United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

APR 18 2000

Memorandum

To: Deputy Commissioner -- Indian Affairs
Attn: Director, Indian Gaming Management Staff

From: Derril B. Jordan
Associate Solicitor – Indian Affairs

Re: Paskenta Band of Nomlaki Indians – determination of lands in Tehama County under Section 20 of IGRA

By memorandum dated October 22, 1999, the Regional Director, Pacific Region, requested a legal determination at the Central Office level on the following four issues:

> 1) Whether the Paskenta Band ('Tribe") is a "restored" tribe within the meaning of section 20 of the Indian Gaming Regulatory Act (IGRA);
>
> 2) Whether an acquisition of land into trust in Tehama County, California on behalf of the Tribe would qualify as the "restoration of lands" within the meaning of section 20 of IGRA; and
>
> 3) Whether the Paskenta Band Restoration Act places a mandatory or discretionary duty on the Secretary to take land into trust in Tehama County, California for the benefit of the Tribe and therefore exempting the acquisition from 25 C.F.R. Part 151; and
>
> 4) Whether an acquisition of land into trust in Tehama County, California for the benefit of the Tribe under the Paskenta Band Restoration Act is exempt from National Environmental Policy Act ("NEPA") compliance.[1]

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[1]By memorandum dated September 3, 1999, the Office of the Regional Solicitor for the Pacific Southwest Region opined that the Tribe that the acquisition of land into trust under the Paskenta Restoration Act would be discretionary, and thus subject to 25 C.F.R. Part 151 and NEPA. The Regional Director requested this office to review the opinion to assure national consistency in interpretation. This memorandum concludes that the acquisition of lands in Tehama County is not discretionary, and therefore not subject to the provisions in 25 C.F.R.

It is our opinion that the Tribe is a "restored" tribe within the meaning of section 20 of IGRA, and that lands taken into trust by the United States in Tehama County, California, for the benefit of the Tribe would qualify as the "restoration of lands" within the meaning of section 20 of IGRA. It is our opinion that the Tribe's Restoration Act places a mandatory duty on the Secretary to acquire land in Tehama County, California, in trust for the benefit of the Tribe, thus exempting the acquisition from 25 C.F.R. §§ 151.10 and 151.11.

The Indian Gaming Regulatory Act

There is a general prohibition against gaming on land acquired in trust after October 17, 1988. 25 U.S.C. § 2719(a). However, section 20 of IGRA sets forth several exemptions to the prohibition. Id. § 2719(a)(1)-(b). One exemption is for lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." Id § 2719(b)(1)(B)(iii). There is a two-pronged analysis to this exemption. 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. *See* Memorandum of Solicitor to Assistant Secretary -- Indian Affairs 2 (October 19, 1999) (hereinafter "Coos Opinion").

"Restored" is not defined in IGRA, nor is there any relevant legislative history regarding the meaning of this term. However, we have consistently opined 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. Coos Opinion at 3. 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. Id. at 4; *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).

Restored to Federal Recognition

The Paskenta Band was legislatively terminated in 1958 pursuant to the California Rancheria Act. Pub. L. No. 85-671, 72 Stat. 619. On November 2, 1994, Congress enacted the Paskenta Band Restoration Act ("Restoration Act"). Pub. L. No. 103-454, 108 Stat. 4794, *codified at* 25 U.S.C. § 1300m - 1300m-7.

We have previously determined on several occasions that the word "restored" need not appear in the body of the Restoration or Reservation Act in order for the Tribe to be restored within the

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§C.F.R. 151.10 or §151.11, including the NEPA provisions.

meaning of IGRA. *See* Opinion of the Solicitor on Pokagon Band of Potowatomi 3-4 (September 19, 1997) (hereinafter "Pokagon Opinion"); Memorandum from Associate Solicitor – Indian Affairs to Deputy Commissioner for Indian Affairs 7 (November 12, 1997) (hereinafter "LTBB opinion"); Letter from Solicitor to Congressman Vic Fazio (August 3, 1998). Nevertheless, section 303(a) of the Paskenta Restoration Act provides:

> **Federal recognition is hereby extended to the Tribe**. Except as otherwise provided in this subchapter, all laws and regulations of general application to Indians and nations, tribes, or bands of Indians that are not inconsistent with any specific provision of this subchapter shall be applicable to the tribe and its members.

25 U.S.C. § 1300m-1(a) (emphasis added). Section 303(b) states:

> [A]ll rights and privileges of the Tribe and its members under any Federal treaty, Executive order, agreement, or statute, or under any authority which were diminished or lost under the Act of August 18, 1958 (Public Law 85-671; 72 Stat. 619), are **hereby restored** and the provisions of such Act shall be inapplicable to the Tribe and its members after November 2, 1994.

Id § 1300m-1(b) (emphasis added). Section 303(c) makes the tribe and its members eligible for all Federal services and benefits furnished to federally recognized tribes or their members. Id. § 1300m-1(c).

It is clear from the Restoration Act provisions that the Paskenta Band is a "tribe that is restored to Federal recognition" within the meaning of section 20 of IGRA. *See* Memorandum from Associate Solicitor – Indian Affairs to Director, Indian Gaming Management Staff 2-3 (January 18, 2000); Coos Opinion at 2-3; Pokagon Opinion at 5-7.

Restored Lands

The Tribe's Restoration Act states:

> The Secretary shall accept any real property located in Tehama County, California, for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to the authority of the Secretary under the Act of June 18, 1934 (25 U.S.C. 461 et seq.).

25 U.S.C. § 1300m-3(a).[2]

As explained above, 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. The Paskenta Band Restoration Act provides, *inter alia*, for the acquisition of land within Tehama County. Therefore, any real property within Tehama County that are acquired into trust by the Secretary on behalf of the Tribe qualifies as "the restoration of lands" within the meaning of section 20 of IGRA.

Compliance with 25 C.F.R. Part 151 and NEPA

The Secretary's authority, procedures and policy for accepting land into trust are set out in the regulations at 25 C.F.R. Part 151. Two types of acquisitions are contemplated in the regulations - mandatory and discretionary. For discretionary acquisitions, the Secretary must consider various factors in evaluating whether to accept land in trust for individual Indians and Indian tribes when the acquisition "is not mandated." by legislation. 25 C.F.R. §§ 151.10, 151.11. For example, the Department must consider the need of the individual Indian or tribe for additional land and must consider the purpose for which the land will be used. Id. §§ 151.10(b),(c), 151.11(a). The Secretary must also consider the extent to which the tribe has provided information that allows the Secretary to comply with the National Environmental Policy Act (NEPA). Id. § 151.10(h), 151.11(a).

If the trust acquisition is "mandated" by Congress, then the Bureau of Indian Affairs is not required to consider the factors enumerated in sections 151.10 and 151.11 in determining whether to accept the land into trust. However, other provisions of Part 151 apply when an acquisition is mandated by Congress, e.g. 25 C.F.R. §§ 151.9 and 151.12(b).

The Tribe's Restoration Act provides:

> The Secretary shall accept any real property located in Tehama County, California, for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes owed.

25 U.S.C. § 1300m-3(a). Language almost identical to this has been determined to create a mandatory duty on behalf of the Secretary to acquire land into trust and not subject to 25 C.F.R. 151.10. *See* LTBB opinion at 8.

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[2] Subsection (c) of section 1300m-3 provides that any land conveyed or transferred under the land acquisition provisions shall be part of the Tribe's reservation.

In Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United .States, 78 F.Supp.2d 699 (W.D. Mich. 1999), the court upheld the Secretary's determination that the acquisition of land into trust of behalf of the Little Traverse Bay Bands of Odawa Indians ("LTBB") was mandatory, and thus not subject to 25 C.F.R. 151.10 and 151.11. Id. at 705. The LTBB Restoration Act provides:

> The Secretary shall acquire real property in Emmet and Charlevoix Counties for the benefit of the Little Traverse Bay Bands. The Secretary shall also accept any real property located in those counties for the benefit of the Little Traverse Bay Bands if conveyed or otherwise transferred to the Secretary, if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages or taxes owed.

25 U.S.C. § 1300k-4(a).[3] The Court held that the Secretary's interpretation of the statute as requiring the mandatory acceptance of property into trust in the named counties was not arbitrary and capricious. Sault Ste. Marie, at 705. The Court stated that the Secretary's position was an "eminently reasonable interpretation" of the Restoration Act. Id..

NEPA compliance is required for discretionary trust acquisitions under the provisions of 25 C.F.R. Part 151.10(h). However, NEPA compliance is not necessary in this instance because the acquisition of property in Tehama County for the Tribe is explicitly mandated by Congress by the Tribe's Restoration Act. *See* LTBB Opinion at 8-9. In Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Portland Area Director,) 27 IBIA 48 (1994), the Interior Board of Indian Appeals found that the BIA was not required to comply with NEPA prior to taking land into trust pursuant to the Coquille Tribe's Restoration Act because the acquisition was mandated by Congress and the action of the BIA Area Director, in taking the land into trust, was ministerial in nature. The Coquille Restoration Act contains language similar to that of the Paskenta Band's Restoration Act. *See* 25 U.S.C. § 715c(a). Thus, NEPA compliance is not necessary for acquisition of land in Tehama County into trust for the benefit of the Paskenta Band. *See* LTBB opinion at 8-9.

However, the acquisition of land in Tehama County can only occur if there are no adverse legal claims existing on the property. We believe that adverse legal claims include potential environmental liability. 25 U.S.C. § 1300m-3(a). As a result, the BIA must comply with the

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[3] The Court noted that in contrast, subsection (c) of the LTTB Restoration Act states the Secretary "may" accept additional acreage in the Band's service area. Sault Ste. Marie, at 702. The same provision exists in the Paskenta Band's Restoration Act. However, it should be noted that the use of the word "shall" in the legislation does not in and of itself create a mandatory duty to acquire the land in trust. The land acquisition provision must be read in its entirety before it can be determined whether the Secretary's duty is mandatory or discretionary.

requirements of 602 DM 2, Land Acquisitions: Hazardous Substance Determinations, to determine whether any such potential environmental claims exist before the land may be accepted into trust for the benefit of the Tribe. *See* LTBB opinion at 8.

The Regional Director also asked whether the IBIA's decision in Santana v. Sacramento Area Director, Bureau of Indian Affairs, 33 IBIA 135 (1999), requires the BIA to comply with NEPA in mandatory trust acquisitions. In Santana, the Board determined that the stipulated judgment in Hardwick v. United States, No. C-79-1710-SW (N.D. Cal. 1983), imposed a mandatory duty on the Secretary to acquire land in trust, if the restoration to trust status was in accordance with the terms of the stipulated judgement. 33 IBIA141. The Board held that the BIA exercised its discretionary authority under Part 151 by agreeing to restore lands to trust status in the stipulated judgment and if a request met all of the requirements in the judgement, the mandatory provisions of the Part 151 regulations did not apply. Id. at 142.

The Board also determined, however, that the Secretary must comply with NEPA in restoring those lands to trust status because the parties could not waive compliance with federal law by entering into a stipulated agreement. Id. at 143. The authority authorizing the Secretary to accept land into trust under the stipulated judgement in Hardwick was 25 U.S.C. § 465, the Secretary's discretionary authority under the Indian Reorganization Act (IRA).

Since the stipulated judgment in Hardwick pertained to the Secretary's discretionary authority to acquire land under the IRA, and the stipulated judgment could not waive federal law or requirements, the Board found that acquisitions under the Hardwick stipulated judgement must comply with NEPA. 33 IBIA at 143. The Board did not address, nor was the issue before it, the BIA's compliance with NEPA in the context of Congressional legislation mandating the acquisition of lands into trust. The Board did not overrule, or even mention, its previous decision in Confederated Tribes of Coos, 27 IBIA 48 (1994). It is our opinion that the IBIA's holding in Santana pertains only to requests for acquisitions under the stipulated judgement in the Hardwick litigation and is limited in its holdings to those circumstances. Thus, Santana does not require the Secretary to comply with NEPA when Congress has legislatively mandated the acquisition of land into trust. The Board's decision in Confederated Tribes of Coos 27 IBIA 48 (1994), is still controlling law when acquisitions are mandated by Congress.

If you have any questions, please contact Patti Jamison at (202) 208-4388 or Mary Anne Kenworthy at (202) 208-4631.

cc: Regional Director, Pacific Region
Regional Solicitor, Pacific Region
Office of Trust Responsibilities, BIA
Attention: Chief, Division of Real Estate Services