United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 18 2000

Memorandum

To: George Skibine
Director, Indian Gaming Management Staff

From: Derril B. Jordan
Associate Solicitor – Indian Affairs

Re: United Auburn Indian Community – Determination under 25 U.S.C. § 2719(b)(1)(B)(iii)

The United Auburn Indian Community ("the Tribe") asked for a determination as to whether the trust acquisition of "Resultant Parcel 'B'" located in Placer County, California, qualifies as "the restoration of lands for an Indian tribe that is restored to Federal recognition" under section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and is therefore eligible for gaming. By letter dated December 2, 1999, the Tribe's attorneys submitted documents and legal arguments for our consideration. After careful review, we have determined that "Resultant Parcel 'B'" qualifies as "restored" land within the meaning of section 20 of IGRA.

Although the Tribe did not specifically ask, it is also necessary to determine whether the trust acquisition of "Resultant Parcel 'B'" is discretionary or mandatory. If it is discretionary, the Bureau of Indian Affairs must consider the factors enumerated in 25 C.F.R. § 151.11 and the factors incorporated by reference in § 151.11 from § 151.10. We have determined that the acquisition is discretionary, so the factors must be considered.

Background

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. There is also no relevant legislative history. However, we have consistently opined that "restored lands" under section 20(b)(1)(B)(iii) include only those

OIGM
1-18-00

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 Auburn Rancheria was legislatively terminated in 1958 pursuant to the California Rancheria Act, Public Law 85-671. On October 31, 1994, Congress enacted the Auburn Indian Restoration Act (hereinafter "Restoration Act"). Pub. L. No. 103-434, 108 Stat. 4533, *codified at* 25 U.S.C. § 1300*l* - 1300*l*-7. The Restoration Act provides:

> Notwithstanding any other provision of law, Federal recognition is hereby extended to the Tribe. Except as otherwise provided in this subchapter, all laws and regulation of general application to Indian or 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. § 1300*l*(a). The Restoration Act also makes the Tribe and it members eligible for all Federal services and benefits furnished to federally recognized Indian tribes or their members. Id. § 1300*l*(c).

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 the Tribe to be restored within the meaning of IGRA. *See* Pokagon Opinion; Memorandum from Associate Solicitor – Indian Affairs to Deputy Commissioner for Indian Affairs 7 (November 12, 1997); Letter from Solicitor to Congressman Vic Fazio (August 3, 1998). These sections establish the Auburn Community as a restored tribe within the meaning of section 20. *See* Coos Opinion at 2-3; Opinion on Pokagon Band of Potowatomi 5-7 (September 19, 1997). Moreover, section 1300*l*(b) of the Restoration Act eliminates any lingering ambiguity. That provision provides:

> [A]ll rights an privileges of the Tribe and its members under any Federal treaty, Executive order, agreement or statute, or under any other authority which were diminished or lost under the Act of August 18, 1958 (Public Law 85-671), are hereby **restored** and the provision of such Act shall be inapplicable to the tribe and its members after October 31, 1994.

Id. § 1300*l*(b) (emphasis added). This provision taken with the other provisions of the Restoration Act leave no doubt that the Auburn Community is "an Indian tribe that is restored to Federal recognition" within the meaning of section 20 of IGRA.

Restored Lands

The Tribe's Restoration Act states:

> The Secretary may accept any real property located in Placer 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 on such property, including outstanding liens, mortgages, or taxes owed.

25 U.S.C. § 1300*l*-2(a).[1]

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. According to the documents submitted with the letter of December 2, 1999, and according to the documents of the Bureau of Indian Affairs, "Resultant Parcel 'B'" is located within Placer County, California. Congress specifically provided in the Auburn Community's Restoration Act for the acquisition of land located in Placer County, California, as part of the Tribe's restoration process. 25 U.S.C. § 1300*l*-2(a). Consequently, the trust acquisition of "Resultant Parcel 'B'" qualifies as "the restoration of lands for an Indian tribe that is restored to Federal recognition" under section 20(b)(1)(B)(iii) of IGRA and is therefore eligible for gaming without going through the two-part determination under section 20(b)(1)(A).

The Tribe argues in the letter of December 2, 1999, that "Resultant Parcel 'B'" also qualifies as "restored" lands under Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan, 46 F. Supp. 2d 689 (W.D. Mich. 1999), in which the Court addressed the "restored" lands exemption in the context of denying a temporary restraining order. We note that the Grand Traverse decision is not final, and the Court has remanded the case for further development of the issue. Nevertheless, we have determined that the parcel qualifies as "restored" lands because it falls within the land acquisition provision of the Tribe's Restoration Act, and therefore analysis under Grand Traverse is unnecessary.

---

[1] Section 1300*l*-2 contains other land acquisition provisions. For example, subsection (a) states that the Secretary may accept any additional acreage in the Tribe's service area pursuant to the Secretary's authority under 25 U.S.C. § 461 *et seq.* Subsection (c) provides that any land conveyed or transferred under the land acquisition provisions shall be part of the tribe's reservation.

Discretionary Acquisition

Although the Tribe did not specifically ask, it is necessary to determine whether the trust acquisition of "Resultant Parcel 'B' is mandatory or discretionary. If it is discretionary, the Bureau of Indian Affairs must consider the factors enumerated in 25 C.F.R. § 151.11 and the factors incorporated by reference in § 151.11 from § 151.10 while processing the Tribe's application.

Under Departmental regulations, 25 C.F.R. Part 151, the Secretary must consider various factors in evaluating whether to approve a request to acquire off-reservation land in trust for individual Indians and Indian tribes when the acquisition "is not mandated." 25 C.F.R. § 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. § 151.11(a) (incorporating 151.10(b) and (c)). The Department must contact the state and local governments for their comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. Id § 151.11(d). 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. § 151.11(a) (incorporating 25 C.F.R. § 151.10(h)). If the trust acquisition is "mandated" by Congress, then the Bureau of Indian Affairs is not required to consider these factors under the regulations.

The acquisition of the "Resultant Parcel 'B'" into trust is discretionary. The Restoration Act says the Secretary "may" accept any real property in Placer County, California, for the benefit of the Tribe, if there are no adverse legal claims.[2] 25 U.S.C. § 1300*l*-2(a). "May" means the Secretary has discretion whether to accept the land into trust or not. Therefore, the Bureau of Indian Affairs must comply with 25 C.F.R. § 151.11 in processing the Tribe's application to acquire "Resultant Parcel 'B'" in trust.

[2] It is noteworthy that as originally enacted, subsection (a) of the Auburn Community's Restoration Act stated the Secretary "shall" acquire the land, but on March 29, 1996, Congress changed "shall" to "may." Pub. L. No. 104-122, 110 Stat 876.