United States Department of the Interior

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Memorandum

To: George Skibine, Director, Office of Indian Gaming Management

From: Philip N. Hogen, Associate Solicitor, Indian Affairs Phil Hogen

Subject: Revisiting the United Auburn Indian Community lands opinion.

On December 14, 2001, you asked my legal advice regarding whether recent court cases, *Grand Traverse and Coos,* and/or the subsequent legal opinions issued by NIGC and the Solicitor's office[1] changed the Auburn Indian lands opinion issued by the Associate Solicitor for Indian Affairs on January 18, 2000 (hereafter "Auburn opinion.") As you know, both the NIGC's GTB opinion and my Coos opinion found certain land met the restored lands exception in the Indian Gaming Regulatory Act (IGRA). These opinions use a broader interpretation restored lands provision in IGRA than the interpretation of that provision in the Auburn opinion, i.e. that restored lands are limited to those lands Congress authorizes to be taken into trust on behalf of a tribe in the tribe's restoration act. I do not believe that these opinions are inconsistent and, therefore, no change to the Auburn opinion is necessary.

The Auburn opinion concluded that a 49.21 acre parcel in Placer County, California qualified as "restored land" under section 25 U.S.C. 2719(b)(1)(B)(iii) of IGRA. This opinion looked to the language in the Auburn Restoration Act which provided that:

> 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). The Auburn opinion found that lands taken into trust in Placer County met the restored lands exception found in 25 U.S.C. § 2719(b)(1)(B)(iii).

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[1] *Grand Traverse Band v. United States,* 46 F. Supp. 689 (W.D. Mich. 1999) and the subsequent August 31, 2001 legal opinion issued by the National Indian Gaming Commission (NIGC) finding restored lands for the Grand Traverse Band (GTB) and *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt,* 116 F. Supp.2nd 155 (Dist. D.C. 2000) and my December 5, 2001 legal opinion finding restored lands for Coos.

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In the GTB and Coos opinions we determined restored lands provision in IGRA could be interpreted to include lands other than those lands identified in a restoration act or the initial reservation of a tribe restored to federal recognition through the acknowledgment process. For GTB and Coos tribes, both of which were restored prior to the passage of IGRA, restored lands can also be determined by analyzing the specific land in question to determine whether the lands have a temporal and geographic connection to the restored tribe as well as historically significant to the tribe.

This broader interpretation of the restored lands opinion is consistent with the interpretation expressed in the Auburn opinion. Of course, the clearest indication of congressional intent to restore lands is, as in the case of Auburn, when Congress expressly provided for the restoration of lands to a tribe in its restoration act either through discretionary or mandatory authority to take land into trust. For Auburn, Congress specifically spoke to the geographic area, Placer County, where the Department could take land into trust for the Tribe. What changed since the January 18, 2000 Auburn opinion is that the Department no longer sees this as the *exclusive* means by which lands can meet the restored lands exception in 25 U.S.C. 25 U.S.C. § 2719(b)(1)(B)(iii). In addition to lands being identified in a restoration act or a tribe's initial reservation, in limited circumstances, a tribe may be able to demonstrate that certain lands can also meet the definition of restored lands.

Your request was accompanied by two lengthy letters submitted by the opposing sides on this issue. One letter was from J. Scott Smith who represents the cites of Roseville and Rocklin and the Citizens for Safer Communities. The other letter was from Howard Dickstein at Dickstein & Merin who represents Auburn. Mr. Smith argued that the Auburn opinion was contrary to the court's decision in GTB and did not consider the court's decision in Coos because it was issued before the Coos litigation was decided. Mainly, Mr. Smith took issue with our reliance on the plain language of the Auburn Restoration Act and our opinion that, "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." Mr. Smith contends that since the courts in GTB and Coos considered the dictionary definition of restored, we must also. Mr. Dickstein argues that the Auburn opinion is consistent with the Coos and GTB decisions.

The District Court's decision in Coos held that the Department's interpretation was "unduly narrow" because it limited restored lands to those lands Congress authorized to be taken into trust in the restoration act. Id. at 163. Instead the court found that a plain meaning of "restoration of lands" could be construed to include lands that place a tribe back in a position it held prior to termination. The position argued by the Mr. Smith ignores this plain meaning of the statute and the admonition of the court in Coos.

Moreover, the Auburn Restoration Act is clear. It provides that "[t]he Secretary may accept any real property located in Placer County . . " There is no indication that Congress intended anything other than to restore land in Placer County for the Auburn Tribe. The only

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condition imposed was that the land did not have encumbrances, such as liens, mortgages and taxes owed. If Congress intended other conditions, such as the land must be ancestral or previously owned by the Auburn Tribe, it would have said so. Congress clearly said that the Tribe may obtain 'any land' available in the county. We needn't go any further to discern Congress' intent to restore land for the tribe.

Finally, basic statutory construction requires us to read both statutes so that one does not negate the other. Under Mr. Smith's reading, the Congress' intent to restore lands for Auburn in its Restoration's Act would be limited by IGRA. However, IGRA was passed first and if Congress had wanted to the restoration of lands in the Auburn Restoration to be limited by IGRA it could have said so. Thus, it is contrary to these canons of statutory construction to use the dictionary definition of restored in IGRA to implicitly limit the land restoration provision in the Restoration Act.

If we can be of further assistance, please don't hesitate to ask.

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