United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT 21 1999

VIA FACSIMILE and U.S. MAIL
The Honorable Dick Clarkson
Tribal Council Chairman
Confederated Tribes of Coos, Lower Umpqua and Suislaw Indians
338 Wallace Avenue
Coos Bay, Oregon 97420
fax: (541) 888-5388

Dear Mr. Clarkson:

Pursuant to your request, I have reviewed whether the "Hatch Tract" is exempt from the general prohibition against gaming on land acquired into trust after October 17, 1988, under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.* The Hatch Tract was taken into trust on behalf of the Tribes in March of 1998.

In accordance with the enclosed opinion issued by the Solicitor, I have concluded that the Hatch Tract does not qualify for an exemption under section 20 of IGRA from the general prohibition against gaming on lands acquired into trust after October 17, 1988. The Solicitor opined that the acquisition of the Hatch Tract into trust was not part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." The Solicitor also determined that the Tract was not "contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988."

I regret the decision could not be more favorable at this time.

Sincerely,

Kevin Gover

Assistant Secretary – Indian Affairs

Enclosure

cc: Dennis Whittlesey
Jackson & Kelly
2401 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20037
fax: (202) 973-0232

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 19 1999

Memorandum

To: Assistant Secretary - Indian Affairs

From: Solicitor

Subject: Proposed Gaming on the Hatch Tract in Lane County, Oregon, for the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

This memorandum is in response to your inquiry regarding whether a parcel of land called the "Hatch Tract" is exempt from the general prohibition against gaming on land acquired into trust after October 17, 1988, as set forth in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et. seq.* ("IGRA"). The Hatch Tract was acquired in trust by the United States in March of 1998 for the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians.

IGRA places a general prohibition against gaming on lands acquired in trust after October 17, 1988. 25 U.S.C. § 2719(a). There are several exceptions to this general prohibition set forth in section 20 of IGRA, and your inquiry raises two of them. The first relevant exemption is for lands that 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). The second relevant exception is for lands "contiguous to the boundaries of the reservation...on October 17, 1988." Id. § 2719(a)(1).

The Tribes' attorney submitted letters, memoranda, and documentation to the Office of the Solicitor – Division of Indian Affairs in support of the Tribes' position that the Hatch Tract qualifies for one or both of the exemptions. There were also several face-to-face and telephonic consultations. After careful consideration and thorough analysis, we conclude that the Hatch Tract does not fall within either of these exceptions in section 20 of IGRA. Our analysis is set forth below.

I. Background

The Confederated Tribes were legislatively terminated by the Indians of Western Oregon Termination Act of 1954. 25 U.S.C. §§ 691 *et seq*. On October 17, 1984, Congress legislatively restored the Tribes to federal recognition through the Coos, Lower Umpqua, and Siuslaw Restoration Act ("Restoration Act"). Pub. L. No. 98-481, 98 Stat. 2250, *codified at* 25 U.S.C. §§ 714 *et seq*. Section 7 of the Restoration Act states "the Secretary shall accept the following lands

in trust for the tribe as a reservation" and lists two parcels of land in Coos County, Oregon, and one parcel in Curry County, Oregon. 98 Stat. at 2253. The Hatch Tract is not one of the listed parcels.

On October 14, 1998, Congress amended the Restoration Act through a technical corrections bill. Pub. L. No. 105-256. This bill added a parcel of land known as the Peterman Tract to section 7. Id. § 5. The Peterman Tract is a driveway which leads to an Indian cemetery.

The Hatch Tract is a parcel of land contiguous to the Peterman Tract. It was taken into trust by the United States pursuant to the Secretary of the Interior's discretionary authority under 25 U.S.C. § 465 and 25 C.F.R. Part 151 on behalf of the Confederated Tribes in March of 1998. The Tract has cultural and historical significance for the Confederated Tribes. Although it appears economic development on the Hatch Tract may have been mentioned during the administrative acquisition process, the Tribes' attorney stated in a letter to the Office of the Solicitor that at no time relevant to the trust acquisition did the Tribes have any plans to introduce gaming under IGRA on the Hatch Tract. Letter from Dennis Whittlesey, tribal attorney, to Stan Speaks, BIA, Portland Area Director (March 23, 1998) (hereafter, Whittlesey Letter).

II. Restored Lands under Section 20 of IGRA

Lands that are taken into trust as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition" are exempt from the prohibition against gaming on lands acquired into trust after October 17, 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). There is a two-pronged analysis to the "restored" exception in section 20(b)(1)(B)(iii). First, the tribe must be "restored" within the meaning of IGRA. Second, the land to be acquired must be "restored" within the meaning of IGRA.

The Confederated Tribes are a "restored" tribe within the meaning of section 20. The Coos, Lower Umpqua, and Suislaw Restoration Act of October 17,1984, states:

> Federal recognition is hereby extended to the Tribe, and all its members shall be eligible for all Federal services and benefits furnished to federally recognized tribes.

25 U.S.C. § 714a(a). The Restoration Act further states:

> [A]ll rights and privileges of the Tribe and of members of the Tribe under any Federal treaty, Executive order, agreement or statute, or under any authority, which were diminished or lost under the Act of August 13, 1954 (25 U.S.C. § 691 *et seq.*)[the Western Oregon Termination Act], are hereby restored and the provisions of that Act are inapplicable to the Tribe and to members of the Tribe upon passage of this Act.

Id. § 714a(b). These sections leave no doubt that the Confederated Tribes are a restored tribe within the meaning of section 20. *See* Opinion on Pokagon Band of Potowatomi 5-7 (September 19, 1997) (hereafter, Pokagon Opinion). The next question is whether the Hatch Tract is restored land.

The Confederated Tribes argue that the Hatch Tract is restored lands for the purposes of section 20 of IGRA because it has historically been owned and occupied by tribal members. The Tract is described as being originally deeded to a tribal ancestor as a public domain allotment and, up until a few years ago, was owned by the heirs of the ancestor/allottee and was occupied by a tribal member. The Hatch Tract is of particular importance to the Tribes because it is the site of a former Siuslaw village and is adjacent to an important Indian cemetery which contains the remains of tribal ancestors. Whittlesey Letter. The Tract apparently has never been on the Oregon or Lane County tax rolls. Id.

Assuming all of this information is true, it is our opinion that the Hatch Tract is not "restored land" for the purposes of IGRA. Prior ownership of a parcel of land by the Tribe or a member is not sufficient by itself to qualify the land as "restored." The cultural, historical or traditional significance of the particular parcel also is not sufficient in and of itself to meet the "restored lands" exception in section 20.

We believe that "restored lands" under section 20(b)(1)(B)(iii) include only those lands that are available to a restored tribe as part of its restoration to federal recognition. The statute that restores the Tribe's Federal recognition status must also provide for the restoration of land, and the particular parcel in question must fall within the terms of the land restoration provision.[1] Here, the Confederated Tribes were restored to Federal recognition pursuant to their Restoration Act of 1984 and Congress specifically described the parcels to be acquired. The only lands which constitute "restored" lands for the Confederated Tribes are those parcels in section 7.

This conclusion is consistent with the Department's analysis in previous determinations. For example, we have determined that the particular land proposed by the Pokagon Band of Potowatomi for trust acquisition was "restored land" for purposes of IGRA because: 1) it fell within the ten counties described in the Pokagon Band's Restoration Act as its "service area" that had been ceded to the U.S. by treaty; and 2) the Restoration Act mandated that the Secretary acquire trust land. *See* Pokagon Opinion at 7.

Congress enacted the Pokagon Band's Restoration Act in 1994. Pub. L. No. 103-323, 108 Stat. 2152, *codified at* 25 U.S.C. §§ 1300j - j-8. It provides:

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[1] We offer no opinion in this memorandum as to whether a tribe can be restored or whether lands can be restored to a tribe within the meaning of IGRA by judicial decree or stipulation as opposed to Congressional action.

> The Secretary shall acquire real property for the Band. Any such real property shall be taken by the Secretary in the name of the United States in trust for the benefit of the Band and shall become part of the Band's reservation."

25 U.S.C. § 1300j-5. This section provides no direction as to which lands are to be considered restored when acquired on behalf of the Band. Therefore, we looked to other provisions in the Restoration Act for guidance as to which lands should be considered restored under section 20 of IGRA. Pursuant to numerous treaties, tribal lands were ceded to the United States. *See* id. § 1300j(1). These ceded lands included 10 counties in Michigan and Indiana that were defined in the Restoration Act as the Pokagon Band's service area. Id. § 1300j-6. The opinion concludes, "[s]ince the lands proposed for acquisition lie within this ten county area [identified by Congress as the Tribe's "service area"] and are thus part of the territory the Bands' predecessors ceded to the U.S...the proposed acquisitions pursuant to the Restoration Act are properly characterized as 'restored' lands" under section 20(b)(1)(B)(iii) of IGRA. Pokagon Opinion at 7-8; *see* id. at 2, fn 2.

The Tribes argue that the Department should use the dictionary definition of "restored" in construing the meaning of this exception in section 20. Webster's Ninth New Collegiate Dictionary defines "restored" to mean, in pertinent part, "to put again in possession of something." When Congress does not specify or provide guidance on what lands should be considered restored, the dictionary definition referring to previous possession can be one of the tools, along with other provisions of the restoration act, to determine Congressional intent. We applied this analytical framework in the Pokagon Opinion to conclude that the land in question fell within the Band's Congressionally designated 10 county service area, which was part of the territory ceded to the U.S. in earlier treaties and was properly characterized as "restored land" under IGRA. When Congress specifies or provides concrete guidance as to what lands are to be restored pursuant to the restoration act, they qualify as "restored lands" under section 20 regardless of the dictionary definition. *See, e.g.,* Little Traverse Bay Bands of Odawa Indians Restoration Act, 25 U.S.C. § 1300k-4; Confederated Tribes of Siletz Indians of Oregon Reservation Act, Pub. L. No. 96-340, section 2; Confederated Tribes of the Grand Ronde Community of Oregon Reservation Act, Pub. L. No. 100-425, section 1(c).

In Little Traverse Bay Bands of Odawa Indians (LTBB), the Associate Solicitor – Division of Indian Affairs determined that a certain parcel of land was considered "restored" because it fell within the land acquisition provision in the Reaffirmation Act. Memorandum from Associate Solicitor – Indian Affairs to Deputy Commissioner for Indian Affairs 7 (November 12, 1997) (hereafter, LTBB Opinion). In the Reaffirmation Act, Congress directed the Secretary to accept into trust land located in Emmet and Charlevoix counties for the benefit of the Band. 25 U.S.C. § 1300k-4(a). The opinion concluded that "[a]ny lands to be acquired that lie within the 1836 ceded area, the 1855 Treaty area, or are *otherwise located within* Emmet or Charlevoix counties,

Michigan, are properly characterized as "restored" lands." LTBB Opinion at 7 (emphasis added).[2]

In sum, lands qualify as "restored" lands under section 20(b)(1)(B)(iii) of IGRA if they fall within the land acquisition provisions as set forth by Congress in a tribe's Restoration Act. If Congress does not provide specific direction as to the geographic location, acreage or other description, the dictionary definition of "restored" may be used along with other Congressional direction to ascertain what lands qualify as "restored." For the Confederated Tribes, however, Congress was very clear in the Restoration Act as to what particular parcels qualify as restored. *See* 25 U.S.C. § 714e(b).

III. Lands Contiguous to the Tribes' Reservation on October 17, 1988, under Section 20 of IGRA

The Tribes also contend that the Hatch Tract falls within the exemption for lands "contiguous to the boundaries of the reservation on October 17, 1988" because the Hatch Tract is contiguous to the Peterman Tract. 25 U.S.C. § 2719(a)(1). From oral discussions with the Confederated Tribes' attorney, we understand that the Tribes contend the technical corrections bill which added the Peterman Tract to the Tribe's reservation relates back to the enactment date of the Restoration Act -- 1984. If the Peterman Tract was part of the reservation on October 17, 1988, any lands contiguous to it are exempted under section 20(a)(1) of IGRA.

It is our opinion that the Hatch Tract is not "contiguous to the boundaries of the reservation on October 17, 1988" within the meaning of section 20(a)(1) of IGRA because the Peterman Tract did not become part of the reservation until 1998. There is no evidence, either in the bill's text or in its legislative history, that Congress intended the 1998 technical corrections bill to relate back to 1984. Absent clear Congressional intention, statutes are presumed to operate prospectively. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

The technical correction bill states:

> Section 7(b) of the Coos, Lower Umpqua, and Siuslaw Restoration Act (25 U.S.C. § 714e(b)) **is amended by adding** at the end the following:
>
> (4) [the Peterman Tract description].

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[2]The quoted passage from the LTBB memorandum is somewhat ambiguous. It could be read to mean that lands can qualify as "restored" if they fall within the 1836 ceded area or the 1855 Treaty area or within Emmet or Charlevoix counties. Or it could be read to mean that lands can qualify as "restored" only if they fall within the two counties, areas which happen to significantly overlap with the 1836 and 1855 ceded lands, as identified in the Restoration Act. A recent memorandum from the Associate Solicitor -- Indian Affairs clarifies that the latter is the proper reading. Memorandum from Associate Solicitor – Indian Affairs to Director, Indian Gaming Management Staff (August 5, 1999).

Pub. L. No. 105-256, section 5 (emphasis added). The language is written in present tense, and is therefore of current and not retroactive effect. Statutory language is to be given its plain meaning. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). In explaining the purpose of the technical corrections bill, the House Report also used language of present intent:

> Section 5 **would add** land in Lane County, Oregon, to reservation land that is held in trust for the Confederated Tribes of Coos.

H.R. Rep. 105-733, 105th Cong., 2nd Sess. (1998) (emphasis added).

There is authority for the proposition that a technical correction bill can relate back to the substantive statute's enactment date when it corrects technical defects, because the bill is merely clarifying Congress' original intention. *See* Whalen v. United States, 826 F.2d 668, 670 (7th Cir. 1987); In re Chateaugay Corp., 89 F.3d 942, 952-954 (2nd Cir. 1996). While the 1998 legislation was characterized by Congress as a "technical corrections" bill, the part of it that added the Peterman Tract did more than merely correct technical errors in the 1984 Restoration Act. Rather, as the legislative history clearly shows, it amended the statute substantively:

> **In addition to those technical corrections relating to typographical errors** in existing law are provisions which...add 0.062 acres of land, the driveway to an Indian cemetery, to the Coos, Lower Umpqua, and Siuslaw Tribal Reservation[.]

H.R. Rep. 105-733, 105th Cong., 2nd Sess. 1998 (emphasis added). This leaves no doubt that the provision which added the Peterman Tract to the Tribes' reservation does not relate back to 1984 because it does more than merely correct technical errors.

IV. The Grand Ronde Community and Siletz Indian Tribe Determinations

The Tribes argue that two previous determinations by the Department that certain lands were excepted under section 20 of IGRA requires the Department now to conclude that the Hatch Tract is contiguous to the Peterman Tract for purposes of section 20(a)(1) of IGRA. The two determinations were for the Grande Ronde Community and the Siletz Indian Tribe.

In 1983, the Grand Ronde Community was restored to federal recognition by Congressional act. Pub. L. No. 98-165, 97 Stat. 1064, *codified at* 25 U.S.C. § 713a ("Restoration Act"). The Restoration Act did not establish any reservation but required the development of a reservation plan. Id. § 713f. It further required that the reservation must be established by an act of Congress. Id. The reservation plan was prepared and submitted to Congress. In September 1988, Congress passed Public Law 100-425, 102 Stat. 1594 ("Reservation Act"), which established a

reservation out of publicly owned timber lands in fulfilment of the Restoration Act.

On November 2, 1994, Congress enacted various amendments to the Grand Ronde Reservation Act. Pub. L. No. 103-435, 108 Stat. 4566. One of these, section 2(a), added a new parcel commonly called the Forest Site. Subsequently, the Department determined that acquisition of the Forest Site into trust fell within the "restored lands" exception in section 20 of IGRA, because it fell within the land restoration provisions of the Grand Ronde Restoration Act and subsequent Reservation Act.

The Tribes believe the Department concluded that the 1994 amendment which added the Forest Site related back to the enactment of the original Restoration Act in September 1988. This was the basis, they believe, for the Department's determination that the Forest Site was exempt from the general prohibition in section 20. Using the same reasoning, the Tribes argue that the amendment which added the Peterman Tract should relate back to the Tribes' Restoration Act of 1984.

This was not the Department's reasoning in the Grand Ronde situation. It did not conclude that the amendments related back to the original Restoration Act enactment date and therefore established a reservation before October 17, 1988. Instead, the Department determined that the 1994 amendments simply amended the land acquisition provisions in the Restoration and Reservation Acts, and consequently the Forest Site acquisition fell within the "restored lands" exception in section 20(b)(1)(B)(iii).

The Tribes make the same mistake in construing what the Department did in the Siletz Tribe's case. The Siletz Tribe was restored to federal recognition by Congressional action. Pub. L. No. 95-195, 91 Stat. 1415, *codified at* 25 U.S.C. § 711- 711f ("Restoration Act"). The Restoration Act provided for the creation of a reservation plan, much like the Grand Ronde Restoration Act. Id § 711e. Following submission of the plan, Congress established a reservation on September 4, 1980. Pub. L. No. 96-340, 94 Stat.1072 ("Reservation Act"). On January 25, 1994, Congress enacted amendments to the Siletz Reservation Act. Pub. L. No. 103-435, 108 Stat. 4566. One of these amendments (section 3) directed the Secretary to acquire additional parcels of land and provided that they "shall be deemed to be a restoration of land pursuant to section 7 of the Siletz Indian Tribe Restoration Act." 108 Stat. at 4568.

The Department concluded that, because the parcels in question were acquired pursuant to an explicit direction by Congress that their acquisition was a restoration of land to the Siletz Tribe, they fell within the exception in section 20(b)(10(B)(iii). Letter from Ada Deer, Assistant Secretary – Indian Affairs, to the Honorable Delores Pigsley, Chairman, Confederated Tribes of Siletz Indians (March 14, 1995). There was no need for any analysis concerning the retroactivity of the 1994 amendments because the parcels clearly fell within the land acquisition provisions of the Restoration and Reservation Acts.

The key distinction in these previous two cases from the one now before us is this: The

"contiguous" exception in IGRA is time-specific. That is, the land in question must have been contiguous to the Tribes' reservation on October 17, 1988. 25 U.S.C. § 2719(a)(1). The "restored" land exception in IGRA is not time-specific. Id. § 2719(b)(1)(B)(iii).[3] Consequently, there is no need to make a determination about the retroactivity of the Congressional action when deciding whether a parcel is "restored lands" under IGRA. In Grand Ronde and Siletz, no retroactive analysis was necessary because the "contiguous" exception was not at issue.[4] The "contiguous" exception is, by contrast, at issue for the Hatch Tract.

The Tribes recently advanced an alternative argument that the Department's determination that the Forest Site was "restored land" for Grand Ronde was incorrect. Instead, the Forest Site was reservation land and the 1994 amendment retroactively added it to the Grande Ronde reservation as of 1983. The Tribes argue that the Grand Ronde Restoration Act created a "reservation" and not "restored lands" because the word "restored" or "restoration" does not appear in the body of the Reservation Act. In contrast, the Siletz Reservation Act did call for a "restoration" and is consequently distinct from the Grand Ronde situation.

We have previously determined in several different situations that the word "restored" need not appear in the body of the Restoration or Reservation Act in order for there to be a restoration of lands within the meaning of IGRA. *See* Pokagon Opinion; LTBB Opinion; Letter from Solicitor to Congressman Vic Fazio (August 3, 1998). As discussed above, the Grande Ronde's reservation was established pursuant to Congressional direction in the Tribe's Restoration Act. 25 U.S.C. § 713f; Pub. L. No. 100-425; Pub. L. No. 103-435. Even though Congress never called the lands "restored," the lands were acquired as part of the Tribe's restoration process and fell within the land acquisition provisions of the statutes.

The Siletz Restoration Act explicitly stated the acquired lands "shall be deemed a restoration of land." Pub. L. No. 103-435. The absence of such language would not, however, have been fatal. The Department would still have concluded that such lands were "restored" lands under section 20 of IGRA because they clearly fell within the land acquisition provisions contained in the Reservation Acts enacted pursuant to the Restoration Act. In short, in Grand Ronde and Siletz, the key fact was that the lands to be acquired were taken in trust as part of the restoration process, irrespective of the exact words used by Congress.

V. Conclusion

The Hatch Tract is not exempt from the general prohibition on gaming on lands acquired by the Secretary in trust after October 17, 1988, as set forth in section 20 of IGRA. 25 U.S.C. § 2719.

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[3] Obviously, Congress can legislate time limits in specific restoration legislation.

[4] The analysis used in the "restored land" determinations for Grand Ronde and Siletz is consistent with the "restored land" analysis used here, even though the outcomes are different.

The Hatch Tract acquisition is not part of the "restoration of lands for an Indian tribe that is restored to federal recognition" because it does not fall within the land acquisition provisions set forth in the Tribes' Restoration Act of 1984 or the 1998 amendments. 25 U.S.C. § 2719(b)(1)(B)(iii). Further, the Hatch Tract is not "located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988", because the technical corrections do not relate back to the original enactment date of the Tribes' Restoration Act of 1984. Id. § 2719(a)(1).

cc: Deputy Commissioner for Indian Affairs
Director, Indian Gaming Management Staff
Associate Solicitor - Indian Affairs
Portland Regional Solicitor