the "restored lands" exception provides no independent basis for overturning the regulations.[8]

A "'court is not to substitute its judgment for that of the agency,' . . . and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,'" Fox TV Stations, Inc., 129 S. Ct. at 1810 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)). See also Providence Yakima Med. Ctr. v. Sebelius, 611 F.3d 1181, 1190 (9th Cir. 2010). "Where [an] agency's line-drawing does not appear irrational and the party challenging

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[8] Plaintiff's request regarding the Strawberry Fields and Adjacent 80 Acres properties may have failed under the less clearly-defined framework for applying IGRA's "restored lands" exception that existed prior to the challenged regulations. See, e.g., Mechoopda Indian Lands Opinion, at 12 (Mar. 14, 2003) ("nine-year gap between the Tribe's restoration and the land's acquisition is a sufficient 'temporal relationship' to establish lands as 'restored.' More importantly, the acquisition of the parcel was the first (with the exception of the unusable almond orchard) for this restored tribe") (Exhibit A); NIGC Final Decision and Order, In re: Wyandotte Nation Amended Gaming Ordinance, at 12-14 (Sept. 10, 2004) (property acquired eighteen years after tribe's restoration did not meet temporal connection where Tribe acquired three other parcels within one and six years of restoration) (Exhibit B); Mem. from P. Coleman, NIGC, to P. Hogen, NIGC, regarding Sault Ste. Marie Tribe of Chippewa Indians, at 15-16 (July 31, 2006) (determining tribe did not meet Grand Traverse's temporal test and noting that "newly restored tribes have been very conscious of how the IGRA's limitations on after-acquired land will impact their first acquisitions of trust or reservation land") (Exhibit C); Letter from P. Coleman, NIGC, to J. Barnett, Cowlitz Indian Tribe, at 16 (Nov. 23, 2005) (temporal requirement met where tribe submitted application "on the very same day that" it was acknowledged and"acquisition would be the first trust acquisition made for the" tribe) (Exhibit D); Mem. regarding Elk Valley Lands Determination from K. Arha, Interior, to C. Artman, Interior, at 9 (July 13, 2007) ("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.") (Exhibit E). Cf., Pl.'s Mem. at 21 n. 10, 22 (failing to note that Elk Valley Rancheria possessed no trust land at the time of its application, but was gaming on land held in trust by a tribal member).

the agency action has not shown that the consequences of the line-drawing are in any respect dire, courts will leave that line-drawing to the agency's discretion." Id.(citation omitted).

Interior articulated a sufficient basis for adopting the regulations implementing IGRA's "restored lands" exception. Plaintiff's assertion that "[t]he Secretary failed to provide any explanation for adopting the Regulations" is meritless. See Pl.'s Mem. at 23. To the contrary, the regulations' twenty-one page preamble explicitly addressed the Secretary's basis for adopting the regulations. Gaming on Trust Lands Acquired after Oct. 17, 1988, 73 Fed. Reg. 29,354-74 (May 20, 2008). For example, the Secretary explicitly addressed Grand Traverse and explained his addition of a "modern connection" test to the factors applicable to the "restored lands" exception. 73 Fed. Reg. at 29,365 ("The modern connection test remains in the final regulations because it offers a mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency, both of which are reflected in IGRA."). The Secretary likewise adopted 25 C.F.R. § 292.12's temporal connection test because "the temporal limitation effectuates IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the surrounding community." 73 Fed. Reg. at 29,367. The Secretary relied upon agency expertise and experience in balancing these competing interests to select the specific criteria at issue. Id. ("the 25 year number [in 25 C.F.R. § 292.12(c)(2)] is both a practical and reasonable number based on the Department's experience under section 2719"). The temporal connection requirements challenged by Plaintiff provide tribes with two paths to acquire lands under the "restored lands" exception, but place temporal limits on the tribes' ability to use the exception. 25 C.F.R. § 292.12.[9] At a minimum, it can be reasonably discerned, based upon the preamble to the regulations, that the Secretary adopted these regulations to provide tribes with multiple paths to improving their economic situation without prejudicing nearby tribes.

The Secretary's interpretation of the "restored lands" exception to include the temporal connection requirements set forth in the challenged regulations constitutes a permissible

[9] Plaintiff is incorrect that Section 292.12(c)(1) "forces a restored tribe to make gaming its first priority after restoration." Pl.'s Mem. at 9. Section 292.12(c)(2) allows a tribe to have land taken into trust for gaming purposes up to twenty-five years after its restoration.

interpretation of an ambiguous statute. Accordingly, the challenged regulations are neither arbitrary nor capricious. See Chevron, 467 U.S. at 844; Mayo Found., 131 S. Ct. at 715 (deferring to regulation based, in part, upon agency's conclusion that the regulation would promote administrability and certainty).

III. Interior's Denial of Plaintiff's Application Should Be Upheld Because Interior Considered, and Reasonably Rejected, Plaintiff's Arguments.

Defendants properly considered the arguments made by Plaintiff in support of its request to game on the Strawberry Fields and Adjacent 80 Acres properties. In order to qualify for the "restored lands" exception under 25 C.F.R. § 292.12(c)(1) - the exception relied upon by Plaintiff - a tribe must establish that the land it seeks to have taken into trust "is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition." 25 C.F.R. § 292.12(c)(1). Plaintiff does not challenge the Secretary's interpretation of the plain language of Section 292.12(c)(1), under which the Secretary determined that "[i]n order to qualify under Section 292.12(c)(1), the Parcels [that Plaintiff sought to have taken into trust for gaming] must have been included in the Tribe's first request for newly acquired lands since the Tribe was restored to Federal recognition." Decision Document ("Dec. Doc.") at 7 (AR5411); Pl.'s Mem. at 9. Instead, Plaintiff argues that its first three post-restoration applications requesting that Interior take land into trust were not requests for newly acquired lands under IGRA's "restored lands" exception. Pl.'s Mem. at 30-34. As discussed below, the Secretary considered and addressed Plaintiff's arguments, and reasonably determined that Plaintiff's application relating to the Strawberry Fields and Adjacent 80 Acres properties was not Plaintiff's first post-restoration request for newly acquired lands.

Plaintiff asserts that Interior's application of 25 C.F.R. § 292.12(c)(1) violated the APA because Interior refused to consider two arguments in support of its request. Pl.'s Mem. at 32-33. Plaintiff's first argument is that its acquisition of approximately 8.5 acres of land for gaming purposes in 1992 should not bar its request that Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust because the tribe could game on the land acquired in 1992 under the "on reservation" exception set forth at 25 U.S.C. § 2719(a)(1). Compl. ¶¶ 38-48; Pl.'s Mem. at 30-31. Plaintiff's second argument is that two land-into-trust applications that it submitted between 1995

and 2000 were not requests to take land into trust because Interior was allegedly required to take the land into trust under the stipulation of settlement in Hardwick v. United States, Case No. C-79-1710 (N.D. Cal. Dec. 22, 1983) (AR6240-53). Id. at 31-32.

Plaintiff essentially admits that its argument regarding Interior's alleged failure to consider Plaintiff's submissions is without merit by agreeing with Defendants' interpretation of the regulations implementing the "restored lands" exception - an interpretation that bars the application of the exception to the Strawberry Fields and Adjacent 80 Acres properties. Plaintiff acknowledges that 25 C.F.R. §§ 292.2 and 292.12(c)(1) control whether Plaintiff's request relating to the Strawberry Fields and Adjacent 80 Acres qualifies as Plaintiff's first post-restoration request to take land into trust. Pl.'s Mem. at 9. Significantly, Plaintiff admits that under the plain meaning of these two provisions a tribe's request to have land taken into trust constitutes a "request for newly acquired lands" even if the land is not taken into trust for gaming purposes. Id. Plaintiff is essentially correct that Section 292.12(c)(1) creates a bright-line rule restricting a tribe's use of the "restored lands" exception to a "tribe's first request for newly acquired lands since the tribe was restored to Federal recognition" regardless of whether the tribe might have other lands taken into trust under other exceptions to IGRA. See id.[10] Under Plaintiff's own interpretation of the regulations, its three prior post-restoration trust acquisitions barred its application to have the Strawberry Fields and Adjacent 80 Acres properties taken into trust under 25 C.F.R. § 292.12(c)(1).

Regardless, the decision document establishes that Interior reasonably interpreted the regulations implementing IGRA's "restored lands" application. Plaintiff bases its claim that Interior ignored its arguments on a citation to Interior's decision document. Pl.'s Mem. at 32. Plaintiff's citation to the decision document omits two significant portions of Interior's analysis:

> **In order to qualify under Section 292.12(c)(1), the Parcels must have been included in the Tribe's first request for newly acquired lands since the Tribe was restored to Federal recognition. The regulations define the term "newly**

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[10] As discussed above, Plaintiff is incorrect that the "restored lands" exception bars a tribe from relying on the "last recognized reservation" exception after having lands restored under Section 292.12(c)(1). Moreover, Plaintiff is incorrect that the "restored lands" exception limits a tribe to gaming on its first request to have land taken into trust. See 25 C.F.R. § 292.12(c)(2).

> **acquired lands" to mean, "land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988. 25 C.F.R. § 292.2.[12]**
> The Tribe asserts that the trust-to-trust transfers giving the Tribe its first trust holdings in 1992 should not be considered newly acquired land, as the land was already held by the Secretary in trust before October 17, 1988. I do not have to reach that issue. As detailed in the Background section, after the Tribe received its trust-to-trust transfers, the Tribe made two requests for fee-to-trust acquisitions that predate its request relating to the Strawberry Fields Property. Whether we consider the Tribe's first request for newly acquired lands to be the trust-to-trust **transfers or the subsequent fee-to-trust requests**, it is evident that the subject Parcels were not included in either of those requests. Therefore, the Parcels were not "included in the [T]ribe's first request for newly acquired lands since the [T]ribe was restored to Federal recognition" and they cannot meet the standard in 25 C.F.R. § 292.12(c)(1).
>
> **[12] Contrary to the Tribe's arguments, the definition of "newly acquired lands" is not limited to trust lands acquired for gaming purposes or trust lands acquired off reservation.**

Id. (quoting Dec. Doc. at 7) (AR5411) (Plaintiff's omissions in bold). The decision document addressed the key issue - the impact of Plaintiff's two trust applications between 1995 and 2000 - in a simple and straightforward manner. Interior determined that Plaintiff's application relating to the Strawberry Fields and Adjacent 80 Acres properties was not Plaintiff's first post-restoration request for newly acquired lands because the properties were not included in Plaintiff's two prior "fee-to-trust" requests. Dec. Doc. at 1-2, 7 (AR5405-6, 11). The portions of the decision document omitted by Plaintiff establish that Interior considered and addressed Plaintiff's arguments in support of its request to have Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust.

Plaintiff's reliance on Butte County v. Hogen, 613 F.3d 190 (D.C. Cir. 2010), is misplaced, as Interior did not refuse to consider Plaintiff's arguments.[11] In Butte County, the NIGC issued an opinion in 2003, with the concurrence of Interior's Solicitor's Office, that land could be taken into trust for the Mechoopda Tribe under the "restored lands" exception. Id. at 193. In 2006, Butte County "wrote to the Secretary to dispute [the NIGC's] opinion" and provided an expert report in

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[11] The AR "consists of all documents and materials directly or indirectly considered by the agency." Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993). Courts "assume that an 'agency properly designated the Administrative Record absent clear evidence to the contrary.'" Cook Inletkeeper v. United States EPA, 400 Fed. Appx. 239, 240 (9th Cir. 2010) (citing Bar MK Ranches, 994 F.2d at 740). The letters Plaintiff relies upon are contained in the AR. Pl.'s Mem. at 30-32 (citing AR6080-6; AR6093-120; AR6150-7; AR6812-5). To the extent that this issue is relevant, Plaintiff must rebut the presumption that Interior considered Plaintiff's letters.

support of its argument that the land at issue should not be considered "restored lands." Id. Interior *declined* to consider the report, stating that Interior was "not inclined to revisit [the NIGC's 2003] decision now because the Office of the Solicitor reviewed this matter in 2003, and concurred [with] NIGC." Id. at 193-94. Butte County is inapposite for two reasons. Whereas Interior provided no additional response regarding the Butte County report, it provided Redding with an eight-page decision document setting forth the grounds for its denial of Plaintiff's request. Id. at 194. And Interior did not "refus[e] to consider evidence bearing on" whether Plaintiff's first three land-into-trust applications constituted requests for newly acquired lands. Id. To the contrary, Interior assumed that Plaintiff's statements regarding whether the lands previously taken into trust on Plaintiff's behalf were on Plaintiff's reservation was accurate. Dec. Doc. at 7 (AR5411).

It was reasonable for Interior to determine, based upon Plaintiff's trust applications between 1995 and 2000, that "the Tribe made two requests for fee-to-trust acquisitions that predate its request relating to the Strawberry Fields Property." Defs' Mem. at 5-6. At a minimum, Interior's "path may reasonably be discerned,'" Fox TV Stations, Inc., 129 S. Ct. at 1810. Plaintiff belatedly attempted to characterize its prior requests that Interior take lands into trust as something other than "requests" to avoid the plain language of Section 292.12(c)(1). AR6153. But Plaintiff itself referred to its prior requests to take land into trust as "requests." AR6123, 6126. Under Interior's simple and straightforward application of the regulations, the Strawberry Fields parcel was not the Tribe's first trust acquisition request because "the definition of 'newly acquired lands' is not limited to trust lands acquired for gaming purposes or trust lands acquired off reservation." Dec. Doc. at 7 n.12 (AR5411). Interior therefore reasonably determined that the properties at issue "were not 'included in the [T]ribe's first request for newly acquired lands since the [T]ribe was restored to Federal recognition.'" Id. at 7.

IV. Defendants' Objections to Plaintiff's Extra-record Declarations

Plaintiff filed four declarations offering alleged facts in support of its motion for summary judgment. See Doc. No. 18. Defendants object to the declarations and move the Court to strike them from the record in this case. The declarations should be excluded from consideration for two reasons. First, this is a case filed pursuant to the APA, and review of this matter is limited to the

AR compiled by Interior. Because the information offered in Plaintiff's declarations is outside the AR, it cannot be considered by the Court under the APA. Second, the declarations should be stricken from the record because they do not conform to the Federal Rules of Evidence ("FRE").

A Review in APA cases is limited to the administrative record

When a court reviews a final agency action pursuant to the APA's deferential standard of review, 5 U.S.C. §§ 701-706, it must generally look no further for evidence than the AR compiled by the agency and upon which the agency based its decision. The only relevant and admissible evidence in a case seeking judicial review of agency action is found within the AR. Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA, 499 F.3d 1108, 1114-15, (9th Cir. 2007) ("courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.") (citations omitted); Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).[12] Thus, in reviewing decisions based on the record before the agency, the district court is to function more like an appellate court than a trial court, and supplementation of the AR should not be allowed. Ranchers Cattlemen, 499 F.3d at 1115.

Agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). To determine whether an action is arbitrary and capricious, the Court's role is to review the AR and "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416. See Marsh, 490 U.S. at 378 (review under arbitrary and capricious standard is "searching and careful" but "the ultimate standard of review is a narrow one," and a court may not substitute its judgment for that of the agency). The

[12] Fla. Power & Light Co. also establishes that, "[i]f the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." 470 U.S. at 744. Plaintiff's motion, to the extent it seeks an order directing Interior to take the Strawberry Fields and Adjacent 80 Acres properties into trust, should therefore be rejected. See Plfs. Mem. at vii.

Court should review the AR only for the limited purpose of determining whether Interior's decision had any rational basis. See Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976). Consideration of external matters, such as declarations prepared during the course of subsequent litigation and extra-record documents, is normally not permitted.

Exceptions to review beyond the record are strictly limited and not applicable to this case. Ranchers Cattlemen, 499 F.3d at 1115 (setting forth four exceptions). The Ninth Circuit intends that the exceptions be strictly limited to the rare cases where one of the four grounds has been established. Otherwise, judicial review is confined to the AR. See id. Plaintiff (1) failed to file a motion for leave to supplement the AR and (2) has not even invoked any of the exceptions to the general prohibition on admitting extra-record materials. The submission of material that did not exist at the time of the decisions in this matter is especially troublesome because the decision-maker could not have reviewed declarations that were drafted after the decision was made. Because Plaintiff has neither claimed nor demonstrated that the extra-record material falls within any of the narrow exceptions to record review, the declarations should be excluded from consideration in reviewing Interior's decision in this matter. Animal Def. Council v. Hodel, 840 F.2d 1438 (9th Cir. 1988) (district court properly limited review to AR because plaintiff failed to demonstrate that evidence fell within any of the exceptions).

B. The declarations do not comply with the Federal Rules of Evidence.

Even if the Court were open to considering Plaintiff's extra-record information, significant parts of the declarations are inadmissible because they do not comply with the FRE. An elementary rule of motion practice is that evidence submitted to the Court by way of declaration must meet all requirements for admissibility of evidence, if offered at the time of trial. Fed.R.Civ.P. 56(e); N.D. Cal Civil L. R. 7-5(b); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 (9th Cir. 1989). This means that declarations, to be admissible, must:

> -- be made by witnesses having personal knowledge of the facts stated therein;
> -- state facts that would be admissible evidence (rather than hearsay statements or the declarant's opinions or conclusions); and,
> -- affirmatively show that the witness would be competent to testify at trial.

See Fed. R. Civ. P. 56(c)(4). Admissibility is determined under the FRE. Sarno v. Douglas Elliman-

Gibbons & Ives, Inc., 183 F.3d 155, 160 (2d Cir. 1999) (hearsay assertion that would not be admissible at trial is not competent material for a Rule 56 declaration).

The issues pending before this Court are those matters that are a part of the AR on file with the Court. Plaintiff's four declarations deal with alleged facts and opinions pertaining to the various declarants' personal experiences on the Rancheria and personal opinions, which are irrelevant to the decision the Court is being asked to make. Such irrelevant information is inadmissable and should be disregarded by the Court. FRE 401 and 402. To be admissible, a statement must be based on the declarant's personal knowledge, and the declaration must contain facts showing the declarant's personal connection with the matters stated therein, *establishing the source* of his or her information. It is *not enough* for the declarant to state that he or she has personal knowledge of the facts stated. FRE 602; United States v. Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999). The declarations contain conclusory statements without factual support and do not establish the source of the information provided. Such conclusory allegations are insufficient as evidence and are inadmissible. Nat'l Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997). Although the declarants state that they have "personal knowledge" of the statements in their declarations, they generally offer no statements as to the source of their information. Thus, statements are inadmissible and should be stricken because the declarants failed to establish the basis of any personal knowledge and competency to testify. See Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412 (9th Cir. 1995) (declarations entitled to "no weight" because declarant lacked personal knowledge).

The declarations are also inadmissible because they repeatedly offer the declarant's personal opinions. Under FRE 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Moreover, personal knowledge must be shown by the facts stated, namely they must be matters known to the declarant, personally, rather than matters of opinion. See Pahlavi, 58 F.3d at 1412. Throughout the declarations, the statements offered are speculative and/or matters of personal opinion. The declarant's proffered personal opinions and speculations are not evidence, are inadmissable, and should be stricken.

V. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants'

motion for summary judgment and deny Plaintiff's motion for summary judgment.

Respectfully submitted this 28th day of October, 2011.

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EXHIBIT A

MEMORANDUM

To: Chairman
From: Acting General Counsel

Subject: Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria

Date: March 14, 2003

The Mechoopda Indian Tribe of the Chico Rancheria (Tribe or Mechoopda) has a management contract pending before the National Indian Gaming Commission (NIGC). The Tribe also has a fee-to-trust application pending before the Department of Interior, Bureau of Indian Affairs (BIA) for land acquired by the Tribe after October 17, 1988. The Tribe proposes to conduct gaming on this land. The Indian Gaming Regulatory Act (IGRA) precludes gaming on trust land acquired after October 17, 1988, unless the land meets one of several statutory exemptions. 25 U.S.C. § 2719 (Section 2719). The Department of the Interior, Office of the Solicitor requested that the NIGC assume primary responsibility for an opinion as to whether the land in question, if taken into trust, would meet one of the statutory exemptions. The Tribe submitted documentation to support its claim that the land meets the "restored lands" exception. The Tribe's submission satisfies us that the land in question, should it be taken into trust, would fall within the "restored lands" exception to Section 2719's prohibition against gaming on trust land acquired after October 17, 1988.

Background

At issue is an approximately 645-acre parcel of land[1] (Chico parcel) located outside the Chico city limits in Butte County, California. The Tribe acquired the parcel in December 2001. The Tribe has a fee-to-trust application for this parcel pending before the BIA. The Chico parcel is approximately 10 miles from the Tribe's original Rancheria, which was located in what is now the center of the city of Chico, California.

1 The legal description of the land is as follows: All that certain real property situated in the County of Butte, State of California, described as follows: that part of the east half of the northeast quarter which lies northeasterly of Highway 99 and the Oroville Chico Road, in section 1, township 20 north, range 2 east, M.D.B. & M; and all that portion lying north and east of the northerly line of the Chico Oroville Road in section 6, township 20 north, range 3 east, M.D.B. & M; and the north half of the northwest quarter; and the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter in section 5, township north, range 3 east, M.D.B. & M.

EXHIBIT A

The Tribe submitted the following in support of its claim that the parcel in question was restored: Request for Indian Lands Determination, Dated March 26, 2002; Historical Use and Occupancy Report, Brian Biddy, Ethnographer/Historian, Dated May 9, 2002; Archeological Inventory of 640 Acres Located Near the Intersection of Highways 99 and 149, in Butte County, California, Jelmer W. Eerkens, Dated June 2002; Second Historical Use and Occupancy Report, Brian Biddy, Ethnographer/Historian, Dated July 26, 2002; Letter from Christina Kahze, Esq., Monteau and Peebles, to Maria Getoff, Esq., NIGC, Re: Supplemental Information Regarding Request for Mechoopda Indian Lands Determination, Dated November 8, 2002; and Letter from Christina Kahze, Esq., Monteau and Peebles, to Maria Getoff, Esq., NIGC, Re: Mechoopda Indian Tribe of the Chico Rancheria's Request for an Indian land Determination, Dated November 20, 2002.

Applicable Provisions of IGRA

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are "within such tribe's jurisdiction." 25 U.S.C. § 2710(b).

IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
> (B) *any lands* title to which is either *held in trust* by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and *over which an Indian tribe exercises governmental power* [emphasis added].

25 U.S.C. § 2703(4).

NIGC regulations further clarify the Indian lands definition:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either --
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Lands that do not qualify as Indian lands under IGRA generally are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The question whether a tribe "has jurisdiction" and "exercises governmental power" over land on which the tribe proposes to conduct gaming can arise under a variety of circumstances. *See, e.g., Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied,* 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National*

Indian Gaming Commission, 158 F.3d 1335 (D.C.Cir.1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1217-18 (D.Kan. 1998) (*Miami II*) (a tribe must have jurisdiction to exercise governmental power); *State ex rel. Graves v. United States*, 86 F. Supp.2d 1094, 1099 (D.Kan. 2000), *aff'd and remanded, Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan. 1996) (*Miami I*).

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

Fee-To-Trust Land Application

The Tribe proposes to conduct class III gaming on the parcel. The Tribe has a fee-to-trust application pending before the BIA. This opinion assumes that the BIA will take the land into trust for the benefit of the Tribe. This opinion cannot be relied upon if the land is not taken into trust.

Jurisdiction

Because the land at issue is off-reservation, the Tribe has the additional burden of establishing that it exercises "governmental power" over the parcel it intends to use for gaming purposes. *See* 25 C.F.R. § 502.12(b). "Tribal jurisdiction" is a threshold requirement to the exercise of governmental power. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir.1998) (In addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1217-18 (D.Kan.1998) (*Miami II*) (A tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan.1996) (*Miami I*) (the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D.Kan. 2000), *aff'd and remanded, Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994). As a threshold matter, we must analyze whether the Tribe possesses jurisdiction over the parcel.

As a general matter, tribes are presumed to possess tribal jurisdiction within "Indian country." *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The Supreme Court has stated that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Historically, the term "Indian country" has been used to identify land that is subject to the "primary jurisdiction . . . [of] the Federal Government and the Indian tribe inhabiting it." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). The U.S. Code defines "Indian country" as:

> (a) all land within the limits of any Indian reservation...,
> (b) all dependent Indian communities..., and
> (c) all Indian allotments, the Indian titles to which have not been extinguished....

18 U.S.C. § 1151. The *Venetie* court observed that Section 1151 reflects the two criteria the Supreme Court "previously . . . had held necessary for a finding of 'Indian country' ... first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527. Prior to the enactment of section 1151 in 1948, the Court had already found that reservation lands and allotments satisfied those requirements. *See, e.g., United States v. Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain Indian lands set apart for Indians under governmental care"); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). The *Venetie* court also observed that Congress used the term "dependent Indian communities" in Section 1151(b) to codify the Court's understanding, as expressed in *United States v. McGowan*, 302 U.S. 535 (1938), and *United States v. Sandoval*, 231 U.S. 28 (1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. *Venetie*, 522 U.S. at 530; *see, e.g., McGowan*, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); *Sandoval*, 231 U.S. at 45-49 (Pueblo Indian lands).

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

Here, consistent with these decisions, once the land is taken into trust for the benefit of the Tribe, the land will be "Indian country," within the meaning of section 1151. The land has been "validly set-aside for the tribe under the superintendence of the federal government." *United States v. McGowan*, 302 U.S. at 539, quoted in *Venetie*, 522 U.S. at 529.

It is unnecessary to decide whether the Tribe's land is more properly categorized as an informal reservation under section 1151(a) or as a dependent Indian community under section 1151(b) because, regardless of category, the property in this case, held by the United States in trust for the Tribe, would be Indian country. The Tribe's land comes within at least one of the three statutory categories, because the trust lands possess the two characteristics of Indian country reflected in section 1151. *See Venetie*, 522 U.S. at 527. Therefore, when the land is acquired into trust, it is Indian country, and we can conclude that the Tribe has jurisdiction over it.

Exercise of Governmental Authority

The Tribe must also have a present day exercise of governmental authority over the land. See 25 U.S.C. § 2703(4)(B); see also, *Narragansett Indian Tribe*, 19 F.3d at 703; *Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F. Supp. 523 (D.S.D. 1993), *aff'd* 3 f.3d 273 (8th Cir. 1993). Present day exercise of governmental authority cannot be established before the land is acquired into trust. The Tribe has submitted information indicating that, once the land is in trust, it will exercise governmental authority over the parcel through various environmental, zoning, trespass, law enforcement and other ordinances and programs. We can reasonably rely on the Tribe's representations and assume for the purposes of this opinion that the Tribe will exercise those authorities when the land is acquired into trust.

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

Even though a parcel may meet the definition of "Indian lands" under 25 U.S.C. § 2703(4), we must still determine whether the general gaming prohibition under IGRA would bar the Tribe from gaming on the trust land. Under Section 2719(a) of IGRA, gaming is prohibited on lands acquired by the Secretary of the Interior into trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within certain exceptions in 25 U.S.C. § 2719(b). Accordingly, we must review the exceptions to determine whether a tribe can conduct gaming on after-acquired trust lands.

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

"Restored" Tribe

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

The U.S. District Court for the Western District of Michigan recently addressed the definition of "restored" and "restoration" in *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920 (W.D. Mich. 2002). At issue was whether the Grand Traverse Band was a restored tribe and whether the parcel on which gaming was conducted was restored lands. The *Grand Traverse* court held that both "restore" and "restoration" should be given their ordinary meaning ("In no sense has a proprietary use of 'restore' or 'restoration' been shown to have occurred." *Id.* at 931). Applying the ordinary meaning of the words, the court concluded that the Band's history showed that the Band was in fact restored:

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

Grand Traverse Band at 933.

An examination of the pattern of Mechoopda's history shows that it is similar to the pattern in the case of Grand Traverse Band. The Mechoopda Indian village was originally established in what is now Butte County, California and the present-day city of Chico by General and Mrs. John Bidwell for their Indian employees. In 1849, General Bidwell purchased from William Dickey a Mexican land grant of more than 22,000 acres, known as the Rancho del Arroyo Chico. The Mechoopda Tribe occupied this land base. In 1851, the United States entered into a treaty with the Mechoopda, in which the Tribe was promised land approximately 20 miles long and 6 miles wide in exchange for relinquishing all claim to their former territory. This treaty, which was never ratified, was found in 1905 by Senate clerks. (Request for Indian Lands Determination, March 26, 2002, page 6)

Between 1909 and 1918, Mrs. Bidwell gave 26 acres, where the Mechoopda Indians were living, to the Board of Home Missions in trust for the Mechoopda Indians. In 1939, this land was conveyed to the United States in trust for the Mechoopda Indians under the authority of the appropriation for Homeless California Indians of 1925, reappropriated in 1939, 50 Stat.564, 573. *Id.*

On August 15, 1958, Congress enacted the California Rancheria Act, authorizing the termination of the trust status of the lands and the Indian status of 41 California rancherias, including the Mechoopda. The Tribe was terminated by proclamation published on June 2, 1967. Pub. L. No. 85-671, 72 Stat. 619, amended by Act of August 11, 1964, Pub. L. No. 88-419, 78 Stat. 390.

In 1986, the Mechoopda Tribe, along with three other Indian Rancherias and several individuals, filed suit in federal court challenging the federal government's termination. *Scotts Valley v. United* States, No. C-86-3660-VRW (N.D. Cal. Filed 1986). On January 6, 1992, the Mechoopda Tribe and the United States entered into a Stipulation for Entry of Judgment to settle the Tribe's claims. In the Stipulation, the United States agreed that the Tribe was not lawfully terminated and further agreed that the Tribe and its members were eligible for all the rights and benefits extended to other federally-recognized Indian tribes. (Stipulation for Entry of Judgment, Monteau Submission, March 26, 2002, at Exhibit A). On May 4, 1992, the Assistant Secretary for Indian Affairs published a notice in the Federal Register that the Tribe and its members were reinstated to their status that existed prior to termination. 57 Fed. Reg. 19, 133 (May 4, 1992). The Mechoopda Tribe is now on the list of federally-recognized Indian tribes. 65 Fed. Reg. 13,298, 13, 300 (2000).

The qualified voters of Mechoopda adopted their constitution on February 1, 1998 at a Secretarial election. The BIA Sacramento Area Director approved the constitution on February 13, 1998, pursuant to delegated authority under the Act of June 18, 1934.

In short, like the Grand Traverse Band, the Tribe has been recognized by the federal government, terminated, and again recognized. Accordingly, we find that 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 question remains whether the land at issue was "taken into trust as a part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

Federal courts, the Department of the Interior, and NIGC have recently grappled with the concept of restoration of land. In so doing, they established several guideposts for a restoration-of-land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band II")*, Supra,. *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt ("Coos")*, 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's restoration to federal recognition. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I")*, 46 F. Supp.2d 689, 699 (W.D. Mich. 1999); *Coos* at 164. The language of section 2719(b)(1)(B)(iii)—"restoration of lands for an Indian tribe that is restored to Federal recognition"—"implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event." *Grand Traverse Band II* at 936; *Grand Traverse Band I* at 701.

Nonetheless, there are limits to what constitutes restored lands. As NIGC stated in the Grand Traverse Opinion, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied

throughout its history." NIGC Grand Traverse Opinion at p. 15; *see also* Office of the Solicitor's Memorandum Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt* (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied," p. 8).

The courts in *Coos* and *Grand Traverse Band I* and *II* noted that some limitations might be required on the term "restoration" 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"). All three courts proposed that land acquired after restoration be limited by "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration. *Id.* In this case, these factors lead us to conclude that the Tribe's land acquisition is a "restoration."

1. Factual Circumstances of the Acquisition

The Tribe acquired the approximately 645-acre parcel in December 2001. Also in December 2001, the Tribe submitted a fee-to-trust land application to the BIA. The Tribe's acquisition arose in the following context:

The original 26-acre Rancheria was conveyed to the United States in trust for the Mechoopda Tribe in 1939. When the Tribe was terminated in 1967, there were somewhere between 50 and 70 Mechoopda tribal members living on the Rancheria. However, this entire land base was lost through unscrupulous land sales. Upon restoration in 1992, the Tribe was landless. The Tribe's former Rancheria was now located in the center of the city of Chico. Approximately one-half of the old Chico Rancheria is now owned by the State of California and is part of the campus of California State University, Chico. The other one-half contains 50 separate parcels and lots and are now devoted to mixed residential and commercial uses. By its terms, the Stipulation and Order restoring the Mechoopda Tribe prevents it from reestablishing its former Rancheria boundaries. Mechoopda, therefore, had no choice but to look for land outside the City of Chico.

Following restoration, the Tribe began to slowly reorganize, with a tribal office initially located in the home of the Tribe's first Chairperson. In 1994, the tribal office was moved to Chico, California. The Tribe focused on establishing a base roll, constitution, and ordinances and policies. Mechoopda administered its first HUD program at the end of 1996 and purchased land to address the immediate housing needs of tribal members. Unfortunately, this land was an almond orchard located in a flood plain and unsuitable for a housing project. HUD allowed the Tribe to keep the orchard as an economic development project, and it continues in operation today. (Request for Indian Lands Determination, March 26, 2002, page 2.)

In 1996, the Mechoopda prepared a restoration plan in collaboration with the BIA wherein it identified a parcel of land that it desired to acquire and transfer to the United States as trustee for the Tribe. One of the planned uses for the proposed property was to be a tribally-operated gaming facility. In August 1998, the Solicitor's Office of the Department of the Interior

informed Mechoopda that it disagreed with the Tribe's contention that the proposed land constituted restored lands under the IGRA. The Department based its disagreement on its interpretation that the restored lands exception only applied to tribes restored by Congress. [2] Id. at 3. Thereafter, in 1999 and 2000, two federal courts held in other cases that this interpretation of the IGRA's restored lands exception was too restrictive. *Grand Traverse, Supra; Coos, Supra.*

In December 2001, the Tribe purchased the approximately 645-acre parcel at issue. It is located about 10 miles from the Tribe's former Rancheria.

"Restoration" denotes a taking back or being put in a former position. *Coos* at 162. It might mean "reacquired." *Id.* ("The 'restoration of lands' could be construed to mean just that; the tribe would be placed back in its former position by reacquiring lands.") In any event, "restoration" does not mean "acquired." We therefore must look further for indicia that the land acquisition in some way restores to the Tribe what it previously had.

2. Location

The parcel at issue on which the Tribe proposes to game is located outside the boundaries of the Rancheria as it existed immediately prior to termination under the California Rancheria Act. Specifically, the proposed gaming site is approximately ten (10) miles from the boundaries of the former Rancheria. (Request for Indian Lands Determination, March 26, 2002, page 3). (Because the Stipulation and Order restoring the Tribe prevented the Tribe from reestablishing its former Rancheria boundaries, the Tribe had no choice but to purchase land outside those boundaries.)

While restored lands may include off-reservation parcels, there must be indicia that the land has in some respect been recognized as having a significant relation to the Tribe. *Grand Traverse Band I* at 702. In *Grand Traverse Band II,* the court held that the lands at issue were restored because they lay within counties that had previously been ceded by the tribe to the United States. *Grand Traverse Band II* at 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.* In its Grand Traverse Opinion, NIGC further found that restoration was shown by the Band's "substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." Grand Traverse Opinion at 15. The tribe's history included the ceding of that very ground to the United States by the ancestors of the present tribe in a 1836 treaty. *Id.* at 9-10, 16. As a result, NIGC concluded that the Band had a "historical nexus" to the land. *Id.* at 17.

Brian Biddy, the Tribe's ethnographer and an expert on California Indian Communities, states that it is difficult to establish, with certainty, the exact boundaries of the Tribe's traditional territory. This is due to the lack of documentary materials detailing the traditional ethno-

2 The Tribe had an option to purchase this land. The Tribe let the option expire when it received the adverse opinion from the Department of Interior.

geography of the region. He further states that, "[t]he rapidity in which traditional native life changed, and the subsequent abandonment of villages, resulted in a significant loss of geographic information by the time anthropologists and ethnographers began to interview elderly native people of the region during the first two decades of the twentieth century." (Mechoopda Indian Tribe's Territory, Second Historical Use and Occupancy Report, July 26, 2002, page 1, Exhibit 5).

Despite the lack of information as to specific boundaries of territory, Biddy indicates that C. Hart Merriam's Field Notes are the most informative concerning the names and locations of former villages in the Chico area. Merriam was an ethnologist and botanist who interviewed residents of the Chico Rancheria on at least three occasions: June 8, 1903; November 20 and 21, 1919; and May 1923. Based on these interviews, Merriam was able to approximate the boundaries that contained the Mechoopda villages, of which there were 23.[3] Biddy plotted those boundaries on a map submitted by the Tribe as Exhibit 3 to the Second Historical Use and Occupancy Report. The map shows that the land the Tribe purchased falls squarely within those boundaries.

In addition, the land at issue is part of an area occupied by the Northwestern Valley Maidu, of whom the Mechoopda are the sole surviving group. "With the demise of other Sacramento Valley villages, residents of those Northwestern Valley Maidu villages, including Udahwek, Eskini and so forth, congregated at the Mechoopda village; by 1900, Mechoopda was the only remaining village of the Northwestern Valley Maidu. (Declaration of Craig D. Bates, para. 9, Exhibit H to Monteau Submission, March 26, 2002.)

Furthermore, the land is within a land base promised to the Mechoopda in the unratified treaty of 1851. (Treaty of August 1, 1851 Between United States and the Chiefs, Captains and Headmen of the Mi-chop-sa, Es-Kuin, etc., Tribes of Indians, Exhibit J to Request for Indian Lands Determination, March 26, 2002.) The treaty promised approximately 227 square miles of land, reaching roughly from Chico to Nimshew to Oroville. (Map of Land Boundary Granted by the U.S. Treaty of 1851, Exhibit J to Monteau Submission, March 26, 2002.) Biddy's map shows that the parcels at issue are within the unratified treaty area. (Second Historical Use and Occupancy Report, Exhibit 3).

According to Merriam, there were 23 villages which made up the Mechoopda Tribe. Merriam, C. Hart, Mitchopda (Mechoopda) Territory and Villages, Unpublished Manuscript, Bancroft Library, University of California Berkeley, undated. Several of these villages are located in close proximity to the parcels at issue, and include Eskeni-5 ½ miles; Hololopai-9 miles; Taimkoyo-7 miles; Mechoopda-8 miles; and Boga-16 ½ miles. Eskeni, Hololopai and Mechoopda were signers of the 1851 unratified treaty. (Request for Indian Lands Determination, March 26, 2002, pages 5-10.)

The proposed site has cultural and historical significance to the Tribe. Three buttes with cultural significance to the Mechoopda are located one mile north of the proposed site. These buttes figure prominently in the myth of Onkoitopeh, a cultural hero of the Mechoopda. (Historical

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3 The boundaries are as follows: "[t]erritory from just south of Nord, southerly to a little beyond Durham, and from Sacramento River easterly to the foothills." Merriam, C. Hart, Mitchopda Territory and Villages, Unpublished manuscript, Bancroft Library, University of California Berkeley, undated.

Use and Occupancy Report, May 9, 2002, page 3.) In addition, an historic trail, linking the villages of Ushtupedah and Weleuduh to other Maidu villages crosses the parcels. In historic times, the trail would have linked the Mechoopda at Chico with other villages in the Oroville region. In addition, the lands encompassed by the parcels include areas likely used in the late 19th century and before by the Mechoopda for hunting and gathering. (Bates Declaration at para. 10, Exhibit H to Request for Indian Lands Determination, March 26, 2002).

Based on the above, the Tribe has proven a historical and cultural nexus to the land sufficient to show that the parcel was not merely an acquisition but a restoration of previously used lands.

3. Temporal Relationship of Acquisition to the Tribal Restoration

The Tribe was restored through the *Scotts Valley* Stipulated Judgment in 1992. The Tribe acquired the parcel at issue in December 2001, nine years after the Tribe was restored. This nine-year gap is the same as that in the case of the Grand Traverse Band's off-reservation acquisition, which was taken into trust nine years after Grand Traverse Band's acknowledgement through the federal administrative acknowledgement procedures. Also similar to Grand Traverse Band, the acquisition is the first and only land acquisition (aside from the almond orchard) after the Tribe's restoration.

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

> Congress allowed 14 years to elapse before restoring the Peterson Tract to the Tribe. Thus, in this particular instance, without some relevant attenuation, the mere passage of time should not be determinative. Also, it is not improper of the Department to take account of the practical effect of the passage of the restored lands exception. For instance, it will often be the case that newly restored tribes will, out of practical necessity, take some time to acquire land [footnote omitted]. The Department recognizes, as Congress surely did, that newly restored tribes do not have readily available funds for land acquisition, that land is not always available, and the process of land acquisition is time consuming....Thus, the Tribes quickly acquired the land as soon as it was available and within a reasonable amount of time after being restored.

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

Furthermore, as part of the Stipulation in *Scotts Valley*, the Tribe agreed not to seek to reestablish the former boundaries of the Chico Rancheria. The Stipulation provides for the acquisition of land outside the former Rancheria boundaries as part of the Tribe's restoration. (*Scotts Valley v. United States*, No. C-86-3660-VRW (N.D. Cal. Filed 1986)).

Although the Chico parcel was purchased nine years after the Tribe's restoration, the belated purchase is not fatal to a finding of restoration for the land. The Tribe's initial reorganization and search for appropriate land bases took several years and experienced significant obstacles. However, building a gaming facility was part of its economic development and land use plans from the beginning. Once the Tribe was in a position to acquire a sufficient amount of usable land to accomplish these goals, the Tribe moved quickly to complete its economic development plans. Based on these facts, we can find that the Chico parcel falls within the Tribe's process of restoration.

We conclude that the facts surrounding the timing of the acquisition support a determination of "restored land." A nine-year gap between the Tribe's restoration and the land's acquisition is a sufficient "temporal relationship" to establish lands as "restored." More importantly, the acquisition of the parcel was the first (with the exception of the unusable almond orchard) for this restored tribe.

In light of federal cases interpreting the restored lands exception, and the factual circumstances, location, and timing of the acquisition, we conclude that the Tribe's land may be considered "restored" for purposes of the pending fee-to-trust acquisition for gaming. The Tribe has shown that the land has been acquired to address the issue of landlessness and that there is a historical and cultural nexus between the Tribe and the land.

Conclusion

IGRA permits tribes to conduct gaming on Indian lands only if they have jurisdiction over those lands, and only if they assert jurisdiction by exercising governmental power which will enable the tribe, through appropriate ordinances, to satisfy the statute's substantial and detailed requirements for the regulation of gaming. After careful review and consideration, we conclude that the Tribe's land, should it be taken into trust, qualifies as Indian lands as defined by IGRA and NIGC regulations. A close examination of the documentation submitted shows that the Tribe had a historical and cultural connection to the land and that the land is therefore restored. The proposed gaming site therefore falls within the restored land exception to Section 2719. The Tribe may therefore lawfully conduct gaming on its proposed site pursuant to IGRA when it is acquired by the United States in trust for the Tribe, provided the Tribe complies with all other applicable requirements of IGRA.

The Department of the Interior, Office of the Solicitor concurs with our conclusion.

If you have any questions, Maria Getoff, Staff Attorney, is assigned to this matter.

Signed: Penny Coleman
Penny J. Coleman, Acting General Counsel

EXHIBIT B

National Indian Gaming Commission

In Re:

Wyandotte Nation Amended Gaming Ordinance

September 10, 2004

FINAL DECISION AND ORDER

The Wyandotte Nation (Tribe) has waived its right to an administrative hearing and has requested a final agency decision with respect to its request for review and approval of an amendment (Ordinance Amendment) to its Tribal Gaming Ordinance. The Chairman of the National Indian Gaming Commission approved the Tribal Gaming Ordinance on June 29, 1994. The Tribal Gaming Ordinance authorizes the Wyandotte Nation to conduct gaming within "Indian Country." Tribal Gaming Ordinance, Section 4(b). The Ordinance Amendment at issue adds a new definition to Section 2 of the Tribal Gaming Ordinance. This new definition defines Indian Country to include all Wyandotte Indian land including the Shriner Tract[1], a parcel of land in Kansas City, Kansas, held in trust for the benefit of the Tribe. Wyandotte Nation Resolution No. 040709, July 9, 2004.

DECISION AND ORDER

The Commission finds that the Tribe may not lawfully game on the Shriner Tract and therefore disapproves the Ordinance Amendment.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

On June 29, 1994, the NIGC Chairman approved the Tribal Gaming Ordinance, which authorizes Class II gaming. The Tribal Gaming Ordinance does not identify any specific parcels of land upon which the Tribe may game. On June 20, 2002, the Tribe submitted

[1] "A tract of land in the Northwest Quarter of Section 10, Township 11, Range 25 Wyandotte County, Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked 'Church Lot' thereon." 61 Fed. Reg. 114, 29757-29758 (June 12, 1996).

EXHIBIT B

an amended gaming ordinance specific to the Shriner Tract property. The Tribe also submitted documentation supporting its claim that the Shriner Tract meets three separate exceptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988. On August 27, 2002, the Tribe withdrew the amended ordinance to give the NIGC more time to issue an Indian lands opinion. The Tribe later advised the NIGC that it did not plan to game on the Shriner Tract after all.

On August 28, 2003, the Tribe commenced gaming on the Shriner Tract. This parcel was taken into trust for the benefit of the Tribe on July 15, 1996. Because the Shriner Tract was taken into trust after October 17, 1988, for gaming to be legal under the IGRA, it must fall within one of IGRA's exceptions to the general prohibition on gaming on lands acquired into trust after October 17, 1988 for gaming to be legal under the IGRA.

On September 2, 2003, the Tribe advised the NIGC by letter that it had commenced gaming. The Tribe also resubmitted the supporting material from June 2002 and subsequently provided additional supporting material and arguments.

On March 24, 2004, the NIGC Office of General Counsel (OGC) provided the Tribe with its written opinion that gaming is not legal on the Shriner Tract under the IGRA. On March 31, 2004, the Tribe requested reconsideration of the March 24, 2004, opinion.

On March 26, 2004, the Tribe filed suit against the NIGC in U.S. District Court for the District of Columbia, challenging the March 24, 2004, NIGC opinion. Complaint for Declaratory and Injunctive Relief, *Wyandotte Nation v. Nat'l. Indian Gaming Commission*, No. CV-04-0513 (D.D.C. March 26, 2004). On April 2, 2004, the Tribe filed a Motion For Leave to Amend Complaint For Declaratory and Injunctive Relief (Motion to Amend Complaint), seeking to add several Kansas State authorities as defendants. The D.C. District Court did not act on this motion but instead transferred the case to the U.S. District Court for the District of Kansas. *Wyandotte Nation v. NIGC*, No. CV-04-0513 (D.D.C. April 2, 2004)(Order). On April 7, 2004, the Kansas District Court granted the Tribe's Motion to Amend Complaint. *Wyandotte Nation v. NIGC*, No. CV-04-0513 (D.D.C. April 7, 2004)(Order Memorializing April 7, 2004 Rulings). The NIGC moved to dismiss the action for lack of a final agency action, a prerequisite for the Court's subject matter jurisdiction. The Tribe did not oppose this motion, and on June 1, 2004, the District Court granted the NIGC's Motion to Dismiss.[2] *Wyandotte Nation v. NIGC, et. al.*, Case No. 04-2140-JAR (D.C. Kan. June 1, 2004) (Order Granting Motion to Dismiss).

The NIGC granted the Tribe's request for reconsideration. Upon reconsideration, the OGC determined that some of the language in the March 24, 2004 opinion was overbroad, and therefore revised the opinion. The March 24, 2004 opinion was superceded by an OGC opinion dated July 19, 2004. The conclusion remains the same. It is the opinion of the OGC that the Tribe cannot lawfully game on the Shriner Tract pursuant to the IGRA.

[2] The case is still a live action as to the State of Kansas defendants.

On July 12, 2004, the NIGC received the Ordinance Amendment for review and approval by the NIGC pursuant to 25 U.S.C.§ 2710. By letter dated July 23, 2004, the Tribe waived its right to an administrative hearing and requested that the Commission issue a final decision on the record. We do not typically agree to forego the Chairman's issuance of an ordinance disapproval letter and any resultant appellate process. However, we do so in this case for several reasons: (1) the question of whether the Tribe may game on the Shriner Tract has been under review by the NIGC for some time; (2) the OGC has already issued its opinion regarding gaming on the Shriner Tract; and (3) the Tribe is involved in active litigation regarding gaming on the Shriner Tract. In this case, we believe it in the best interests of both the Commission and the Tribe to expeditiously resolve this matter.

ANALYSIS

Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after the enactment of IGRA on October 17, 1988, unless one of several exceptions apply. Accordingly, because the Shriner Tract was taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether the Tribe may conduct gaming on the Shriner Tract.

The Tribe argues that three exceptions to the general prohibition on gaming on after-acquired lands apply to the Shriner Tract. The Tribe argues that (1) the Shriner Tract is within the Tribe's last reservation; (2) the Shriner Tract was taken into trust as part of a settlement of a land claim, and (3) the Shriner Tract was taken into trust as part of the restoration of their lands. We address each of these arguments in turn.

Last Reservation

The Tribe argues that the "last reservation exception" applies to the Shriner Tract. The "last reservation exception" provides that gaming may be conducted on lands acquired after October 17, 1988, provided that the tribe had no reservation on October 17, 1988, and the lands are located in a state other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located. 25 U.S.C. § 2719(a)(2)(B). The first two parts of this exception are met: the Tribe had no reservation on October 17, 1988,[3] and the land is in Kansas, not in Oklahoma. We therefore turn our attention to the remaining question, whether the land at issue is within the tribe's last recognized reservation within the State within which the Tribe is presently located.

To answer this question, we must first determine where the Tribe is presently located. The Tribe argues that it is presently located in Kansas, and that the Shriner Tract is within the Tribe's last recognized reservation in Kansas. The Tribe argues that it is "presently

[3] We understand there are no reservations in the State of Oklahoma, as contemplated by the IGRA. Otherwise, the all encompassing Oklahoma exception in 25 U.S.C. § 2719 (a)(2) would likely not exist.

located" in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. The Tribe argues that the existence of an inter-governmental agreement with Kansas City providing for the maintenance and security of the Huron Cemetery establishes this jurisdiction.

The answer to this question turns on the scope and meaning of the term "presently located." To determine the scope of a statute, we look first to its language. Reves v. Ernst & Young, 507 U.S. 170, 177 (1993). To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); (See also, U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002), "In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams v. Taylor, 529 U.S.420, 432 (2000).

While tribes can be located in more than one state (see e.g. the Navajo Nation which is located in three states or the Standing Rock Sioux Tribe which is located in two states), we believe the plain meaning of the term "presently located" is clear. It is not where the tribe happens to have an isolated tract of land. It plainly means where the tribe is currently to be found, i.e., where the tribe physically resides. To determine where this is, we look to where the seat of tribal government is, and where the Tribe's population center is. The seat of the Wyandotte Tribal government and its population center is in Wyandotte, Oklahoma. We therefore find that the Tribe is presently located in Oklahoma.

We do not subscribe to the Tribe's argument that it is presently located in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. As stated by the Tenth Circuit, "[a]lthough the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. It is further uncontroverted that, since the time of the 1855 treaty, the Huron Cemetery has not been used by the Wyandotte Tribe for purposes of residence. Rather, the tract, which is now separated by a significant distance from the actual reservation of the Wyandotte Tribe in Oklahoma, has consistently maintained its character as a public burial ground." Sac and Fox at 1267.

This plain reading of the statutory language is consistent with our reading of the whole of section 2719(a). The language of section 2719(a) evidences a Congressional intent to limit gaming to tribal reservations or, if no reservation exists, to areas within former reservations or last reservations where the tribe is located. This section of IGRA limits, not expands, the right to game. It is clear that Congress intended to allow some gaming to occur on lands acquired after enactment of the IGRA under this provision, but only contemplated gaming on newly acquired lands far from the current or prior reservation in very specific isolated circumstances.

If a court were to find that the term "presently located" is ambiguous, the court would defer to the NIGC's reasonable interpretation of the statutory language. U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002). The court would also look to the legislative history. The legislative history here does not support the Tribe's views. With respect to lands acquired after October 17, 1988, the Select Committee on Indian Affairs stated, "[g]aming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary [of the Interior] determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S. Rep. No. 446, 100th Congress, 2d Session 8 (1988).

Because we find that the Tribe is not presently located in Kansas, we need not address the Tribe's other arguments in support of its contention that the Shriner Tract is within its last reservation.[4]

Settlement of a Land Claim

The Tribe argues that the land claim settlement exception to the prohibition on gaming on lands acquired after 1988 applies to the Shriner Tract. This exception allows gaming on land taken into trust after 1988 as part of a settlement of a land claim. The Tribe argues that the Tribe's ICC claims are land claims within the meaning of 25 U.S.C. § 2719(b)(1)(B)(i), and that the Shriner Tract was taken into trust as part of a settlement of those claims. (Tribe's September 2, 2003, submission at 15-17).

Specifically, the Tribe argues that, in Docket Nos. 139 and 141, the ICC held that the Tribe was granted recognized title to Royce Areas 53 and 54 by virtue of the Treaty of Greenville and the Treaty of Fort Industry, and that the ICC, as a precursor to evaluating damages, had to apportion interests in the areas among the various tribal signatories to these two treaties. (Tribe's September 2, 2003, submission at 16). The Tribe argues that a claim requiring a determination of ownership of title to land is a "land claim" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(ii).[5]

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[4] We note, however, that the Tenth Circuit Court of Appeals has held that the Huron Cemetery, adjacent to the Shriner Tract, is not a reservation for purposes of the IGRA because it was not set aside for the Tribe to reside on. Sac and Fox Nation of Missouri v. Norton, 240 F. 3d. 1250, 1267 (10th Cir. 2001; *cert. denied*, Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002). The court found that "IGRA's use of the phrase 'the reservation of the Indian tribe' in 25 U.S.C. § 2719(a) suggests that Congress envisioned that each tribe would have only one reservation for gaming purposes." Id. at 1267. Further, the court held, "IGRA specifically distinguished between the reservation of an Indian tribe and lands held in trust for the tribe by the federal government. If the term 'reservation' were to encompass all land held in trust by the government for Indian use (but not necessarily Indian residence), then presumably most, if not all, trust lands would qualify as 'reservations.' In turn, all of those parcels could be used in the manner in which the Wyandotte Tribe seeks to use the Huron Cemetery and its surrounding tracts." Id.

[5] The Tribe cites to no substantive authority to support this definition, only to cases discussing the Indian Canon of Construction, which provides that ambiguous statutes are to be construed liberally, with ambiguities resolved in favor of Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976). However,

As stated above in our discussion of the "last reservation" exception, the interpretation of the land claim settlement exception must begin with the language of the provision itself. Reeves, 507 U.S. at 177. To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. KMart Corp. 486 U.S. at 291; (See also, Seminole Nation of Oklahoma at 944 ("In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams, at 432.

If the language of the land claim settlement provision is clear and unambiguous, then the plain meaning of the provision will apply and there is no need to turn to the legislative history of the provision or to traditional aids to statutory construction. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 251 (1992); Sacramento Regional County Sanitation Dist. v. Reilly, 905 F.2d 1262, 1268(9th Cir. 1990).

Subsection (b)(1)(B)(i) makes an exception to the no-gaming-on-after-acquired-lands rule for "lands [] taken into trust as part of a settlement of a land claim." This provision requires that there be a claim for land, and that land be taken into trust as part of a settlement of that claim. It is clear and unambiguous. It means a claim made by a Tribe for the return of land. To determine whether the Tribe's ICC claims were land claims requires an inquiry into the nature of the claim brought by the Tribe and the resulting award to the Tribe. The Tribe brought claims before the ICC and the Claims Court exclusively for money damages, not over title to land itself. Furthermore, the Tribe's award was limited to money damages. While the ICC may have evaluated whether the Tribe previously held title to the land, and had to assign interests among the various tribes to ascertain money damages, this does not transform the claim into a land claim. The claim was for money, not the land, and the evaluation undertaken by the court to arrive at the amount of money damages does not change that. Furthermore, Pub. L. 98-602 was merely a mechanism with which to distribute judgment funds awarded to the Tribe.

Congress was fully aware of the ICC and the pre-existing process created for the tribes to bring claims against the United States when it enacted the IGRA. Congress could have included a broad exception to the gaming prohibition on lands taken into trust for property purchased with funds awarded by the ICC and the Claims Court; however, no such exception exists in the legislation. Instead, Congress chose to narrowly except lands taken into trust "as part of . . . a settlement of a land claim."

To find that ICC money judgments fit within the plain language of the after-acquired lands exception would result in the exception swallowing the rule. The ICC handled large numbers of claims during its lifetime, and substantial relief was granted to many

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because we find that the term "land claim" is unambiguous, we need not resort to any statutory construction aids, including the Indian Canons of Construction.

tribes. William C. Canby, Jr., American Indian Law at 267 (2nd Ed. 1988). Interpreting the land claim settlement exception to apply any time a tribe uses such monetary judgments to purchase land would open up the exception far beyond what was intended.

Finally, our conclusion is consistent with that of the Department of the Interior (DOI) that previously determined that the Tribe's land in Park City, Kansas, purchased with Pub. L. 98-602 funds, was not land within the meaning of the IGRA land claim settlement exception. The DOI Tulsa Field Solicitor, in an opinion dated February 19, 1993, concluded that:

> Public Law 98-602 which authorizes the expenditure of judgment funds awarded to the Tribe by the Indian Claims Commission and its successor forum, the United States Claims Court, for acquisition of lands to be taken into trust by the Secretary of the Interior, does not come within the meaning of [IGRA's land claim settlement exception]. While the argument of the Tribe is cogent, we are mindful of the limitations on the jurisdiction of the Indian Claims Commission and the United States Claims Court to award money judgments based upon the fair market value of lands taken by the United States at the time of the taking and not land. 25 U.S.C. §§70-70v. Strictly speaking, settlements reached in cases before the Indian Claims Commission and the United States Claims Court are not land settlements wherein the parties assert competing claims to title to property, but rather are settlements of claims against the United States for money damages.

Memorandum from M. Sharon Blackwell, Field Solicitor, Tulsa, to Area Director, Muskogee Area Office, BIA, February 19, 1993 at 11. We see no reason to depart from this interpretation.

Restoration of Land

Finally, the Tribe argues that the "restored lands" exception applies to the Shriner Tract. This analysis requires a two-part determination: (1) that the Tribe is a "restored" tribe, and (2) that the Shriner Tract was taken into trust as part of a restoration of land. 25 U.S.C. §2719(b)(1)(B)(iii); See also, Grand Traverse Band v. United States Attorney for the Western District of Michigan, ("Grand Traverse Band II"), 198 F. Supp. 2d 920 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004). We agree that the Tribe is a restored tribe.[6] We therefore turn our attention to whether the Shriner Tract was taken into trust as part of a restoration of land.

Federal courts, the United States Department of the Interior, and the OGC have recently grappled with the concept of restoration of land. In so doing, they have established

[6] The Tribe was terminated by the Act of August 1, 1956, 70 Stat. 893, and was restored to federal recognition by the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma: Restoration of Federal Services Act, May 15, 1978, 25 U.S.C. § 861, 92 Stat. 246.

several guideposts for a restoration-of-land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. Grand Traverse Band II at 928 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt *("Coos")*, 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's restoration to federal recognition. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I"), 46 F. Supp.2d 689, 699 (W.D. Mich. 1999); Coos at 164.

Nonetheless, there are limits to what constitutes restored lands. As the OGC stated in its opinion, requested by the court in Grand Traverse II, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." Letter from Kevin K. Washburn, National Indian Gaming Commission General Counsel, to Honorable Douglas W. Hillman, Senior United States District Judge, United States District Court (W.D. Michigan), Re: Whether the Turtle Creek Casino site [h]eld in trust [f]or the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the [IGRA's] general prohibition of gaming on lands acquired after October 17, 1988, dated August 31, 2001, p. 15 (NIGC GTB Opinion); see also Office of the Solicitor's Memorandum Re: Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, p. 8. (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied.").

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 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, 2004 FED App. 0151P (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.

The Associate Solicitor, Department of the Interior adopted a similar interpretation in his Coos Opinion on remand from the Coos court. "We believe [t]hat to apply [the] dictionary definition to the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming on restored lands." Id. at 6.

The Associate Solicitor further stated that:

> [B]ecause IGRA provides certain temporal (i.e. the October 17, 1988 limitation for reservation boundaries) and geographic limitations (i.e., land within or contiguous to the tribe's reservation) we cannot view § 2719(b)(1)(B)(iii) to allow gaming on after-acquired lands with no limitations. Consequently, we do not use a dictionary definition of restored to include all lands "restored." It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied. Tribes that were not terminated and thereby not capable of being 'restored' lost vast amounts of land and were forced to move all over the country such that their reservations on October 17, 1988, are vastly different than their aboriginal land.

Id. at 8.

In addition to the above referenced sources, we also consulted our restored lands opinions with regard to the Bear River Band of Rohnerville Rancheria, (See Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria, dated August 5, 2003) (NIGC Rhonerville Opinion) and the Mechoopda Indian Tribe of the Chico Rancheria (See Memorandum from NIGC Acting General Counsel to NIGC Chairman, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria, dated March 14, 2003)(NIGC Mechoopda Opinion).

In this case, these factors (factual circumstances, location and temporal relationship) and our review of agency and judicial precedent lead us to conclude that the Tribe's land acquisition is not a "restoration."

Factual Circumstances of the Acquisition

During 1994 and 1995, the Tribe negotiated to purchase several properties adjacent to the Huron Cemetery. In January 1996, the Tribe submitted an application to the BIA requesting that the United States accept title to certain parcels of real property located in Kansas City, KS, including the Shriner Tract, in trust for the Tribe. The Nation's trust application cited Pub. L. No. 98-602 as the statutory authority for the requested trust acquisition. On June 12, 1996, the BIA published in the Federal Register a Notice stating its intention to accept title to the Shriner Tract in trust for the Tribe.

On July 12, 1996, the State of Kansas and four (4) Indian tribes in Kansas filed suit against the Assistant Secretary seeking to enjoin the trust acquisition of the Shriner Tract. Plaintiffs argued that (i) Pub. L. No 98-602 was not a mandatory trust acquisition and the Secretary's determination to accept title to the Shriner Tract in trust for the Nation was arbitrary and capricious because the Secretary did not consider the factors enumerated in 25 C.F.R. Part 151, and (ii) was in violation of Federal law because the Secretary did not require compliance with certain Federal statutes, including the National Environmental

Policy Act. Plaintiffs also contended that the Secretary's determination that the Huron Cemetery constituted an Indian reservation of the Nation was arbitrary and capricious and inconsistent with applicable law. Although an injunction was entered against the United States on July 12, 1996, the Nation took an emergency appeal to the Tenth Circuit, and on July 15, 1996, the Tenth Circuit vacated the July 12 injunction. The United States accepted title to the Shriner Tract in trust for the benefit of the Nation on July 15, 1996.

Location-Geographical Proximity and Historical Nexus

The Tribe emphasizes that the most significant evidence demonstrating that lands can be considered "restored lands" is the physical location of the land, and that both the Grand Traverse I and Coos courts ruled that "[p]lacement within a prior reservation is significant evidence that the land may be considered in some sense restored." Tribe's September 2, 2003, Submission at 13. See Grand Traverse I, 46 F., Supp. 2d at 702; and Coos, 116 F. Supp. 2d at 164 (quoting Grand Traverse I). The Tribe also quotes language from Grand Traverse I that "any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." Tribe's September 2, 2003, Submission at 13; Grand Traverse I at 701. The Tribe argues that the Shriner Tract satisfies the "location" prong because it is within the Tribe's prior reservation in the State of Kansas. Tribe's September 2, 2003 Submission at 13.

We agree that the physical location of the land is significant. The parcel at issue on which the Tribe proposes to game is located in Kansas City, Kansas. However, the seat of the Wyandotte Tribal government, its present trust lands, and its population center are in Wyandotte, Oklahoma, a distance of approximately 175 miles from Kansas City. Also in Wyandotte, Oklahoma are the Tribe's Turtle Stop Convenience Store, Turtle Tot Learning Center, a Seniors Program, and educational assistance programs. In 1993, the Tribe completed an expansion of the tribal complex, which includes administrative offices, new classrooms for the Turtle Tots Learning Center, as well as a Library and Heritage Center. See Tribe's web site at www.wyandot.org. It is clear that the Shriner Tract is sited far from where the Tribe is actually located in Wyandotte, Oklahoma.

In Grand Traverse and Rhonerville, the land at issue was located either near the tribal center or near tribal programs. In Grand Traverse, the site was located in the same area as a tribal housing development and an 80-acre youth camp. NIGC GTB Opinion at 1. In Rhonerville, the parcel at issue was six miles from the Rhonerville Tribe's original Rancheria, whose boundaries had been re-established. NIGC Rhonerville Opinion at 2. In Mechoopda, the parcel was located approximately 10 miles from the Tribe's original Rancheria, which it occupied immediately prior to termination, and which was located in what is now the center of the city of Chico, California. NIGC Mechoopda Opinion at 1 and 9. While we do not, in this opinion, establish a standard for determining what is a reasonable distance for purposes of the restoration of lands analysis, we do not believe a distance of 175 miles between the parcel and the tribal center is close enough to establish a geographical connection.

We also look to the historical nexus between the Tribe and the parcel at issue. In Grand Traverse, we found that restoration was shown by the "Band's substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." NIGC GTB Opinion at 15. We further stated, "At the time of termination, Band members lived not far from the [parcel at issue]. For most of the Band's recorded history, it has lived and worked in [the general area of the parcel at issue]". Id. at 18. Finally, it was significant to the NIGC GTB Opinion that the land had "been at the heart of the Band's culture throughout history..." Id. at 19.

In Coos, the Associate Solicitor found that the land had a geographic nexus to the Coos and that the Coos were not seeking to game on far-flung land. Associate Solicitor Coos Opinion at 13. The Associate Solicitor further found it relevant that the Coos had a presence in the area of the parcel at issue at the time of termination. Id. In concluding that the parcel at issue was restored land, the Associate Solicitor stated that he considered that the Coos were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." Id. at 14.

In Mechoopda, we found that the parcel at issue had cultural and historical significance to the Mechoopda Indians. Three buttes with historical significance were located one mile from the parcel. These buttes figured prominently in a tribal myth. In addition, an historic trail linking several tribal villages crossed the parcel. Furthermore, several Mechoopda villages were located in close proximity to the parcel. NIGC Mechoopda Opinion at 10-11.

In Rhonerville, we found that the tribe had a longstanding historical and cultural connection to the parcel at issue. The parcel was located within one mile of two aboriginal villages and two major tribal trails. It was located within three miles of five aboriginal villages. Also within three or four miles from the parcel was the site of a mythic flood in a tribal story telling. Furthermore, the parcel was located 6 miles from the tribe's original Rancheria, which was purchased by the United States for the Rhonerville Indians in 1910. The Rhonerville Tribe was terminated in 1962, and the Rancheria was divided and distributed to individual Indians. At the time the Rancheria boundaries were re-established in 1983, there were still 6 acres in individual Indian ownership. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important to our determination that tribal members resided on the original Rancheria at the time of termination. Rhonerville Opinion at 10.

In contrast, we do not find that the Tribe has a sufficient historical nexus to the Shriner Tract to qualify it as restored land. As evidenced by the information submitted by the Tribe, the Tribe was transient for much of its history. In the first part of the 1600's, the tribe resided in Canada. It then moved to Lake Huron in what is the present State of Michigan. In the early 1700's, the Tribe moved south and into the present State of Ohio and western Pennsylvania. Beginning in 1795, the Tribe began ceding land to the United States. In 1842 the United States granted the Tribe an unspecified area of land located west of the Mississippi River. The Tribe negotiated to purchase land from the Shawnee

Tribe near Westport, Missouri. The Shawnee did not honor their agreement with the Tribe, and at the end of 1843, the Tribe entered into an agreement with the Delaware to acquire land in the Kansas Territory, which includes the parcel at issue. The Tribe occupied this land until the beginning of 1855, when it ceded the land to the United States.

The Tribe occupied the Shriner Tract area for a very brief time (late 1843 to early 1855- only 11 full years). The cases discussed above do not support a finding that this short time period qualifies as an historical nexus. In all of the cases that have analyzed the restored lands question, there was a significant, longstanding historical connection to the land—sometimes even an ancient connection. We are not prepared to find that occupation of land for a period of 11 years, despite that significant roots were put down, rises to the level of an historical connection.[7] We believe that, if we were to so find, we would conceivably be bound to find that the Tribe also had an historical nexus to Michigan, Ohio, Pennsylvania and Missouri, and that if land were taken into trust in those locations, the Tribe could game there. As we said in our Grand Traverse Opinion, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." NIGC GTB Opinion, p. 15.

Furthermore, the Tribe has not shown that it had a presence in the area of the Shriner Tract upon termination. According to the Tribe's submission, it left Kansas in 1855 when it ceded the lands to the United States. The Tribe's status was terminated in 1956. Act of August 1, 1956, 70 Stat. 893. Therefore, more than 100 years elapsed between the time the Tribe left the lands, and the Tribe was terminated. In Grand Traverse, Coos, Mechoopda, and Rhonerville, it was important to the determination of restored lands that the tribes in those cases had a presence on the lands upon termination.

Temporal Relationship of Acquisition to the Tribal Restoration

The Tribe argues that the temporal relationship of the acquisition to the Tribe's restoration is similar to the timelines in the other cases applying the restored lands exception. Tribe's September 2, 2003, Submission at 14. The Tribe points particularly to the temporal relationship in the Grand Traverse case. Id. at 14-15. The Tribe emphasizes that in both its case and the Grand Traverse case, it took years from the time of restoration for approval of a tribal constitution, which was a necessary precursor for any trust acquisition. The Tribe further argues that in both cases, the subject trust acquisitions were the first meaningful acquisitions after restoration, and both were part of a concerted effort to acquire trust lands as part of an economic development program. Finally the

[7] The Tribe argues that the land qualifies as restored because it is within the Tribe's prior reservation. The Tribe argues that the land is within its prior reservation because the land was reservation land of the Delaware Indian Nation, and when the Tribe acquired it, the agreement provided that the Wyandotte Tribe "shall take no better right or interest in and to said lands than is now vested in the Delaware Nation of Indians." 9 Stat. 337. See also page 3, herein. Even if the land could be considered reservation land because it was reservation land of the Delaware, the land does not meet the historical nexus prong, as explained above.

Tribe argues that in both cases, the subject lands were previously ceded to the United States by treaty. Id.

We see several distinctions between the temporal relationship in Grand Traverse and that here. First, with respect to the issue of the tribal constitution, it was noted in Grand Traverse II that the Secretary of the Department of Interior would not take land into trust on behalf of the Grand Traverse Band until its constitution had been approved. Grand Traverse II at 936, aff'd, 2004 FED App. 0151P (6th Cir. 2004). The Band's constitution was approved in 1988, and the subject property was taken into trust in 1989. Therefore, the court found that, "as a matter of timing, the acquisition of the [subject property] was part of the first systemic effort to restore tribal lands." Id. Here, the Tribe has provided no evidence that it was required to have an approved constitution prior to the acquisition of land in trust. In fact, the Tribe's constitution was approved in 1985, yet the United States took land into trust for the Tribe in 1979 and 1984. It is upon this land that the Tribe resides in Wyandotte, Oklahoma.

The Grand Traverse II court further found the absence of any substantial restoration of lands preceding the property at issue to be important. Id. at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Here, the Tribe had a substantial restoration of land preceding the Shriner Tract. In fact, three parcels of land were restored, one within one year and two within six years of tribal restoration.

The Tribe was restored to federal recognition in 1978. The following year, land was taken into trust in Wyandotte, Oklahoma for the Tribe. Noteworthy is a memorandum from the BIA Superintendent of the Miami Agency to the BIA Area Director, Muskogee Area Office, dated November 13, 1978, regarding the Tribe's request to have land taken into trust. The memorandum states, "The Wyandotte tribe was recently reinstated and recognized by the United States Government as Indians and, more recently, acquired a land base with desires of purchasing additional land adjacent and elsewhere." It further states, "The Wyandotte tribe will use their land as a base for tribal economic development...." The trust deed for these 1.5 acres is dated June 8, 1979.

Five years later, in 1984, two additional parcels of land, one 3.8 acres, the other 189 acres were taken into trust for the Tribe. With respect to the 189 acres, the BIA Muskogee Area Director stated in a June 3, 1980, letter to the United States General Services Administration, "I have [d]etermined and hereby certify that subject property is located within the boundary of the former reservation of the Wyandotte Tribe of Oklahoma...."

We do not agree with the Tribe that the Shriner Tract was the first meaningful acquisition. Certainly the Oklahoma land acquisitions, coming on the heels of tribal restoration, and comprising the land upon which the Tribe currently resides, are nothing if not meaningful. The Oklahoma land acquisitions have a strong temporal relationship to tribal restoration, and therefore may more appropriately be considered the Tribe's restored lands. These lands were taken into trust within one and six years of tribal restoration, and were noted by the BIA for being both a land base for the Tribe and within the Tribe's former reservation.

The Shriner Tract, on the other hand, was acquired in trust in 1996, a period of 18 years from the Tribe's restoration in 1978. In Grand Traverse and Mechoopda, the period between restoration and acquisition was 9 years (with the approval of the constitution a requirement in Grand Traverse). In Rhonerville, 10 years elapsed between restoration and acquisition. In Coos, the period between restoration and acquisition was 14 years.

It could be argued that the difference between 14 and 18 years is small. This difference might not be significant if the Tribe met the other factors. However, we cannot find that the land is restored based solely on an 18-year passage of time. Perhaps if the Tribe met the other factors, we might be willing to push the outer limits of what has previously been considered an acceptable delay. However, that is not the case here. Furthermore, here, the Tribe acquired land upon which it currently resides within one and six years of restoration. We conclude that, if any land is to be considered restored, it is this intervening land. [8]

Finally, the Tribe argues that in both Grand Traverse and its case, the subject lands were previously ceded to the United States by treaty. The relevant language from Grand Traverse II is as follows; "The Band has introduced substantial and uncontradicted evidence that the parcel is located in an area of historical and cultural significance to the Band that was previously ceded to the United States." Grand Traverse II at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Our reading of this language suggests that the previously ceded land must be in an area of historical and cultural significance to be considered restored. As discussed above, the Shriner Tract, which the Tribe occupied for some 11 years, does not qualify as historically significant. Therefore, the fact that the land was ceded, without the historical connection, does not warrant a finding of restoration.

Section 2719(a) of the IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions are met. The Shriner Tract was acquired in trust after October 17, 1988. As discussed above, the Shriner Tract does not meet any of the exceptions to the IGRA prohibition on gaming on lands acquired after October 17, 1988. Therefore, the Tribe may not lawfully game on the Shriner Tract. Consequently, we must disapprove the Ordinance Amendment in as much as it defines Indian Country to include

[8] We acknowledge that the Mechoopda Tribe had acquired intervening land. However, that land was purchased to address the housing needs of its members, but was an almond orchard located in a flood plain and unsuitable for housing. In the Wyandotte's case, the land they purchased is where the tribal headquarters is located, and is where the Tribe could game if it chose.

the Shriner Tract.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen	Nelson Westrin	Cloyce V. Choney
Chairman	Commissioner	Commissioner

EXHIBIT C

MEMORANDUM

TO: Philip N. Hogen, Chairman

FROM: Penny J. Coleman, Acting General Counsel PJC

DATE: July 31, 2006

RE: The St. Ignace Parcel Does Not Qualify As The Restoration Of Lands For An Indian Tribe Restored To Federal Recognition

On July 3, 2003, the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) notified the Bureau of Indian Affairs (BIA) of its intent to game on a parcel of land near St. Ignace, Michigan (St. Ignace parcel)[1] pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* The National Indian Gaming Commission (NIGC) Office of General Counsel (OGC) requested clarification of the exceptions claimed to the general prohibition of gaming on lands acquired into trust after October 17, 1988, found in 25 U.S.C. § 2719. The Tribe asserted that the St. Ignace parcel meets two exceptions: that it is contiguous to a parcel that should be considered an informal reservation and that it qualifies as restored lands of a tribe restored to federal recognition. This opinion analyzes the applicability of the latter exception, 25 U.S.C. § 2719(b)(1)(B)(iii), which allows gaming on land that constitutes the restoration of lands of a tribe restored to federal recognition.

We conclude that the Sault Ste. Marie Tribe has failed to establish that the St. Ignace parcel qualifies as restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

I. Background

Over ninety percent of the new Kewadin Shores Casino is situated on the St. Ignace parcel, with the remainder on a parcel acquired into trust in 1983.[2] The St. Ignace parcel

[1] Lot 2, Section 19, Town 41 North, Range 3 West, and the South ½ of the Southwest ¼ of said Section 19, Town 41 North, Range 3 West, lying Southerly of a line described as beginning at a point 650 feet Northerly along the centerline of Mackinac Trail and South line of Section 19; thence Northeasterly to the Southeast corner of the Northwest ¼ of the Southwest ¼ of Section 19, Town 41 North, Range 3 West, Michigan Meridian. Michigan.

[2] That portion of Section 19, Town 41 North, Range 3 West described as: All of the NW ¼ of the SW ¼ and all of the S ½ of the SW ¼ Northerly of a line described as beginning 650 feet Northerly along the centerline of Highway

EXHIBIT C

was taken into trust in 2000 and is therefore not eligible for gaming under the IGRA unless an exception to the general prohibition of gaming on after-acquired lands is met.

Although the Tribe asserted that the 2000 parcel met two of the exceptions to the IGRA's general prohibition against gaming on land acquired after October 17, 1988, in order to expedite the opinion, we agreed that the NIGC would initially consider only the argument that the land is contiguous to the boundaries of the Tribe's reservation as of October 17, 1988. Letter from M. Catherine Condon, Greene, Meyer & McElroy, to Andrea Lord, NIGC (Nov. 3, 2004). Pursuant to a Memorandum of Agreement between the NIGC and the Department of the Interior (DOI), NIGC consulted with DOI as to whether the Tribe's trust land adjacent to the St. Ignace parcel constituted a reservation. Memorandum of Agreement between the National Indian Gaming Commission and the Department of the Interior (recently amended May 31, 2006). The DOI responded with a finding that the contiguous 1983 trust land does not constitute a reservation for purposes of the IGRA. Letter from Edith R. Blackwell, Acting Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, DOI, to Philip N. Hogen, Chairman, NIGC (Feb. 14, 2006).

Having received a negative response to the first claimed exception, the Tribe submitted a restored lands analysis to the NIGC via letters dated March 27, June 30, and July 13, 2006. Our opinion considers the applicability of the restored lands exception to the St. Ignace parcel. We find that parcel is not eligible for gaming under this exception.

II. Applicable Provisions of IGRA and NIGC Regulations

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction. 25 U.S.C. §§ 2710(b)(1), 2710(d). 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). *See also* 25 C.F.R. § 502.12 (NIGC's implementing regulation further defining Indian lands).

Further, section 2719(a) of the IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions are met. For the purposes of this analysis, the exception laid out in 25 U.S.C. § 2719(b)(1)(B)(iii) is relevant: a tribe may lawfully conduct

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"Mackinac Trail" from the intersection of said centerline with the South section line of Section 19, Town 41 North, Range 3 West; thence Northeasterly to the Southeast corner of the NW ¼ of the SW ¼ of said section. Except the highway right of way and easements of record. Containing 65 acres more or less.

gaming under the IGRA if the lands are taken into trust as "the restoration of lands for an Indian tribe that is restored to federal recognition."

III. Legal Analysis

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction. 25 U.S.C. § 2701; 25 U.S.C. §§ 2710(b)(1) and 2710(d); 25 U.S.C. § 2703(4). Additionally, if the lands at issue are trust lands outside the tribe's reservation, the tribe may conduct gaming on it only if it exercises "governmental power" over the land. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

For purposes of this analysis, we assume that the Tribe has jurisdiction and exercises governmental powers over the St. Ignace parcel based upon the parcel's status as trust land and the Tribe's concrete manifestations of governmental authority in the form of operating a water supply and sewage facility on the land, construction of a casino on the land, and a Mutual Law Enforcement Assistance Agreement between the Sheriff's Department of Mackinac County, the City of St. Ignace Police Department and the Sault Ste. Marie Tribe signed September 24, 1996. Payment Aff. ¶ 22. It is not necessary to further delve into the matter because the St. Ignace parcel does not meet the restored lands of a restored tribe exception.

A. The Tribe Qualifies as a Restored Tribe

To be considered an "Indian tribe that is restored to Federal recognition," as that term is used in IGRA, the word "restored" must be given its plain, primary meaning. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002) (Grand Traverse II), aff'd Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 369 F.3d 960, 967 (6th Cir. 2004) (Grand Traverse III). A tribe must demonstrate a history of: 1) governmental recognition; 2) a period of non-recognition; and 3) reinstatement of recognition. See Grand Traverse III, 369 F.3d at 967; Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt (Coos), 116 F. Supp. 2d 155, 161 (D.D.C. 2000). In addition to court guidance, we also consulted the restored lands of a restored tribe opinions issued by the NIGC and the DOI.

i. History of the Sault Ste. Marie Tribe's governmental relations with the United States

The Sault Ste. Marie Band has been recognized as a successor to some of the Chippewa Tribes that treatied with the United States between 1785 and 1855. *See* Treaty with the Chippewa, June 16, 1820 (7 Stat. 206) (signed at Sault Ste. Marie); Treaty with the Ottawa and Chippewa Nations of Indians, March 28, 1836 (7 Stat. 491); Treaty with the Ottawa and Chippewa, July 31, 1855 (11 Stat. 621) (signed by chiefs and headmen of the Chippewa Indians living near Sault Ste. Marie, Michigan); Treaty with the Chippewa of Sault Ste. Marie, Aug. 2, 1855 (11 Stat. 631); United States v. State of Michigan, 471 F. Supp. 192, 264 (W.D. Mich. 1979) ("Members of the tribes which are parties to this

action can trace their lineage to the Ottawa and Chippewa tribes which were beneficiaries of the Treaty of Ghent and whose leaders signed the Treaties of 1836 and 1855. . . . The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836 (7 Stat. 491)."); 25 U.S.C. § 1300k(2) ("Grand Traverse Band of Ottawa and Chippewa Indians, the Sault Ste. Marie Tribe of Chippewa Indians, and the Bay Mills Band of Chippewa Indians, whose members are also descendants of the signatories to the 1836 Treaty of Washington and 1855 Treaty of Detroit, have been recognized by the Federal Government as distinct Indian tribes.").

The Sault Ste. Marie Tribe entered into two treaties with the United States in 1855. The first, of July 31, 1855, dissolved an artificial amalgam of Ottawa and Chippewa Indians created in a March 28, 1836, treaty for the sole purpose of easing the United States' negotiations for land. It was the understanding of both the Treaty Commissioners and the Tribal representatives that what was being dissolved was not the government-to-government relations of the tribal and federal governments, but rather the artificial entity created in the 1836 treaty. The proceedings of the July 31, 1855, treaty at Detroit were transcribed. The Sault Ste. Marie representative, Wau-be-jeeg, stated "[a]t the treaty of 36, our fathers were in partnership with the Ottawas, but not [sic] the partnership is finished and we who come from the foot of Lake Superior wish to do our business for ourselves." Proceedings of a Council with the Chippeway & Ottawas of Michigan held at the City of Detroit by the Hon. George W. Manypenny & Henry C. Gilbert, Commissioners of the United States July 25, 1855. Wau-be-jeeg later added, "I told you when I first came that I wanted to be separated from the Ottawas and you have not answered me. We have sat here and heard you talk to the Ottawas – while you paid no attention to us." Id. To this Commissioner Manypenny responded, "The very case you suggested is met in the treaty. You are separated as you desire. This treaty you and the Ottawas must sign together because the old treaty of '36 was made in that way. But here we have followed your suggestion and provide that the money shall be paid to the different bands and that no general council shall be called." Id.

The second 1855 treaty was signed just two days later on August 2nd, solely with the Sault Ste. Marie Tribe. The August 2 treaty surrendered the Tribe's fishing rights at the falls of St. Mary's and right to camp nearby in return for annuity payments and a half acre island in the St. Mary's river.

Sault Ste. Marie Tribal members were made United States citizens and were allotted land pursuant to the July 31, 1855, treaty. Letter from E.J. Brooks, Special Agent, Department of the Interior, General Land Office, to E.A. Hayt, Commissioner of Indian Affairs at 1 (Jan. 4, 1878). Mr. Brooks noted of the Michigan Indians that "[t]heir tribal organizations were also dissolved by the [July 31, 1855] treaty and since that date they have been considered and treated as citizens, have voted at the elections, have been held accountable to the laws, and have been subject to taxation." Id. at 4.

In 1932, the Commissioner of Indian Affairs received a letter contending that the Sault Ste. Marie Tribe had not been dissolved via the July 31, 1855, treaty because the United

States had entered into a subsequent treaty with the Tribe two days later on August 2. Letter from C.J. Rhoads, Commissioner, to Frank Bohn, House of Representatives (June 22, 1932). In his response to that letter, Commissioner Rhoads found "[i]f therefore, the subsequent treaty of August 2, 1855, was a recognition of the tribal existence of this band, it was only for the purpose of negotiating a surrender of the fishing and encampment rights reserved by the treaty of July 31, 1855." Id.

In 1935, the Commissioner of Indian Affairs was asked whether the Ottawa and Chippewa Tribes of Michigan might participate in the Indian Reorganization Act of 1934 (IRA), *25* U.S.C. §§ 461 *et seq.* (also known as the Wheeler-Howard Act). Letter from Jonas Shawanesse to John Collier, Commissioner of Indian Affairs (June 1, 1935). Commissioner Collier responded, "[u]pon the fulfillment of the treaty of July 31, 1855, Government wardship over the Indians with whom the treaty was made ceased and they became subject to the laws of the State in which they resided." Letter from John Collier, Commissioner, to Jonas Shawanesse (June 27, 1935).

A DOI memorandum on the status of the Nahma and Beaver Island Indians in Michigan, who may have been signatories of the July 31, 1855, treaty stated as follows:

> Article V of the [July 31,] 1855 treaty provides that the tribal organization of the Ottawa and Chippewa Indians 'is hereby dissolved' and that future negotiations in reference to any matters contained in the treaty should be carried on only with those Indians locally interested. This article has been consistently interpreted by the Interior Department, for as far back as the available files go, as providing for the dissolution of all tribal relations, including band relations, and the Interior Department has refused to recognize any of the Ottawa and Chippewa groups as bands. A sample of this attitude, which is repeated in innumerable instances of correspondence with Ottawa and Chippewa Indians, is the letter of February 15, 1917, to Mr. Eugene Hamlin concerning his credentials as a representative of Ottawa and Chippewa Indians near Harbor Springs, Michigan:
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> * * *
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> 'In answer you are advised that the Ottawa and Chippewa tribes of Indians many years ago became citizens of the United States and of the state in which they reside and are now not under the jurisdiction of the government.'
>
> * * *
>
> The most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups occurred with relation to the Sault Ste. Marie Bands of Chippewas. A thorough in-vestigation of the history of these bands was undertaken in an effort to prove their band status. It was found that a separate treaty was entered into with these bands

> subsequent to the July 31, 1855 treaty; that they were enrolled as separate bands in the money payment rolls of Ottawas and Chippewas from 1857 to 1867; that they retained their formal band organization down to the present time and continuous correspondence had been carried on between their band representatives and the Indian Office. However, in spite of this evidence tending to show their actual band status the Interior Department refused to accord them legal recognition as a band, in view of the dissolution of the Ottawa and Chippewa Tribe under the 1855 treaty and the cessation of the exercise of guardian over these Indians for nearly half a century.
>
> If the Sault Ste. Marie Bands were not in a position to be recognized as a band by the Interior Department it is out of the question to establish any existing band status for the Nahma and Beaver Island Indians in view of the paucity of any evidence on the subject and in view of the fact that there is no showing in any treaty that the Nahma Indians were even recognized originally as a band.

Memorandum from Frederic L. Kirgis, Acting Solicitor, to the Commissioner of Indian Affairs (May 1, 1937).

A delegation from the Sault Ste. Marie Tribe again approached DOI seeking federal recognition and placement of land into trust in 1972. The Interior Department reviewed the Tribe's history and found:

> It was the consensus of the conference that the Sault Ste. Marie band of Chippewa Indians, exclusive of those who are members of the Bay Mills Indian Community, merit Federal recognition and that action should be taken to assist them to acquire the 40-acre tract, to secure the acceptance by the United States of trust title to it, and to perfect an organization under the provisions of the Indian Reorganization Act.

Memorandum from Commissioner of Indian Affairs, to Area Director, Minneapolis (Sep. 7, 1972).

In addition to the September 7, 1972, memorandum from the Commissioner of Indian Affairs granting recognition to the Sault Ste. Marie Tribe, DOI took land into trust for the Tribe on March 2, 1974, and declared it to be a reservation on December 13, 1974. 40 Fed. Reg. 8367 (Feb. 20, 1975). On November 13, 1975, DOI approved the Tribal constitution and by-laws adopted by the Tribe. The Tribe appears on the list of federally recognized tribes published annually by DOI. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 70 Fed. Reg. 71194 (Nov. 25, 2005).

Further, the case City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), tangentially examined the issue of whether the Tribe's government-to-government

relationship with the United States ever ceased. The question before the Andrus court was whether the Tribe had been eligible to organize under the Indian Reorganization Act (IRA), *25* U.S.C. §§ 461 *et seq.* of 1934, such that the Secretary could acquire trust land for the Tribe pursuant to that act. The Andrus court did not determine that the Tribe had ever been terminated, although it noted the existence of the 1937 and 1972 memos. The court found that the 1937 memo "indicates that the Chippewas should not be recognized for purposes of the IRA because the Chippewas were dissolved officially by a treaty of July 31, 1855, with the United States." 532 F. Supp. at 161. The United States filed a joint brief with the Tribe in the Andrus case; the brief argued that the Tribe had a continuous governmental existence, albeit not a federally recognized one in the period before the 1972 memo. Defendants' Response to Plaintiff's Motion For Summary Judgment, And Memorandum In Support of Defendants' Motion for Partial Summary Judgment on the Grounds of Res Judicata and Collateral Estoppel 3, 6-10 (Jan. 28, 1980).

The language of the Andrus court ruling is vague, although it does appear to recognize that a period of non-recognition has existed:

> [A]lthough the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934. The 1972 Memorandum constitutes just such subsequent recognition.

532 F. Supp. at 161.

ii. Comparison of the Tribe's Situation with that of Other Opinions and Court Cases on the Restored Tribe Factor of the Restored Lands Exception

It is clear from the treaties that the United States recognized the government of the Sault Ste. Marie Tribe as a political entity in 1855. The 1878 letter from Special Agent Brooks suggests that this occurred when the allotments had been handed out and the tribal members were treated as United States citizens subject to state jurisdiction in 1872. Regardless, it is clear from the record that by 1917 the Department of the Interior did not consider Sault Ste. Marie a tribal entity with which it maintained government to government relations.[3]

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[3] The Tribe's submissions allege that the United States provided benefits to individual Indians in the period from 1878 to 1972. Charles E. Cleland, The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians 7 (June 28, 2006). However, the 1930's letters declining to let the Tribe organize under the IRA and the 1937 DOI memo finding that the Interior Department continually refused to recognize the Tribe despite the latter 1855 treaty demonstrate that there was a significant period when the federal government did not have a government-to-government relationship with the Sault Ste. Marie Tribal government. A previous OGC opinion considered whether the Karuk tribe, whose government voluntarily cut off contact with the federal government for several decades, could be considered a restored tribe. Letter from Penny J. Coleman, NIGC Acting General Counsel, to Bradley G. Bledsoe Downes, Esq., 3 (Oct. 12,

The Sault Ste. Marie Tribe's situation is similar, but distinguishable from that of the Grand Traverse Band of Chippewa Indians. The Grand Traverse Band was terminated by the Secretary of the Interior and was restored administratively pursuant to the Federal Acknowledgment Process (FAP) adopted by DOI in 1979. Grand Traverse II, 198 F. Supp. 2d at 929; 44 Fed. Reg. 7235 (Jan. 1, 1979). The Sault Ste. Marie Tribe was restored to federal recognition pursuant to administrative action by the Department of the Interior via the 1972 memo.[4]

We find that the evidence submitted by the Tribe, as well as the court pleadings and ruling in City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), demonstrate that the United States unilaterally ended relations with the Tribe as a government from the 1870's until 1972.[5]

B. The St. Ignace Parcel Does Not Constitute Restored Lands of the Tribe

The second half of a "restored lands" exception analysis is whether the parcel was taken into trust as a restoration of lands. 25 U.S.C. § 2719(b)(1)(B)(iii); see also, Grand Traverse II, 198 F. Supp. 2d 920 (W.D. Mich. 2002). We look to court decisions as well as NIGC and DOI Indian lands opinions for guidance.

Federal courts, NIGC, and DOI have established several guideposts for a restoration of land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. Id. at 928; Coos, 116 F. Supp. 2d at 161. In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's

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2004) (NIGC Karuk Opinion). Individual Karuk tribal members received federal services during that time due to their status as Indians. Id. at 3. Although the Karuk case differs from the current situation because the government-to-government relationship was never severed by the United States, the opinion does recognize that it is possible for individual Indians to receive benefits based upon that status whether or not the United States has relations with the governing tribal entity.

[4] We note as a matter of irony that the Tribe brought suit against the United States in order to block the taking of land into trust for the Little Traverse Bay Bands' (LTBB) casino project, arguing that the only way to qualify as a restored tribe for purposes of 25 U.S.C. § 2719 was for the tribe to have been terminated by Congressional action. Sault Ste. Marie Tribe Of Lake Superior Chippewa Indians v. United States, 78 F. Supp. 2d 699 (1999), rev'd on other grounds (standing). With the exception of restoration via a Congressional act, the LTBB history is markedly similar to that of the Sault Ste. Marie. The LTBB took part in the 1836 Treaty of Washington and the 1855 Treaty of Detroit as well, were denied the right to organize under the IRA, maintained a continuous tribal government, and its leaders had continuous dealings with the federal government. Id. The LTBB was found to be restored by the court due to its history, and the Sault Ste. Marie Tribe qualifies as well in spite of its lack of Congressional termination.

[5] We note that, under the preliminary regulations proposed, but not yet adopted, by DOI interpreting 25 U.S.C. § 2719, the Sault Ste. Marie Tribe would not qualify as a restored tribe. Draft section 292.7(3) requires that tribal restoration to federal recognition must have been via one of three methods: congressional legislation, administrative action through the Federal Acknowledgment Process of 25 C.F.R. § 83.8, or judicial determination or court approved stipulated entry of judgment entered into by the United States. The Sault Ste. Marie Tribe was administratively restored before the Federal Acknowledgment Process was implemented in 1979. The Tribe thus would not qualify as a restored tribe under the draft regulations.

restoration to federal recognition. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan (Grand Traverse Band I), 46 F. Supp. 2d 689, 699 (W.D. Mich. 1999), aff'd Grand Traverse II; Coos, 116 F. Supp. 2d at 164.

Nonetheless, there are limits to what constitutes restored lands. As the NIGC stated in its opinion, requested by the court in Grand Traverse II, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." Letter from Kevin K. Washburn, National Indian Gaming Commission General Counsel, to Honorable Douglas W. Hillman, Senior United States District Judge, United States District Court (W.D. Michigan), Re: Whether the Turtle Creek Casino site [h]eld in trust [f]or the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the [IGRA's] general prohibition of gaming on lands acquired after October 17, 1988, 15 (Aug. 31, 2001) (NIGC Grand Traverse Opinion); see also Office of the Solicitor's Memorandum Re: Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt 8 (Dec. 5, 2001) (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied.").

The courts in Coos and Grand Traverse I and Grand Traverse 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, 116 F. Supp. 2d at 164; Grand Traverse I, 46 F. Supp.2d at 700; see also Grand Traverse II, 198 F. Supp. 2d at 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"). 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.; see also Letter to Bradley Bledsoe Downs, Dorsey and Whitney LLP, from Penny J. Coleman, Acting General Counsel 5 (Oct. 12, 2004) (adopting the court's suggested three-factor analysis).

The Associate Solicitor, Department of the Interior adopted a similar interpretation in his Coos Opinion on remand from the Coos court. "We believe [t]hat to apply [the] dictionary definition to the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming on restored lands." Office of the Solicitor's Coos Opinion at 6.

Upon review of these three factors, as set forth below, we conclude that the St. Ignace parcel would not be considered restoration of lands to a restored tribe under 25 U.S.C. § 2719(b)(1)(B)(iii).

i) Factual Circumstances of the Acquisition

On balance, the factual circumstances of the acquisition do not weigh in the Tribe's favor. Congress added the exceptions in 25 U.S.C. § 2719(b)(1)(B) to ensure that tribes lacking reservations or other trust lands when IGRA was enacted would not be disadvantaged relative to more established tribes. *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 124 S. Ct. 1888 (2004).

The Sault Ste. Marie Tribe was restored to federal recognition in 1972. Since that time, the Tribe has had several parcels proclaimed to be the Tribe's reservation by the Secretary. In 1975, the Secretary proclaimed a 40 acre tract on Sugar Island as a reservation for the Tribe pursuant to the Indian Reorganization Act. 40 Fed. Reg. 8367-68 (Feb. 27, 1975). An additional 84.8 acres of land were proclaimed to be a reservation in 1984. 40 Fed. Reg. 940 (Jan. 6, 1984). Thus, the Tribe has 120.8 acres currently set aside as its reservation.

In addition, the Tribe has many other acres of land acquired in trust by the United States for its benefit. There are currently approximately 1656 acres in trust for the Tribe according to a Bureau of Indian Affairs' Sault Ste. Marie Trust Land Log, all but approximately 564.38 acres of which were taken into trust before acquisition of the St. Ignace parcel in 2000. In total, the Tribe has approximately 1776.65 acres of trust and reservation land according to the Trust Land Log. The St. Ignace trust parcel is not contiguous to any of the Tribe's parcels that have been proclaimed to be reservation land by the Secretary. This record of trust acquisition indicates that the Tribe has had no difficulties acquiring reservation land or placing land into trust. The Tribe had acquired a substantial land base by the time the St. Ignace parcel was taken into trust.

Several of our past restored lands opinions addressed the number of lands already in trust before the potential gaming site. The Cowlitz Indian Tribe had no land base whatsoever when it applied to have its proposed gaming parcel put into trust. Letter from Penny J. Coleman, Acting General Counsel, to John Barrett, Chairman, Cowlitz Indian Tribe, Re: Cowlitz Indian Tribe's Class II Gaming Ordinance 10 (Nov. 23, 2005) (NIGC Cowlitz Opinion). Similarly, the parcel examined for Bear River Band of the Rohnerville Rancheria was that tribe's first trust acquisition, and the parcel examined for the Mechoopda Indian Tribe of the Chico Rancheria was that tribe's second trust acquisition. Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria 10 (Aug. 5, 2003) (NIGC Rohnerville Opinion); Memorandum from NIGC Acting General Counsel to NIGC Chairman 8 (March 14, 2003) (NIGC Mechoopda Opinion). The DOI Coos Opinion noted that the subject site was a public domain allotment to the ancestor of a tribal member. DOI Coos Opinion at 14. On the other hand, the Karuk and Wyandotte opinions noted that many trust acquisitions had already been made for those tribes and that this weakened the restored land claim. NIGC Karuk Opinion at 9 (11 parcels in trust); *In re: Wyandotte Nation*

Amended Gaming Ordinance, NIGC Final Decision and Order at 13 (Sept. 10, 2004) (NIGC Wyandotte Opinion) (3 parcels, totaling 194.3 acres).

The factual circumstances analysis allows the NIGC to assess the land acquisition status of a tribe when the proposed gaming site was taken into trust. We find very informative the finding of the Grand Traverse II court that the site at issue for the Grand Traverse Band "was part of the very earliest attempts to build a reservation". Grand Traverse II, 198 F. Supp. 2d at 937. In the case of the Sault Ste. Marie Tribe, the many trust and reservation parcels acquired previous to the 2000 parcel indicate that the Tribe had already managed to acquire a significant land base. The factual circumstances here of extensive acreage in trust and reservation status for the Tribe do not support a conclusion that the 2000 parcel was part of the IGRA land restoration process.

ii) Location of the Land

The physical location of a trust acquisition is an important factor in determining whether the parcel constitutes restored lands. NIGC Grand Traverse Opinion at 17-18; NIGC Wyandotte Opinion at 10. In this context, we evaluate the Tribe's historical nexus to the land as well as its modern nexus to the land. Id.

a. Historical Connections to the Land

Several indicators of historical nexus have been developed through agency decisions and IGRA caselaw. These include whether the gaming site is within a former reservation of the tribe, whether the land is near to a tribal center or tribal programs, and how significant the land is to the tribe. Based upon a review of these criteria, we find that the Tribe has a historical nexus to the St. Ignace parcel.

First, both the Grand Traverse I and Coos courts held that "[p]lacement within a prior reservation is significant evidence that the land may be considered in some sense restored." See Grand Traverse I, 46 F. Supp. 2d at 702; and Coos, 116 F. Supp. 2d at 164 (quoting Grand Traverse I). The St. Ignace parcel was in an area ceded by the Tribe in the treaty of 1836,[6] when the Tribe ceded the eastern half of the Upper Peninsula and its land in the Lower Peninsula of Michigan. Treaty of June 16, 1836. The City of St.

[6] The Indian Claims Commission found:

> With respect to claims under the treaties, history shows that while the treaties named the "Chippewa Nation of Indians" or "Chippewa Tribe of Indians" as parties, the treaties were in fact made with, and the payments to be made under them, were understood to be limited to only those of the numerous bands of Chippewas who were in the area where the lands dealt with in the treaties were situated. After the advent of Lewis Cass in 1817 and Henry R. Schoolcraft in 1822, all responsible officials of the United States were careful in the dealings with the Chippewa Indians to summon to council the headmen of all bands known or believed to be in occupancy of the lands in question or otherwise interested in matters to be discussed, and not to summon other Indians.

Bay Mills, 22 Ind. Cl. Comm. at 88-89 (Nov. 19, 1969)

Ignace is located near the northeastern tip of the Upper Peninsula and was within the land ceded in the 1836 treaty.

Second, the NIGC has taken into consideration the proximity of the land in question to the tribal center prior to termination. In our Rohnerville opinion, the parcel at issue was six miles from the Rohnerville tribe's original Rancheria, whose boundaries had been re-established. NIGC Rohnerville Opinion at 2. Additionally, when the Rohnerville tribe was terminated in 1962, the Rancheria was divided and distributed to individual Indians; at the time the Rohnerville Rancheria boundaries were re-established in 1983, there were still six acres in individual Indian ownership. In our Mechoopda opinion, the parcel was located approximately ten miles from the Tribe's original Rancheria, which it occupied immediately prior to termination. NIGC Mechoopda Opinion at 1, 9. In our Grand Traverse Opinion, we noted that the Turtle Creek site was not on the fringes of the Grand Traverse Tribe's territory, but was part of a tightly circumscribed area that formed the core of the tribe's territory. NIGC Grand Traverse Opinion at 17.

In this instance, the parcel is approximately 50 miles from the Tribal center in Sault Ste. Marie, Michigan. The entire Chippewa nation was located in the area around Lakes Huron and Superior when the first white explorers arrived in the seventeenth century. Bay Mills Indian Cmty., Sault Ste. Marie Bands v. United States, 22 Ind. Cl. Comm. 85, 88 (Nov. 19, 1969).[7] The Chippewa bands that make up the Sault Ste. Marie Tribe ceded the eastern Upper Peninsula and the eastern half of the Lower Peninsula in the 1836 treaty, maintaining a reservation at Point-au-Barbe near the city of St. Ignace as well as reservations near the city of Sault Ste. Marie and on the Mackinac and Sugar Islands.

The case United States v. Michigan found that the Tribal bands largely live and fish in their historical fishing areas. 471 F. Supp. at 225. The BIA has taken into trust lands in or near the cities of Sault. Ste. Marie, St. Ignace, Hessel, Manistique, Munising, and Escanaba for the benefit of tribal members living in these eastern Upper Peninsula areas. The cities of Escanaba, Munising, and Manistique are each over 100 miles from that of Sault Ste. Marie, past nearby St. Ignace. Moreover, the Tribe has historical connections to this large land base as determined by Professor Charles Cleland, an expert on the Chippewa Indians. Cleland Aff. ¶¶ 7-9; Charles E. Cleland, Ph.D., *The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians* (June 28, 2006). An important Tribal center was at the falls of St. Mary in what became the city of Sault Ste. Marie, approximately fifty miles from St. Ignace. The various Chippewa bands used to gather at the falls every year for the abundant fishing which constituted an integral part of the members' diet. Charles E. Cleland, *The Place of the Pike (Gnoozhekaaning): A History of the Bay Mills Indian Community* (2001). The Tribe's fishing and encampment rights at the city of Sault Ste. Marie's falls of St. Mary were preserved when the Tribe ceded territory in the 1820 and 1836 treaties, though ceded in the August 2, 1855 treaty. Considering the extent of the Sault Ste. Marie Tribe's historical territory, we find that the St. Ignace parcel is within the core of the Tribe's

[7] The Indian Court of Claims found that the Bay Mills Indian Community was entitled to bring claims in a representative capacity on behalf of the Sault Ste. Marie Band of Chippewa Indians. Id. at 89-90; Bay Mills, 22 Ind. Cl. Comm. at 83 (Nov. 19, 1969).

territory, which centers around the fishing site at the falls of St. Mary. We do not offer an opinion as to that of the Tribe's other trust parcels as they are not being considered here other than as examples of the breadth of the territory inhabited by the Tribe.

Third, we have also looked at the significance of the land to the tribe. In Grand Traverse, we found that restoration was shown by the "Band's substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." NIGC Grand Traverse Opinion at 15. We further stated, "[a]t the time of termination, Band members lived not far from the [parcel at issue]. For most of the Band's recorded history, it has lived and worked in [the general area of the parcel at issue]". Id. at 18. Finally, it was significant to the NIGC Grand Traverse Opinion that the land had "been at the heart of the Band's culture throughout history..." Id. at 19. In concluding that the parcel at issue was restored land, the Associate Solicitor stated that he considered that the tribes in the Coos opinion were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." Id. at 14. In Mechoopda, three buttes that figured prominently in a tribal myth were located one mile from the parcel; an historic trail linking several tribal villages crossed the parcel; and several Mechoopda villages were located in close proximity to the site. NIGC Mechoopda Opinion at 10-11. In Rohnerville, the parcel was located within one mile of two aboriginal villages and two major tribal trails and was within three miles of five aboriginal villages. NIGC Rohnerville Opinion at 11. Also, the site of a mythic flood in tribal lore was within three or four miles from the Rohnerville site. Id. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important to our determination that tribal members resided on the original Rancheria at the time of termination. NIGC Rohnerville Opinion at 10. The NIGC Cowlitz Opinion, while finding that the historical nexus was not the strongest prong of that tribe's restored lands analysis, noted that the Cowlitz Tribe, throughout its history, used the Lewis River Property area for hunting, fishing, frequent trading expeditions, occasional warfare, and if not permanent settlement, then at least seasonal villages and temporary camps. NIGC Cowlitz Opinion at 11.

In this case, the Sault Ste. Marie Tribe cites to the case of United States v. Michigan and has provided an affidavit and report by Dr. Charles E. Cleland, Ph.D. The Michigan court noted the locations of the bands who signed the 1836 treaty, although it was unsure which bands were from the Ottawa Tribe, which from the Chippewa, and which from both. 471 F. Supp. at 223. The bands at St. Ignace on Lake Huron were included in this list. Id. The court went on to note that both the Bay Mills and Sault Ste. Marie Tribes "are modern political successors in interest to the Indians who were party to the Treaty of 1836." Id. at 264. As to the areas ceded by the Chippewa and Ottawa by treaty, the court found "[t]he Indians were living on the shores of the Great Lakes throughout the [1836] treaty area adjacent to the productive fishing grounds . . . . This settlement pattern is shown in the Treaty of 1836 itself in the location of the reservations and of the chiefs listed in the schedule supplemental to Article Tenth."). The court also found that "Indian fishermen still live in the same areas and fish on the same fishing grounds as did their ancestors for centuries past." 471 F. Supp. at 225.

Professor Cleland's affidavit and report shed further light on the extent of the Sault Ste. Marie Tribe's territory.[8] Professor Cleland concluded that the aboriginal Chippewa peoples, to which the Tribe is a successor, have occupied the coast of Lake Huron in the St. Ignace region since time immemorial and met French traders in the area in the 1650's. Cleland Aff. ¶ 7; Charles E. Cleland, *The Place of the Pike*; *Rites of Conquest: The History and Culture of Michigan's Native Americans* (1992). Professor Cleland states that the Sault Ste. Marie Tribe has never left the St. Ignace area, which is an important hunting, fishing, trapping, and gathering area for the Tribe. Id. Professor Cleland also submitted a report, in which he noted that the Sault Ste. Marie who signed the treaty of 1836 were "composed of six bands that occupied the territory from Marquette on the south shore of Lake Superior east to the Sault." Charles E. Cleland, Ph.D., *The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians* (June 28, 2006).

The St. Ignace parcel is within the tribe's last treaty reservation and thus would meet the test set forth in the DOI preliminary regulations on the eligibility of land for gaming under the IGRA as proposed section 292.7(2)(ii)(A). The Tribe would additionally qualify for this factor under the alternative method, found at proposed section 292.7(2)(B), of establishing a historical connection because it has significant documented historical connections to the area noted in court findings.

b. Modern Connections to the Land

We also examine the modern nexus of the tribe to the land at issue. Wyandotte Nation v. National Indian Gaming Comm'n, 2006 U.S. Dist. LEXIS 45905 at *61 (D. Kan. July 6, 2006) (The court "agrees with the NIGC that in order to evaluate this issue fully, the agency must evaluate the present circumstances of the Tribe and its relationship with the land at issue.").

The Tribe has modern-era and present connections to the land at issue. Modern connections to the land can be established through a variety of factors, such as a geographical nexus between the parcel and the seat of tribal government, the tribe's population center, tribal member service facilities, tribal businesses, tribal housing developments, or the tribe's service area as defined by federal agencies. NIGC Wyandotte Opinion at 10; NIGC Grand Traverse Opinion at 20-21.

The St. Ignace site is indisputably within several miles of many tribal programs. On the 1983 trust land contiguous to the St. Ignace parcel, there are fifty-nine Housing and Urban Development (HUD) homes for tribal members maintained by the Tribal housing authority; the Tribe's Lambert Center operates an outpatient medical clinic, family and substance abuse services, and a Head Start center; and the Tribe's Kewadin Shores Casino. Payment Aff. ¶ 22. In the town of St. Ignace the Tribe maintains a building housing a tribal youth facility and the tribal court. Id. The St. Ignace parcel itself contains a tribal water and sewage system for the fifty-nine tribal housing units on the

[8] His work is especially persuasive because he is one of the experts on whom the Michigan court relied.

1983 tract. Id. at ¶ 7. Additionally, the Tribe runs a convenience store and a gas station on a parcel contiguous to the 1983 tract. Id. at ¶22. Therefore, the Tribe has established a modern connection to the St. Ignace area and the adjacent 1983 trust parcel in particular.

We note the preliminary regulations being considered by the DOI on the eligibility of after-acquired trust lands for gaming purposes find a modern connection to the land if a majority of tribal members reside within 50 miles of the gaming site. 292.7(2)(i) of the draft regulations. The Sault Ste. Marie Tribe has over 30,000 members spread out over Michigan's Upper Peninsula, with tribal trust lands in or near the cities of Sault. Ste. Marie, St. Ignace, Hessel, Manistique, Munising, and Escanaba and tribal members living in these areas. Letter from Bruce R. Greene, Greene, Meyer, & McElroy, to Andrea Lord, Attorney, NIGC (July 13, 2006). Approximately 13,000 members live in the Upper Peninsula and 9,200 of those live within 50 miles of the city of St. Ignace. Id. The Tribe would not meet this requirement if the regulations are promulgated in their current form.

iii) Temporal Relationship of the Acquisition to Tribal Restoration

The final factor to be considered in the restored lands analysis is whether there is a reasonable temporal connection between the restoration of federal recognition and the trust acquisition of the land at issue. Grand Traverse II, 198 F. Supp. 2d at 936 ("the land may be considered part of a restoration of lands on the basis of timing alone."); NIGC Mechoopda Opinion at 11 ("the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored").

The NIGC recognizes that, subsequent to the restoration of federal recognition, a tribe needs time to organize, hold elections, and approve a constitution or other governing document before focusing on land acquisition. Consistent with court guidance, we assess whether the site was "part of the first systematic effort to restore tribal lands." Grand Traverse II, 198 F. Supp. 2d at 936. There are two issues inherent to this analysis: 1) the time the land was taken into trust after restoration of the Tribe and 2) how many other parcels were taken into trust or turned into a reservation for the Tribe after Tribal restoration, but before the parcel in question.

The longest gap between tribal restoration and the acquisition of land into trust found to be a restoration of lands by the DOI or the NIGC is 14 years. See Office of the Solicitor Coos Opinion. The Sault Ste. Marie Tribe asks us to double this restoration period to a significant gap of 28 years between tribal restoration, if such occurred, and acquisition of trust land, years in which this Tribe was actively building up its extensive land base.

The Tribe makes much of the fact that draft regulations being considered by DOI allow for a 25 year period between Tribal restoration and trust land acquisition on lands eligible for gaming under the IGRA. However, that 25 year period is to accommodate tribes who have had difficulty placing land into trust, a problem which has not plagued the Sault Ste. Marie Tribe, whose Trust Land Log indicates a continual process of trust acquisitions. In the case of the Grand Traverse Band, for example, years passed between tribal restoration and DOI approval of the tribal constitution, and the Secretary of the DOI would not take land into trust on behalf of the Grand Traverse Band until its constitution had been

approved. Grand Traverse II, F. Supp. 2d at 936. The situation with the Sault Ste. Marie Tribe, however, is not one of a tribe making its first trust acquisition or set of trust acquisitions. The Tribe had its first reservation parcel by 1975, and three reservation parcels by 1984 as well as an additional 184.21 acres in trust. These parcels were taken into trust 3 years and 9 years after Tribal restoration. By the time the St. Ignace parcel was placed into trust in 2000, the Tribe had acquired 50 parcels totaling nearly another 1000 acres into trust. These trust parcels have given it significant acreage devoted to member housing, community services, and economic development that might better be determined part of the Tribe's first systematic effort to restore its land base. The reservation land and at least some of the other acreage acquired into trust by the Tribe in the years between 1972 and 1984 are more likely to be the Sault Ste. Marie Tribe's first systematic attempts to acquire a land base.

Further, the IGRA was passed in 1988. Since that time newly restored tribes have been very conscious of how the IGRA's limitations on after-acquired land will impact their first acquisitions of trust or reservation land. See NIGC Cowlitz Opinion (petition for land to be taken into trust filed on the very day the Cowlitz tribe was restored to federal recognition). The Sault Ste. Marie Tribe certainly knew the importance of timing in selecting trust land for IGRA gaming after passage of the Act. Despite this, the Tribe waited 28 years between restoration of the Sault Ste. Marie Tribe in 1972, and placement of the St. Ignace parcel into trust in 2000.

The Tribe asks us to leap from a 14 year gap to a 28 year one in extending the reasonable temporal period eligible for the restoration of lands for a restored tribe. We decline to do so because a 28 year period has elapsed in which the Tribe has had over a thousand acres placed into trust for it after restoration. At some point, we must establish a limit on the time available to acquire land as part of a Tribe's restoration. Certainly, under the circumstances described here, 28 years is simply too long an interval between restoration and the trust acquisition. The Tribe simply cannot claim under these circumstances that, 28 years later, it was still acquiring its initial land base.

IV. Conclusion

The St. Ignace parcel does not meet the restored lands of a restored tribe exception, laid out in 25 U.S.C. § 2719(b)(1)(B)(iii) to the IGRA's general prohibition of gaming on lands acquired into trust after October 17, 1988. The Sault Ste. Marie Tribe cannot meet the restoration of lands component because two prongs of the analysis, the factual circumstances and temporal connection of restoration with the acquisition of the parcel into trust, have not been met. Therefore, the St. Ignace parcel constitutes Indian lands not eligible for gaming. The Tribe may not game on this land.

The Department of the Interior, Office of the Solicitor, concurs in this opinion.

EXHIBIT D

NOV 23 2005

Via Facsimile and U.S. Mail

John Barnett, Chairman
Cowlitz Indian Tribe
P.O. Box 2547
Longview, WA 98632-8594

RE: Cowlitz Indian Tribe's Class II Gaming Ordinance

Dear Chairman Barnett:

On August 29, 2005, the National Indian Gaming Commission (NIGC) received Tribal Council Ordinance No. 05-2 (Aug. 22, 2005), the proposed tribal gaming ordinance of the Cowlitz Indian Tribe (the Tribe). Aside from the ordinance's definition of "Tribe's Indian Lands," the tribal gaming ordinance generally follows the NIGC's model tribal gaming ordinance and is consistent with the requirements of the Indian Gaming Regulatory Act (IGRA) as well as the NIGC's implementing regulations.

The ordinance's definition of "Tribe's Indian Lands" contains a site-specific legal land description of a nearly 152-acre site in Clark County, Washington, made expressly contingent on the United States first accepting trust title to the site and the Tribe first exercising governmental power over the site. This proposed definition required the NIGC to conduct a legal analysis of the applicability of IGRA's restored lands for a restored tribe provision, 25 U.S.C. § 2719(b)(1)(B)(iii), in order to determine whether the Tribe will be allowed to conduct gaming activities on the site if the Department of the Interior accepts the land into trust for the benefit of the Tribe.

The NIGC's Office of General Counsel has provided me with a legal opinion concluding that the Tribe was "restored to Federal recognition" and that if the Department of the Interior accepts trust title to the 152-acre site, such trust acquisition will be part of the "restoration of lands" for the Tribe, as those terms are used in 25 U.S.C. § 2719(b)(1)(B)(iii). The record supports the Office of General Counsel's opinion, and I therefore adopt the analysis and conclusion provided therein.

Therefore, the tribal gaming ordinance is hereby approved. This approval is not intended to provide any recommendation to the Secretary of the Interior regarding the Tribe's pending fee-to-trust application, or to affect the Secretary's discretion in making the fee-to-trust decision.

EXHIBIT D

Additionally, this approval does not authorize the Tribe to conduct gaming on the subject site. In order to conduct gaming on the subject site, the Department of the Interior must first accept the land into trust, and the Tribe must first exercise government authority over the site.

Sincerely,

Philip N. Hogen
Chairman

MEMORANDUM

TO: Philip N. Hogen, Chairman

FROM: Penny J. Coleman, Acting General Counsel PJC

DATE November 22, 2005

RE: Cowlitz Tribe Restored Lands Opinion

On August 29, 2005, the Cowlitz Indian Tribe ("Cowlitz Tribe" or "Tribe") submitted a site-specific tribal gaming ordinance claiming that a certain parcel in the State of Washington near the Lewis River ("the Lewis River Property") would qualify as Indian lands on which the Tribe could conduct gaming if the lands are acquired into trust by the Department of the Interior.[1]

As detailed below, the Office of General Counsel's opinion is that the Cowlitz Tribe is a restored tribe and that if the United States Department of the Interior accepts the Lewis River Property into trust for the Tribe, such trust acquisition will qualify as the "restoration of lands" within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii). We note that the Department of the Interior, if it acquires the Lewis River Property into trust, may proclaim the parcel to be the Tribe's initial reservation. An "initial reservation" proclamation would provide a second basis by which the parcel would qualify as Indian lands on which the Tribe could conduct gaming. 25 U.S.C. § 2719(b)(1)(B)(ii).

PROCEDURAL BACKGROUND

On January 4, 2002, the Cowlitz Tribe submitted a fee-to-trust application to the Department of the Interior, requesting the Department of the Interior to accept title to the Lewis River Property in trust for the Cowlitz Tribe pursuant to 25 C.F.R. Part 151. The Tribe later withdrew this application, and on March 12, 2004, the Tribe submitted a revised fee-to-trust application that specifically identified the Tribe's intention to use the site for gaming purposes. The Tribe's fee-to-trust application is still pending at the

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[1] The NIGC's decision whether to approve or disapprove the tribal gaming ordinance is due on November 25, 2005. The scope of this legal opinion is limited to the issue of whether the Lewis River Property, if accepted into trust, will qualify for the restored lands for a restored tribe exception to IGRA's prohibition against gaming on Indian lands acquired into trust after October 17, 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). All other legal issues associated with the Tribe's gaming ordinance have been addressed outside of this opinion. The decision whether to approve the Tribe's gaming ordinance will be based on the entire record, including but not limited to, the contents of this legal opinion.

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REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

Department of the Interior. This legal opinion is not intended to affect the Secretary of the Interior's discretion under Part 151 or provide any recommendation regarding the merit of the Tribe's pending fee-to-trust application. Furthermore, this opinion does not authorize the Tribe to conduct gaming on the Lewis River Property. In order to conduct gaming on the Lewis River Property under IGRA, the Department of the Interior must accept the land into trust. This memorandum is simply a legal opinion expressing the Office of General Counsel's view that if the Department of the Interior accepts trust title to the Lewis River Property, the site will then qualify as restored lands for a restored tribe, enabling the Tribe to conduct gaming activities thereon.

The Cowlitz Tribe requested this legal opinion in March 2005 ("Request"), in association with a site-specific tribal gaming ordinance that the Tribe also submitted for the NIGC's review. On August 18, 2005, the Tribe withdrew its original tribal gaming ordinance from the NIGC's review in order to give the NIGC more time to consider the restored lands issue, and to incorporate some minor changes to the ordinance language. On August 29, 2005, the Tribe submitted a revised site-specific tribal gaming ordinance to the NIGC. Letter from V. Heather Sibbison, Counsel for the Cowlitz Tribe, to Jeff Nelson, NIGC Staff Attorney (Aug. 29, 2005) (transmitting Cowlitz Tribal Council Ordinance No. 05-2).

The tribal gaming ordinance at issue, if approved by the NIGC, would authorize Class II gaming on the "Tribe's Indian Lands." Cowlitz Tribal Council Ordinance No. 05-2, § 3. The tribal gaming ordinance's definition of the term "Tribe's Indian Lands" contains a site-specific legal land description of the Lewis River Property. *Id.* § 2(O). Specifically, the Tribe's gaming ordinance defines "Tribe's Indian Lands" as:

> (1) All lands within the limits of the Cowlitz Indian reservation;[2] or
>
> (2) Any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual member of the Tribe, or held by the Tribe or individual member of the Tribe subject to restriction by the United States against alienation and over which the Tribe exercises governmental power, including but not limited to, certain land for which the Tribe has submitted a fee-to-trust application and which the Tribe intends to use for the development of a gaming facility as allowable under 25 U.S.C. 2719(b)(1)(B), provided that this certain land will not be deemed the 'Tribe's Indian Lands' until such time as the United States has acquired trust title to it and the Tribe exercises governmental power over it. Said land is specifically described as follows:
>
> [See Appendix A of this opinion for the detailed legal land description contained in the Tribe's gaming ordinance.]

[2] At the present time, the Cowlitz Tribe has no reservation.

Cowlitz Tribal Council Ordinance No. 05-2, § 2(O).

Based on the maps and other information provided to the NIGC by the Cowlitz Tribe, the legal land description in the tribal gaming ordinance refers to an irregularly-shaped, contiguous tract of land approximately 151.87 acres in size. The site is referred to by the Tribe as "the Cowlitz Parcel," but this opinion uses the term "Lewis River Property" to refer to the same tract of real estate. The Lewis River Property is in Clark County, Washington, just to the west of Interstate 5 at Exit 16, approximately one half mile away from Paradise Point State Park and approximately 16 miles north of Portland, Oregon.

In addition to the Tribe's Request and several supplemental submissions received from the Tribe, we also have received and considered opposition comments and analyses provided by the Confederated Tribes of the Grand Ronde Community of Oregon, two non-Indian card room operations in La Center, the City of La Center, State Representative Richard Curtis, the American Land Rights Association, and a number of other groups and private citizens.

APPLICABLE LAW

For tribes to conduct gaming under IGRA, such gaming must be conducted on "Indian lands," defined 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). *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. IGRA generally prohibits gaming on lands acquired in trust after October 17, 1988 (IGRA's enactment date), unless one of the statute's exceptions apply. 25 U.S.C. § 2719. Accordingly, for lands taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether a tribe can conduct gaming on such lands.

In this case, the Tribe has requested a legal opinion regarding whether trust acquisition of the Lewis River Property would qualify for IGRA's restored lands exception. The restored lands exception allows gaming on Indian lands acquired in trust after October 17, 1988, if the lands are 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).

ANALYSIS

Application of IGRA's restored lands exception requires a two-part analysis: 1) whether the tribe is an "Indian tribe that is restored to Federal recognition"; and 2) whether trust acquisition of the subject land is part of a "restoration of lands" for the tribe. These terms are not defined in IGRA or the NIGC's implementing regulations, but several judicial decisions and agency opinions offer legal guidance.

I. The Cowlitz Tribe Has Been Restored to Federal Recognition

To be considered an "Indian tribe that is restored to Federal recognition," as that term is used in IGRA, a tribe must demonstrate a history of: 1) governmental recognition; 2) a period of non-recognition; and 3) reinstatement of recognition. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004). As set forth below, the Cowlitz Tribe meets all three of these necessary criteria.

A. The Cowlitz Tribe Was Recognized During the Nineteenth Century

The record in this case shows that during the mid-to-late 1800s, the United States Government recognized the Cowlitz Indian Tribe. The current Cowlitz Tribe evolved from an amalgamation of two treaty-time tribes, now referred to as the Lower Cowlitz Tribe and the Upper Cowlitz Tribe. Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002); Final Determination to Acknowledge the Cowlitz Tribe, 65 Fed. Reg. 8436 (Feb. 18, 2000). In this case, during the Federal Acknowledgment Process, the Bureau of Indian Affairs ("BIA") determined that the Lower Cowlitz Tribe and the Upper Cowlitz Tribe, from which the modern Tribe evolved, both were recognized by the Federal government during the mid-to-late 1800s. 67 Fed. Reg. at 608; 65 Fed. Reg. at 8436. The NIGC's Office of General Counsel accepts those findings as conclusive for the purposes of satisfying this element of the "restored tribe" test. Even so, this memorandum will explain why the Office of General Counsel agrees with the BIA's findings.

Before the modern era of federal Indian law, one method by which the United States Government recognized the governmental status of an Indian tribe was to conduct government-to-government negotiations with the intent to enter into a treaty with the tribe. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *see also Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); *United States v. Washington*, 898 F. Supp. 1453, 1458 n.7 (W.D. Wash. 1995), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998) (stating that treaty rights were "the result of the negotiation between two sovereigns, the United States and the Tribes."); Letter

from Penny J. Coleman, NIGC Acting General Counsel, to Bradley G. Bledsoe Downes, Esq., at 3 (Oct. 12, 2004) ("NIGC Karuk Opinion") ("Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time.").

In 1854, the Federal Government's Acting Commissioner of Indian Affairs instructed Washington's first territorial governor, Isaac Stevens, to commence treaty negotiations with the Washington tribes. *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 166 (1969). In February of 1855, Governor Stevens convened treaty negotiations with the "Upper and Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets Indians." *Id.* at 167; *see also* Historical Technical Report: Cowlitz Indian Tribe, U.S. Dep't of the Interior, Bureau of Indian Affairs—Branch of Acknowledgment and Research at 36-39 ("HTR"). The "Cowlitz Tribe" that attended this treaty council was the modern Tribe's predecessor now referred to as the "Lower Cowlitz Tribe." 67 Fed. Reg. at 607-608. During the treaty negotiations, the Lower Cowlitz Tribe expressed a willingness to give up its lands and settle on a reservation being requested by the Upper Chehalis. *Plamondon*, 21 Ind. Cl. Comm. at 168-69. Kishkok, the Cowlitz chief, said they were willing to move to the Satsop country. *Id.* at 169. But Governor Stevens would not accede to the requests of the Indians for the reservations they desired, and no treaty was consummated. *Id.*

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.[3]

Furthermore, the Federal government recognized both the Lower Cowlitz and the Upper Cowlitz during the latter half of the 1800s, as supported by substantial evidence, including several Federal Indian agent censuses. 67 Fed. Reg. at 608; HTR at 67-89. This evidence is more than sufficient to support the opinion that the modern Cowlitz Tribe, through its predecessor tribes, was recognized by the Federal government before it lost such Federal recognition, as described below.

B. The Cowlitz Tribe Lost Its Federal Recognition During the Twentieth Century

Under the second step of an IGRA restored-tribe analysis, a tribe must demonstrate that during some period in the tribe's history, the tribe lost its prior Federal recognition. *Grand Traverse Band,* 369 F.3d at 968-72; *TOMAC v. Norton,* 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002) (holding that plaintiff lacked standing). In this case, as detailed below, the historical evidence establishes that the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002.

[3] The BIA came to the same conclusion, determining that the 1855 treaty negotiations represented "unambiguous Federal acknowledgement." HTR at 11.

Although the Cowlitz Tribe never signed a land cession treaty, President Lincoln opened the Cowlitz lands in southwest Washington to non-Indian settlement through a proclamation signed on March 20, 1863. *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 25 Ind. Cl. Comm. 442, 451 (1971). After the Cowlitz Tribe lost its land base, the Federal government stated in numerous records that the Tribe was not recognized as a governmental entity. For instance, during the early 1900s, the Cowlitz Tribe attempted to seek redress from the Federal Government for alienating its lands without payment to the Tribe. From 1915 through 1929, the Department of the Interior opposed a series of bills introduced in Congress that would have given the U.S. Court of Claims jurisdiction to hear the Tribe's claims, based in part on the Department's position that it no longer had a government-to-government relationship with the Tribe. HTR at 126. For example, in a letter to the Chairman of the Senate Committee on Indian Affairs, the Secretary of the Interior wrote:

> The records show that as early as 1893 these Indians [the Cowlitz Indians] were reported as being scattered through the southern part of the State of Washington, most of them living on small farms on their own; that they hardly formed a distinct class, having been so completely absorbed into the settlements; and that fully two-thirds of them were citizens and very generally exercised the right of suffrage. . . . In view of the foregoing it will be seen that the Cowlitz Indians are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic.

Letter from Secretary Hubert Work, Department of the Interior, to the Honorable J.W. Harreld, Chairman, Senate Committee on Indian Affairs (March 28, 1924), *quoted in* HTR at 126.

In 1933, the Bureau of Indian Affairs responded to a person apparently seeking enrollment in the Cowlitz Tribe:

> The receipt is acknowledged of your letter of October 5, making application for enrolment [sic] with the Cowlitz tribe of Indians; and stating that several of your relatives would like to be enrolled therewith.
>
> No enrolments [sic] are now being made with the remnants of the Cowlitz tribe which in fact, *is no longer in existence as a communal entity. There are, of course, a number of Indians of Cowlitz descent in that part of the country, but they live scattered about from place to place, and have no reservation under Governmental control.* Likewise, they have no tribal funds on deposit to their credit in the Treasury of the United States, in which you and your relatives might share if enrolled.
>
> Only Indians who have the status of Federal wards are entitled to free hospitalization at a Government Indian hospital.

Letter from John Collier, Commissioner, Bureau of Indian Affairs, to Lewis Layton (Oct. 25, 1933), *quoted in* HTR at 123-24 (emphasis added).

In 1968, a Bureau of Indian Affairs enrollment officer informed a Cowlitz tribal member that "the Cowlitz . . . are not a reservation group and . . . are not presently recognized as an organized tribe by the United States." Letter from Chester J. Higman, Bureau of Indian Affairs, to Isaac Kinswa (Sept. 27, 1968), *quoted in* HTR at 149.

In 1975, the Department of the Interior informed Congress that "[t]he Cowlitz Tribe of Indians is not a Federally-recognized tribe. Therefore, there is presently no Federally-recognized successor to the aboriginal entity aggrieved in 1863." Letter from Morris Thompson, Commissioner of Indian Affairs, to the Chairman of the Senate Subcommittee on Indian Affiars (Sept. 24, 1975), *reprinted in* Distribution of Funds to Cowlitz and Grand River Band of Ottawa Indians: Hearing Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 94th Cong. 6 (1975).

One month later, the Department of the Interior sent Senator James Abourezk a letter to respond to the Senator's request for information. Letter from Morris Thompson, Commissioner of Indian Affairs, to the Honorable James Abourezk, United States Senate (Oct. 29, 1975), *reprinted in* Distribution of Funds to Cowlitz and Grand River Band of Ottawa Indians: Hearing Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 94th Cong. 6 (1975). The first question to which the Department responded, as presented in the letter, inquired: "Why are neither the Cowlitz tribe nor the Grand River Band of Ottawa Indians 'federally recognized' tribes?" *Id.* With regard to the Cowlitz Tribe, the Department of the Interior responded:

> Throughout the 1850's and 60's the United States made a concerted effort to conclude a treaty with the Cowlitz Indians. Despite these efforts, no treaty was ever executed between the United States government and the Cowlitz Indians. From that time to the present, there has been no continuous official contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe of Indians.

Id. at 49 (emphasis in original).

Furthermore, before the Cowlitz Tribe completed the Federal Acknowledgment Process in 2000, the Bureau of Indian Affairs did not include the Cowlitz Tribe in its list of Federally-recognized tribes. 63 Fed. Reg. 71941 (Dec. 30, 1998); 62 Fed. Reg. 55270 (Oct. 23, 1997); 61 Fed. Reg. 58211 (Nov. 13, 1996); 60 Fed. Reg. 9250 (Feb. 16, 1995); 58 Fed. Reg. 54364 (Oct. 21, 1993).

This tribal history is very different than the situation presented in the NIGC Karuk Opinion, where the record lacked any evidence that the United States ever considered the Karuk Tribe to be non-recognized or ineligible to maintain a government-to-government relationship. NIGC Karuk Opinion at 3-4. At most, the Karuk Tribe was able to demonstrate that from 1852 to 1979, the United States and the Karuk Tribe had no

official government-to-government dealings. *Id.* However, nothing in the historical record suggested that this period of non-dealing was concomitant with Federal non-recognition. Rather, the record supported the view that the period of non-dealing was the result of the Karuk Tribe's own decisions to refrain from exercising the government-to-government relationship with the Federal government to which the Karuk Tribe was consistently entitled. In contrast here, the United States Government made numerous statements on the record evidencing the Federal Government's position that the Cowlitz Tribe was no longer Federally-recognized.

C. The Cowlitz Tribe's Recognition was Reinstated During the Twenty-First Century

A tribe with a history of governmental recognition, a period of non-recognition, and then reinstatement of recognition has been "restored" under IGRA, whether the reinstatement of recognition was achieved through Congressional action or through the administrative Federal Acknowledgment Process. *Grand Traverse Band,* 369 F.3d at 967, 969-72, *aff'g* 198 F. Supp. 2d 920, 932 (W.D. Mich. 2002); Letter from Kevin Washburn, NIGC General Counsel, to the Honorable Douglas W. Hillman, Senior U.S. District Judge at 12-17 (Aug. 31, 2001) ("NIGC Grand Traverse Opinion").

In this case, the BIA issued a final determination in February 2000 acknowledging that the Tribe exists as an Indian tribe within the meaning of Federal law. 65 Fed. Reg. 8436 (Feb. 18, 2000). In 2002, pursuant to a request for reconsideration, the BIA affirmed its earlier decision to acknowledge the Tribe. 67 Fed. Reg. 607 (Jan. 4, 2002).

As set forth above, the Cowlitz Tribe was recognized, lost its Federal recognition, and finally was reinstated to Federal recognition. Therefore, the Cowlitz Tribe is an "Indian tribe that is restored to Federal recognition" as that term is used in IGRA.

II. Trust Acquisition of the Lewis River Property Would Be a Restoration of Lands

Having determined that the Cowlitz Tribe is "restored," the next issue is whether trust acquisition of the Lewis River Property would be "land taken into trust as part of . . . the restoration of lands for an Indian tribe" under 25 U.S.C. § 2719(b)(1)(B)(iii).

The language of the statute does not require that a "restoration of lands" be accomplished through congressional action or in the very same transaction that restored the tribe to Federal recognition; and therefore, lands may be restored to a tribe through the administrative fee-to-trust process under 25 C.F.R. Part 151. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) ("*Grand Traverse Band II*"); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999) ("*Grand Traverse Band I*"). As stated by the United States District Court for the Western District of Michigan:

> [A]ccepting the State's position that some limitation is required, nothing in the record supports the requirement of Congressional action. Neither the statute nor the statutory history suggests such a limitation. 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.

Grand Traverse Band II, at 935. The court then proposed that land acquired after restoration could be limited by one or more factors: "For example, land that could be considered part of such restoration might appropriately 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.*; *see also* NIGC Karuk Opinion, at 5 (adopting the court's suggested three-factor analysis).

Upon review of these three factors, as set forth below, we conclude that trust acquisition of the Lewis River Property would be considered restoration of lands to a restored tribe under 25 U.S.C. § 2719(b)(1)(B)(iii).

A. Factual Circumstances of the Acquisition

On balance, the factual circumstances of the acquisition weigh in the Tribe's favor. First, the Tribe currently has no reservation or other trust land. Congress added the exceptions in 25 U.S.C. § 2719(b)(1)(B) to ensure that tribes lacking reservations or other trust lands when IGRA was enacted would not be disadvantaged relative to more established tribes. *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 124 S. Ct. 1888 (2004). As a newly-restored tribe seeking to obtain its first trust acquisition, the Cowlitz Tribe is squarely among the class of tribes that Congress intended to assist with these statutory exceptions.

The second factual circumstance that weighs in the Tribe's favor is that the Cowlitz Tribe has a long history of attempts to reacquire land, a history which significantly pre-dates the enactment of IGRA in 1988. Cowlitz tribal members began to seek formal redress for illegal dispossession of lands in 1908, and expanded those claims in 1909. HTR at 106-108. From 1915 through 1929, the Cowlitz Tribe pursued federal legislation that would have allowed it to present its claims before the Federal Court of Claims. HTR at 126. Although this legislation was never enacted, the Tribe was later able to bring a claim before the Indian Claims Commission ("ICC"). HTR at 144. In 1973, the Tribe agreed to settle its litigation with the United States, but insisted that some of the settlement money be set aside for land acquisition. HTR at 152. In 1975, Congress considered legislation to give effect to the settlement agreement, and Cowlitz Tribal Council Chairman Joseph Cloquet testified in favor of including a $10,000 set-aside for tribal land acquisition, stating:

> I submit to you, gentlemen, that this section is the very heart of the legislation to save our tribal entity, tribal ties, our Indianness denied us in

> the past century, and what culture we have left. Many of us, and I for one, would gladly give up the per capita distribution entirely for this provision in S. 1334. I am not willing to give up my Indian heritage for dollars. I will not stand by and see my people disbursed [sic] and become a small footnote to history.

Distribution of Funds to Cowlitz and Grand River Band of Ottawa Indians: Hearing Before the Subcomm. On Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 94th Cong. 68-69 (1975).

The Department of the Interior objected to provisions in the proposed legislation that provided money for land acquisition by the Cowlitz Tribe because the Tribe was not recognized at that time. HRT at 156-57. The proposed legislation stalled until after the Cowlitz Tribe became recognized. In 2004, two years after the Cowlitz Tribe became Federally recognized, Congress enacted the Cowlitz Indian Tribe Distribution of Judgment Funds Act. Pub. L. 108-222 (Apr. 30, 2004). Section 4(f)(1) of this law sets aside 21.5% of the $1.5 million settlement in order to produce annual interest payments that the Tribe may use for "[p]roperty acquisition for business or other activities which are likely to benefit the tribe economically or provide employment for tribal members." *Id.* § 4(f). On March 6, 2005, the Tribal Council of the Cowlitz Indian Tribe adopted a resolution stating that the Cowlitz Tribe shall use the settlement funds made available to the Tribe pursuant to Public Law 108-222 Section 4(f) towards the purchase of the Lewis River Property. Cowlitz Indian Tribe Tribal Council Resolution No. 05-19 (March 6, 2005).

The record shows that the Cowlitz Tribe has spent nearly 100 years attempting to re-establish a land base, and that the trust acquisition of the Lewis River Property would be the first trust acquisition of this protracted effort. Therefore, the factual circumstances of this acquisition weigh in favor of a restored-lands determination.

B. Location of the Acquisition

The physical location of a trust acquisition is an important factor in determining whether the parcel constitutes restored lands. *In re: Wyandotte Nation Amended Gaming Ordinance*, NIGC Final Decision and Order at 10 (Sept. 10, 2004) ("NIGC Wyandotte Opinion"); NIGC Grand Traverse Opinion at 17-18. In this context, we evaluate the Tribe's historical and modern connections to the land. *Id.*

1. Historical Connections to the Land

In this case, the record supports the opinion that throughout the Tribe's history, the Cowlitz people maintained connections to the area surrounding the Lewis River Property sufficient to weigh in the Tribe's favor in this restored lands analysis. The Cowlitz Tribe acknowledges that it was not the only tribe that used and occupied this area. In fact, the record shows that it probably was not the dominant tribe in the lower Lewis River watershed during treaty times. Commenters expressed significant disagreement with

some of the Tribe's assertions and interpretations of the historical record regarding the level of the Cowlitz Tribe's use, control and settlement of the Lewis River area. We have determined, however, that we need not resolve all of the disputes regarding the historical record in this case, because the unquestionable parts of the historical record establish that the Cowlitz Tribe, throughout its history, used the Lewis River Property area for hunting, fishing, frequent trading expeditions, occasional warfare, and if not permanent settlement, then at least seasonal villages and temporary camps. These historical connections are sufficient to weigh in favor of the Tribe in this restored lands analysis. Additionally, while the documentation does not specifically identify the Lewis River Property as a historically important parcel, this lack of a specific nexus is not determinative in light of the other factors weighing in favor of the Tribe's assertion that these lands are restored lands.

In arriving at this conclusion, we relied on the entire record, as provided by the Tribe and its opposition groups. We relied most heavily on facts appearing in the Tribe's acknowledgement proceeding record, as developed and published by the BIA, and the facts adjudicated by the Indian Claims Commission. The following quotations and notes from the record are select examples that are meant only to be illustrative.

The Tribe's federal acknowledgment proceeding record includes the following description:

> From the earliest descriptions of explorers, the historical Cowlitz Indians lived mainly along the length of the Cowlitz River, from slightly above its mouth, or juncture with the Columbia River, as far upriver as the area of Randle, Washington. This was a distance of some 80 miles. There were also villages and/or hunting camp sites along other rivers such as the Toutle and the Lewis.

Genealogical Technical Report: Cowlitz Indian Tribe, U.S. Dep't of the Interior, Bureau of Indian Affairs—Branch of Acknowledgment and Research at 4-5 (footnote omitted) ("GTR").

> In approximately 1813-1814, Alexander Henry of the North West Company wrote that Cowlitz, to the number of 100 men, had a battle with Casino (a Multnomah Chinookan chief) at the lower entrance of the Willamette.

HTR at 19. The "lower entrance" of the Willamette River refers to what is now known as the Multnomah Channel, which enters the Columbia River at present-day St. Helens,[4] across the Columbia River from the mouth of the Lewis River, only about three (3) miles from the Lewis River Property.

[4] Response to the Request of the Cowlitz Indian Tribe for a Restored Lands Determination, Prepared by Perkins Coie LLP at 23 (Nov. 15, 2005).

In the early 1800s, Governor George Simpson (of the Northern Department of the Hudson's Bay Company) explained that "nearly the whole" of the fur trade:

> pass[es] through the hands of three Chiefs or principal Indians viz. Concomely King or Chief of the Chinooks at Point George, Casseno Chief of a Tribe or band settled nearly opposite to Belle vue Point and *Schannaway the Cowlitch Chief whose track from the borders of Pugets Sound strikes on the Columbia near to Belle vue Point*[.]

Fur Trade and Empire, George Simpson's Journal at 86 (emphasis added). Because Bellevue Point is located at the confluence of the Columbia and Willamette rivers, approximately ten (10) miles south of the Lewis River Property, the Cowlitz "track," as described in this narrative, encompasses that portion of the Columbia River that passes within about three (3) miles from the Lewis River Property.

On May 13, 1836, John K. Townsend observed several large lodges of "Kowalitsk" Indians, "in all probably one hundred persons", near his camp "on a plain below Warrior's point." John Kirk Townsend, *Across the Rockies to the Columbia* 232 (University of Nebraska Press 1978) (1839), *cited in Simon Plamondon*, 21 Ind. Cl. Comm. at 155; HTR at 25 n.14. Warrior's Point is on the Columbia River across from the mouth of the Lewis River, about three (3) miles northwest of the Lewis River Property. Whether this group of "several large lodges" housing approximately 100 Cowlitz Indians is characterized as a "village" or a "summer encampment," it is evidence of a historical Cowlitz presence near the Lewis River Property. Although Townsend did not specifically state how far "below Warrior's Point" these Cowlitz lodges were located, it should be assumed that Townsend would have chosen some other landmark to describe the location if the lodges were more than a short distance from Warrior's Point.

During the 1855-1856 Indian war, a Cowlitz Indian named Zack was hunting near Chelatchie Prairie on the Lewis River when he saw 200 armed Indian warriors. HTR at 99 n.86. Zack hurried downstream to warn the American settlers. *Id.* The Chelatchie Prairie is six (6) miles east of the Lewis River Property, and the Lewis River runs less than one (1) mile north of the Lewis River Property.

At Governor Stevens' 1855 treaty negotiations, Cowlitz tribal delegate Ow-hye stated:

> Formerly the King Georges (English) came. They only paid them [the Cowlitz] a shirt to go from Cowlitz [River] to Vancouver. The Indians were very much ashamed at their treatment. They just now find out what the land was worth by seeing the French sell to the Whites. Several hundred dollars for a small piece with a house on it. It was not their land, but the Indians after all.

HTR at 40. The Cowlitz River is located approximately eighteen (18) miles north of the Lewis River Property, and Vancouver is located approximately twelve (12) miles south of the Lewis River Property, putting the Lewis River Property near the center of this narrative. Ow-hye may have been describing Cowlitz territory that the Tribe purportedly

sold to the English, as Ow-hye describes the French selling real estate in the same narrative, or he may have been describing a type of river toll paid to travel this stretch of the Columbia. Under either interpretation, the narrative is evidence of a historical connection to the area.

A map created under the direction of Governor Stevens in 1857 generally supports the position that Cowlitz territory extended south to the Lewis River. *See* "Map of the Indian nations and tribes of the territory of Washington and of the territory of Nebraska west of the mouth of the Yellowstone. Made under the direction of Isaac I. Stevens, gov. of Wash. terr. & sup't of Ind. affairs, March 1857, drawn by William H. Carlton, surveyor and top eng. (1857)."[5] On this map, the "Howalitsk" Indian territory is marked as extending from the Cowlitz River at least as far south as the Lewis River, which is within one (1) mile of the Lewis River Property. *Id.* "Howalitsk" is an alternative spelling of "Cowlitz."[6] Other maps created during this time period depict Cowlitz territory to the north of the Lewis River watershed, but not by a great distance.

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[5] Image of map available at <http://content.wsulibs.wsu.edu/cgi-bin/pview.exe?CISOROOT=/maps&CISOPTR=153&CISORESTMP=/qbuild/buildplate11.html&CISOVIEWTMP=/qbuild/buildplate12.html&CISOROWS=2&CISOCOLS=5&CISOCLICK=title:subjec:creato:date:type:cover>.

[6] Other parts of Governor Stevens' map indicate that "Howalitsk" refers to the Cowlitz Tribe. The upper left portion of the map contains a "Tabular Statement of the Indians west of the Cascade Mountains, showing tribes, population, parties to the several treaties, reservations provided for in the treaties, and temporary encampments." Within that table, "Howalitsk" is not found, but "Cowlitz" and "Tiatinapan" are listed together as located "near Cowlitz landing" and "with whom treaties have not been made." On the map, the closest notation of tribes near Cowlitz Landing is "Tiatinapan" and "Howalitsk." Those notations are perpendicular to each other, with "Tiatinapan" running along the Cowlitz River and "Howalitsk" running from the Cowlitz River south to the Lewis River. Given that Tiatinapan and Cowlitz are listed together in the table, that "Howalitsk" is not listed in the table, that Howalitsk and Tiatinapan are the tribes shown closest to Cowlitz Landing, and that "Cowlitz" is not otherwise depicted near Cowlitz landing (nor anywhere else on the map), the most reasonable explanation is that "Howalitsk" refers to the Cowlitz Tribe.

In addition to the Cowlitz/Howalitsk alternative spellings, the map appears to contain similar alternative spellings for other tribes. For example, the map's table of tribes includes the "Clallams" as party to the 1855 Treaty of Point No Point, yet the map depicts the "Sclallams." Both spellings ignore the spelling of the Tribe's name in the Treaty of Point No Point as "S'Klallams." Similarly, the table of tribes lists the "Lummi" but the map depicts the "Lummie." One possible explanation for the alternative spellings is that the map may have been prepared by a number of different people and/or over a course of time. Given the inability to easily make changes, the alternative spelling of tribal names may not have been viewed as warranting a revision of the map.

Finally, other documents of the era support the conclusion that "Howalitsk" refers to the Cowlitz Tribe. As noted by the ICC, in 1834 John K. Townsend spelled the Tribe's name as "Kowalitsk." *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 155 (1969). Townsend's spelling is almost identical to the spelling on Governor Stevens' 1857 map (compare "Howalitsk" to "Kowalitsk"). The ICC's decision further demonstrates that there was not a standardized spelling of the word "Cowlitz" during this time period. For example, in 1920 Jedidiah Morse reported on the "Cowlitsick." *Id.* at 154. In 1925, Dr. Scouler referred to the Tribe as "Kowlitch" and in 1834 D. Lee and J.H. Frost spelled the Tribe as "Cawalitz." *Id.* at 155. This lack of uniformity in spelling, combined with the textual support in the map itself of the Cowlitz being "near Cowlitz Landing," leads to the conclusion that "Howalitsk" is a reference to the Cowlitz Tribe.

An historical native American village site called Cathlapotle is located on the Carty Unit of the Ridgefield National Wildlife Refuge, about two (2) miles west of the Lewis River Property. In 1999, the U.S. Department of the Interior, Fish and Wildlife Service, published a preliminary report regarding an archaeological investigation conducted by Portland State University's Department of Anthropology. *Archaeological Investigations at 45CL1 Cathlapotle (1991-1996), Ridgefield National Wildlife Refuge, Clark County, Washington, A Preliminary Report,* Prepared by Department of Anthropology, Portland State University (May 1999). The report indicates that Cathlapotle was a very large town site with an occupation spanning about 1000 years (c. AD 1000 to 1840). *Id.* at i. During first contact with Europeans, the village was occupied primarily by the Middle Chinookan Tribe. *Id.* "The Cathlapotle town (also spelled Quathlapotle, Cathlapoodle, etc.) was one of nineteen Chinookan towns recorded by Lewis and Clark (Thwaites 1908) in the Wapato Valley." *Id.* at 12. Citing the work of two prominent academics, the report states that "the [Wapato] Valley's permanent winter population more than doubled every spring by people moving into the area to exploit its abundant seasonal food resources." *Id.* at 13, *citing* Boyd and Hajda (1987). "Towns were linguistically polygot, given the area's marriage practices, so while a town such as Cathlapotle was within Chinookan territory, its occupants would very likely include Cowlitz and people of other regional language families." *Id.* at 14. The report states that beginning in 1830, the Middle Chinookan populations were devastated by disease—likely malaria—and that Cathlapotle was abandoned by 1833. *Id.* at 17. Citing to a historical report of Indian inhabitants in 1835, the authors state: "It is possible that in 1835, the people at or near Cathlapotle were no longer Chinookans." *Id.* As support for this statement, the report discusses John K. Townsend's 1836 journal account, *supra*, of several large lodges of Cowlitz Indians on a plain below Warrior's Point. *Id.* at 18. The authors state: "The area had clearly been reoccupied, but by Cowlitz people." *Id.*

Not only does the historical record demonstrate the Cowlitz Tribe's presence in the Lewis River Property area throughout treaty times, but the Cowlitz Tribe's exclusive use and occupancy area, as adjudicated by the ICC, extended south to the mouth of the Kalama River, approximately fourteen (14) miles away from the Lewis River Property. *Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 170 (1969). Given that the Tribe never had a reservation, this fourteen (14) mile distance between the Lewis River Property and the Tribe's adjudicated exclusive use and occupancy area also supports a "restored lands" decision. *Cf. City of Roseville,* 348 F.3d at 1023 (finding parcel forty (40) miles from tribe's original reservation qualified as "restored lands"). In this case, it is not necessary to decide whether a 14-mile-away adjudicated exclusive use and occupancy area is sufficient, standing alone, to support the conclusion that trust acquisition would be a "restoration of lands." Here, the Tribe has demonstrated not only that the trust acquisition would be located near its historic exclusive use and occupancy area, but also that the Tribe historically used the local region in which the subject land is located, even though such use was not exclusive, and even though the area was not within the core of the Tribe's historical territory.

2. Modern Connections to the Land

The Tribe also has modern-era and present connections to the land at issue. Modern connections to the land can be established through a variety of factors, such as a geographical nexus between the parcel and the seat of tribal government, the tribe's population center, tribal member service facilities, tribal businesses, tribal housing developments, or the tribe's service area as defined by Federal agencies. NIGC Wyandotte Opinion at 10; NIGC Grand Traverse Opinion at 20-21.

In this case, the Cowlitz Tribe maintains governmental offices in Longview, approximately 24 miles away from the Lewis River Property. Request at 32. Standing alone, this distance does not establish a modern connection to the parcel, but unlike the 175-mile distance in our Wyandotte Opinion, 24 miles at least does not militate against a conclusion that there is a modern connection. *Cf.* NIGC Wyandotte Opinion at 10. Furthermore, the Cowlitz Tribe plans to relocate its tribal headquarters to the Lewis River Property after trust acquisition, along with its casino, tribal elder housing, and a tribal cultural center. Preliminary Draft Environmental Impact Statement, Cowlitz Indian Tribe Trust Acquisition and Casino Project at 1-2, 2-14 (Oct. 2005).

The Tribe's enrollment officer reported that 86 tribal members lived in Clark County as of January 2005. Letter from Nancy Osborne, Cowlitz Indian Tribe Enrollment Officer, to Philip Hogen, NIGC Chairman (March 9, 2005), *cited in, and appended to,* Request at 33. The Tribe's Clark County population figure does not amount to a large percentage of the Tribe's total enrollment of nearly 3,500 members. But the Tribe is widely dispersed across the State and the nation. Cowlitz County, for instance, which includes the Cowlitz River and is within the Tribe's historical exclusive use and occupancy area, is home to only 219 Cowlitz members. *Id.* In cases of high tribal dispersion, a relatively low percentage of tribal members who live in the subject county should not weigh against a tribe if, as in this case, the actual number of tribal members living in the county is not insignificant.

Importantly, although the Tribe does not have a high percentage of tribal members living there, Clark County has been included within the Tribe's "service delivery area" as defined by the Indian Health Service ("IHS") and the Tribe's Indian Housing Block Grant "formula area" as defined by the United States Department of Housing and Urban Development ("HUD"). Memorandum from Charles W. Grim, IHS Assistant Surgeon General, to IHS Director, Portland Area (Aug. 27, 2002); Letter from Deborah Lalancette, Director, HUD Office of Grants Management, to Larry Coyle, Executive Director, Cowlitz Indian Tribal Housing (Nov. 1, 2003), *cited in, and appended to,* Request at 33. Furthermore, the Tribe is in the process of submitting a formal request to the BIA to designate a BIA service area that will include Clark County. Request at 34. These designations are important evidence of a tribe's modern connection to the area.

In total, the historical and modern connections in the record lend some weight in favor of a finding that trust acquisition of the Lewis River Property would be a restoration of lands for the Cowlitz Tribe.

C. Temporal Relationship of the Acquisition to Tribal Restoration

Another factor to be considered is whether there is a reasonable temporal connection between the restoration of Federal recognition and the trust acquisition of the land at issue. *Grand Traverse Band II*, 198 F. Supp. 2d at 936 ("the land may be considered part of a restoration of lands on the basis of timing alone."); Memorandum from NIGC Acting General Counsel to NIGC Chairman at 11 (March 14, 2003) ("NIGC Mechoopda Opinion") ("the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored").

In this case, the Tribe has submitted a fee-to-trust application to the Department of the Interior, but the subject land has not yet been taken into trust. Therefore, even assuming that the Department of the Interior will place the land into trust status, it is not possible to determine the length of time that will elapse between the Tribe's restoration of Federal recognition and trust acquisition of the land.

The Tribe points out that by the time it received Federal recognition in 2002, it had already identified the Lewis River Property as its first desired trust acquisition. Request at 35-36. In fact, the Tribe submitted its original fee-to-trust application to the Department of the Interior on the very same day that the Department of the Interior published its reconsidered final determination for Federal acknowledgement. 67 Fed. Reg. 607 (Jan. 4, 2002); Request at 36. By these actions, the Tribe has attempted to minimize the time period between its Federal recognition and trust acquisition of the Lewis River Property. Therefore, in this case, it is not necessary to know exactly how long the applicable time period between Federal recognition and trust acquisition will be. Even if the Department of the Interior does not act on the fee-to-trust application for several more years, the temporal circumstances in this case would still weigh in favor of the Tribe. *See* Memorandum from Penny Coleman, NIGC Acting General Counsel, to NIGC Chairman Deer at 13-14 (Aug. 5, 2002) ("NIGC Rohnerville Opinion") (accepting 10 years between tribal recognition and trust acquisition as reasonable under particular circumstances); Memorandum from Phil Hogen, Associate Solicitor, Dep't of the Interior Division of Indian Affairs, to Assistant Secretary – Indian Affairs at 13-14 (Dec. 5, 2001) ("Interior Coos Opinion") (accepting 14 years between tribal recognition and trust acquisition as reasonable under particular circumstances).

Because this acquisition would be the first trust acquisition made for the Cowlitz Tribe, and because the Tribe has attempted to minimize the time period between recognition and trust acquisition, the temporal relationship factor weighs strongly in the Tribe's favor.

In this case, all three factors in the restored lands analysis weigh in the Tribe's favor. We note that the temporal relationship factor is particularly strong. In other cases where the temporal relationship factor did not support a finding of restored lands, we would require a stronger showing of historical and modern connections to the area. In consideration of all of the factors discussed above, however, a trust acquisition of the Lewis River Property will be part of the "restoration of lands" for the Tribe as that term is used in IGRA.

CONCLUSION

We conclude that the Cowlitz Tribe was "restored to Federal recognition" and that if the Department of the Interior accepts trust title to the Lewis River Property, such trust acquisition will be part of the "restoration of lands" for the Tribe as those terms are used in 25 U.S.C. § 2719(b)(1)(B)(iii). This opinion is not intended to affect the Secretary of the Interior's discretion in deciding whether to accept the Lewis River Property into trust under 25 C.F.R. Part 151, or provide any recommendation regarding the merit of the Tribe's fee-to-trust application. However, if the Secretary of the Interior decides to accept the Lewis River Property into trust, then it is the opinion of the Office of General Counsel that the Lewis River Property would qualify for IGRA's restored lands exception.

If you have any questions, Staff Attorney Jeffrey Nelson is assigned to this matter.

Penny J. Coleman
Acting General Counsel

Appendix A: Legal Land Description of the Lewis River Property
Source: Cowlitz Tribal Council Ordinance No. 05-02, § 2(O)

PARCEL I

BEGINNING at the intersection of the West line of Primary State Highway No. 1 and the East line of the Southeast quarter of Section 5, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; thence Northerly along said West line of Primary State Highway No. 1 a distance of 1307.5 feet to the Point of Beginning of this description; thence West 108.5 feet to an angle point thereon; thence Northerly along the fence 880.5 feet to the center line of a creek; thence Northerly along said creek 443 feet to the West line of Primary State Highway No. 1; thence Southerly along said West line of Highway to the Point of Beginning.

EXCEPT that portion conveyed to the State of Washington by Auditor's File Nos. G 450664 and G 147358.

PARCEL II

That portion of the following described land lying West of the Westerly line of Interstate 5, formerly known as Pacific Highway, in Section 9, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington.

The North half of the Southwest quarter of the Northwest quarter and the South half of the Northwest quarter of the Northwest quarter of Section 9, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington.

EXCEPT any portion lying within NW 31st Avenue.

ALSO EXCEPT that portion thereof acquired by the State of Washington by deed recorded under Auditor's File Nos. G 140380 and D 95767.

PARCEL III

BEGINNING at the Northwest corner of the Northeast quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; and running thence East 390 feet to the Point of Beginning; thence East 206 feet; thence South 206 feet; thence West 206 feet; and thence North to the Point of Beginning.

EXCEPT that portion lying within the right of way of NW 319th Street.

PARCEL IV

All that part of the Southeast quarter of Section 5, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington, lying West of Primary State Road No. 1 (Pacific Highway).

EXCEPT the Henry Ungemach tract recorded in Volume 76 of Deeds, page 33, records of Clark County, Washington, described as follows:

BEGINNING at a point 19.91 chains North of the Southwest corner of said Southeast quarter; thence East 13.48 chains to creek; thence Northerly along creek to North line of said Southeast quarter at a point 6.66 chains West of the Northeast corner thereof; thence West to Northwest corner of said Southeast quarter; thence South 19.91 chains to the Point of Beginning.

ALSO EXCEPT the John F. Anderson tract as conveyed by deed recorded under Auditor's File No. F 38759, records of Clark County, Washington, described as follows:

BEGINNING at the Northwest corner of the Southwest quarter of the Southeast quarter of Section 5, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; and running thence East 514 feet; thence Southerly 340 feet; thence Northwesterly 487 feet to a point 196 feet due South of the Point of Beginning; thence North to the Point of Beginning.

ALSO EXCEPT that tract described as follows:

BEGINNING at a point 26 rods and 9 feet West of the Southeast corner of Section 5, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; and running thence West 20 rods to County Road; thence North 182 feet; thence East 20 rods; thence South 182 feet to the Point of Beginning.

ALSO EXCEPT a certain reserved tract described as follows:

BEGINNING at the intersection of the West line of Primary State Highway No. 1 (Pacific Highway) and the East line of the Southeast quarter of said Section 5, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; thence Northerly along said West line of Primary State Highway No. 1, a distance of 1307.5 feet to the True Point of Beginning of this description; thence West 108.5 feet to an angle point therein; thence Northerly along fence 880.5 feet to center line of creek; thence Northeasterly along said creek 443 feet, more or less, to the West line of Primary State Highway No. 1; thence Southerly along said West line of highway to the True Point of Beginning.

ALSO EXCEPT that portion thereof lying within Primary State Highway No. 1 (SR-5) as conveyed to the State of Washington by deed recorded under Auditor's File Nos. G 458085, G 143553 and D 94522.

ALSO EXCEPT any portion lying within NW 319th Street and Primary State Highway No. 1.

PARCEL V

A portion of the Northwest quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington, described as follows:

BEGINNING at the Northwest corner of the Northeast quarter of Section 8; thence South along the West line of the Northeast quarter of said Section 8, 1320 feet, more or less, to the Southwest corner of the Northwest quarter of said Northeast quarter; thence East along the South line to a point 830 feet West of the Southeast corner of the Northwest quarter of said Northeast quarter; thence North parallel with the East line of said Northeast quarter to a point 600 feet South of the North line of said Northeast quarter; thence East parallel with the North line of said Northeast quarter 370 feet; thence North parallel with the East line of said Northeast quarter 600 feet to the North line of said Section 8; thence West along the North line of said Section 8 to the Point of Beginning.

EXCEPT that portion lying within NW 319th Street.

ALSO EXCEPT the following described tract:

A portion of the Northwest quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington, described as follows:

BEGINNING at the Northwest corner of the Northeast quarter of said Section 8; thence South along the West line of the Northeast quarter of said Section 8, 1320 feet, more or less, to the Southwest corner of the Northwest quarter of said Northeast quarter; thence East along the South line to a point 830 feet West of the Southeast corner of the Northwest quarter of said Northeast quarter; thence North, parallel with the East line of said Northeast quarter to a point 600 feet South of the North line of said Northeast quarter; thence East, parallel with the North line of said Northeast quarter, 370 feet, said point being the True Point of Beginning of the tract herein described; thence West parallel with the North line of said Northeast quarter, a distance of 457 feet; thence North parallel with the West line of said Northeast quarter, a distance of 240 feet; thence East parallel with the North line of said Northeast quarter, a distance of 157.0 feet; thence North, parallel with the West line of said Northeast quarter, a distance of 360 feet, more or less, to the North line of said Northeast quarter; thence East, along said North line, a distance of 300 feet; thence South, parallel with the West line of said Northeast quarter, a distance of 600 feet, more or less, to the True Point of Beginning.

PARCEL VI

A portion of the Northwest quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington, described as follows:

BEGINNING at the Northwest corner of the Northeast quarter of said Section 8; thence South along the West line of the Northeast quarter of said Section 8, 1320 feet, more or less, to the Southwest corner of the Northwest quarter of said Northeast quarter; thence East along the South line to a point 830 feet West of the Southeast corner of the Northwest quarter of said Northeast quarter; thence North, parallel with the East line of said Northeast quarter to a point 600 feet South of the North line of said Northeast quarter; thence East, parallel with the North line of said Northeast quarter 370 feet to a point, said point being the True Point of Beginning of the tract herein described; thence West, parallel with the North line of said Northeast quarter, a distance of 457 feet; thence North, parallel with the West line of said Northeast quarter, a distance of 240 feet; thence East, parallel with the North line of said Northeast quarter, a distance of 157.0 feet; thence North, parallel with the West line of said Northeast quarter, a distance of 360 feet, more or less, to the North line of said Northeast quarter; thence East, along said North line, a distance of 300 feet; thence South, parallel with the West line of said Northeast quarter, a distance of 600 feet, more or less, to the True Point of Beginning.

PARCEL VII

The East 830 feet of the Northwest quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington.

EXCEPT the West 370 feet to the North 600 feet thereof.

ALSO EXCEPT that portion of the remainder thereof, lying within NW 319th Street.

PARCEL VIII

The Northeast quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington.

EXCEPT that portion of said premises, described as follows:

BEGINNING at a point 612 feet East of the Northwest corner of said Northeast quarter of the Northeast quarter of said Section 8; thence South 191.0 feet; thence East 228.0 feet; thence North 191.0 feet; thence West 228.0 feet to the Point of Beginning.

EXCEPT that portion of said premises, described as follows:

BEGINNING at a point 390.0 feet East of the Northwest corner of said Northeast quarter of the Northeast quarter of said Section 8; thence East 206.00 feet; thence South 206.0 feet; thence West 206.0 feet; thence North 206.0 feet to the Point of Beginning.

EXCEPT that portion of said premises lying within Pekin Ferry County Road, and

EXCEPT that portion of said premises lying within County Road No. 25;

EXCEPT that portion conveyed to the State of Washington by deed recorded under Auditor's File Nos. G 143551 and G 499101.

EXCEPT that portion conveyed to the State of Washington for Interstate 5.

EXCEPT that portion conveyed to James Fisher and wife, by instrument recorded under Auditor's File No. G 699690, described as follows:

BEGINNING at the Southeast corner of the Northeast quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; thence North 200 feet; thence West 435 feet; thence South 200 feet to a point on the South line of the Northeast quarter of the Northeast quarter of said Section; thence East 435 feet to the Point of Beginning.

PARCEL IX

That portion of the Northeast quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington, described as follows:

BEGINNING at a point 612 feet East of the Northwest corner of the Northeast quarter of the Northeast quarter of Section 8, Township 4 North, Range 1 East of the Willamette Meridian, Clark County, Washington; thence South 191 feet; thence East 228 feet; thence North 191 feet; thence West 228 feet to the Point of Beginning.

EXCEPT County Roads.

ALSO EXCEPT that portion thereof conveyed to the State of Washington by deed recorded under Auditor's File Nos. G 500929 and G 143551.

EXHIBIT E

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.

EXHIBIT E

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.