December 3, 2001

Ms. Sara J. Drake
Department of Justice
State of California
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Status of the Picayune Rancheria Lands

Dear Ms. Drake:

We received your letter dated September 28, 2001, that serves as the State of California's public comment to the draft Environmental Assessment (EA) prepared by the Picayune Rancheria of Chukchansi Indians (Tribe) for its Class III casino project. Your letter and a subsequent conversation with this office confirmed that you essentially question whether the casino will be operating on a reservation.

As you know, the Picayune Rancheria and Cascade Gaming have a management contract that will ultimately be approved or disapproved by the Chairman of the National Indian Gaming Commission (NIGC). As part of the approval process, the Commission must determine whether the proposed gaming will occur on Indian lands. Because of this responsibility, the NIGC requested that the United States Department of the Interior make a determination as to whether the lands in question are deemed Indian lands pursuant to 25 U.S.C. § 2703(4) of the Indian Gaming Regulatory Act (IGRA).

In a letter to Kevin K. Washburn, General Counsel, NIGC, dated March 2, 2000, Derril B. Jordan, Associate Solicitor, Division of Indian Affairs, Department of the Interior (Department) concludes that lands located within the boundaries of the Picayune lands are "Indian lands" and therefore may be used for Indian gaming operations on the property. This opinion is based largely upon a case that challenged the termination of seventeen California Rancherias. Tillie Hardwick et al. v. United States, No. C-79-1710 SW (N.D. Cal. 1979). In final disposition of this case, the Tribe and the County stipulated and the court so ordered that the original eighty acres of the Picayune Rancheria be restored and that all lands within the restored boundaries be declared "Indian Country." Hardwick, Stipulation and Order (Madera County) Para. 2.C., at 4, May 20, 1987. The parties also stipulated and the court ordered that the Rancheria "shall be treated by the County of Madera and the United States of America, as any other federally recognized Indian Reservation. Hardwick, 1983 Stipulation and Order, Paragraph 2.D. at 4. As such, the Department concludes that the Picayune Rancheria is a

reservation – thus qualifying under 25 U.S.C. § 2703(4) as Indian lands. Further, because the lands qualify as a reservation, the Department also concludes that the land in question need not be taken into trust. Our office subsequently adopted the Department of Interior's views.

The State also apparently believed that these lands are Indian lands, because on October 8, 1999, the State signed a compact with Picayune Rancheria permitting gaming.[1] Nonetheless, the State now asserts that the parcels in question are not "Indian lands" within the meaning of the IGRA. In essence, California asserts that land must be held by a Tribe in trust and otherwise meets the requirements of 25 U.S.C. § 2719 before it can be considered "Indian lands".[2] Further, the State disagrees with the notion that the fee property within the former boundaries of the Rancheria is 'Indian Country' within the generally accepted definition. California argues that no part of the property has been set aside by the federal government for the Tribe, nor is any of it under federal superintendence pursuant to Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 530, 118 S.Ct. 948.

At the present time, the Picayune Tribe has a total land base of approximately 160 acres, including the 80 acres of original rancheria land. The proposed site for the tribal gaming operation lies within the original boundaries of the Picayune Rancheria in the County of Madera, California.[3] In concurring with the Department's opinion, we likewise conclude that the proposed gaming operation is located on lands considered "Indian lands" pursuant to 25 U.S.C. § 2703(4)(A). We conclude that the lands located within the Picayune Rancheria should be treated as a reservation. As such, it is not necessary for the Tribe to place land located within the exterior boundaries of the Rancheria in trust. Further, because the proposed casino site is located on a reservation, the Tribe is not

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[1] Section (C) of the Preamble to the Compact states: "The Tribe does not currently operate a gaming facility that offers Class III gaming activities. However, on or after the effective date of this Compact, the Tribe intends to develop and operate a gaming facility offering Class III gaming activities on its reservation land, which is located in Madera County of California."

[2] The section of the IGRA cited by the State, 25 U.S.C. § 2719, regards gaming on lands acquired after 1988. This section does not apply to those lands that are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988.

[3] As evidenced by materials provided by the Tribe's counsel, the proposed site is described as Parcel 1 of Parcel Map No. 1870 according to the map thereof recorded August 21, 1981 in Book 27 of Maps, at Page 182, Madera County Records. APN: 054-330-031 3. Also, Parcel No. 2 of Parcel Map 1870, in the County of Madera, State of California, per map recorded August 21, 1981, in Book 27 of Map at page 182 of Madera County Records, together with the right of access upon Parcel 1 of said Parcel Map as reserved thereon. APN: 054-330-032. Parcels 1 and 2 (Surveyor's Map, EA July 2001) were purchased by the Tribe in 1995 and 1996, and the Tribe currently holds title to these Parcels. These Parcels described above are within the original boundaries of the Picayune Rancheria --described as the lands in the north half of the northeast quarter of section 29, township 8 south, range 21 east of the Mount Diablo meridian.

subject to the requirements of 25 U.S.C. § 2719. Finally, we conclude that Venetie does not apply to the facts at hand.

The following should clarify any further questions you might have pertaining to whether the parcel in question is considered Indian lands pursuant to the IGRA.

LEGAL BACKGROUND

The IGRA explicitly defines "Indian lands" as follows:

> (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).

NIGC regulations have further clarified the Indian lands definition, providing that:

> 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. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

ANALYSIS

1. Land located within the exterior boundary of the Picayune Racheria should be treated as a reservation.

Originally, the Picayune Rancheria was established by Executive Order of April 24, 1912. Eighty acres were set aside for Indian use. In 1951, however, the State of California requested the United States Congress to authorize the termination of all restrictions upon California Indian Tribes. In 1954, responding to a Congressional

Resolution, H. Con. Res. 108, 83rd Congress, August 1, 1953, to terminate federal supervision in the State of California, the Department of the Interior submitted a bill to provide for the distribution of the land and assets of the Rancheria. In 1958, Congress enacted Public Law 85-671, 72 Stat. 619, Act of August 18, 1958 as amended by the Act of August 11, 1964, 78 Stat. 390 ("California Rancheria Act"). As a result, numerous Indian land parcels in California, including the Picayune Rancheria, passed out of federal ownership and were no longer held in trust for the tribes by the United States Government.

In 1979, the Picayune Rancheria joined with sixteen other California Indian Rancherias in a class action lawsuit in part to restore the reservation status of the rancherias, claiming that the trust relationship with the United States government had been illegally terminated under the California Rancheria Act. Tillie Hardwick et al. v. United States, No. C-79-1710 SW (N.D. Cal. 1979). The Rancherias sought, among other things, judicial recognition that "[t]he Secretary of the Interior is under a duty to 'unterminate' each of the subject Rancherias, and . . . to hold the same in trust for the benefit of the Indians of the original Rancheria;" and further that " [t]he Secretary of the Interior is under a duty to treat all of the subject Rancherias as Indian reservations in all respects[.]" Hardwick, Complaint at 27.

The litigation was ultimately settled. Settlement was achieved by stipulation between the Rancherias and the United States and then between the Rancherias and the respective counties in which they lay.

The first stipulation, which was between the Rancherias and the United States and was approved federal court order on December 22, 1983, provides, in relevant part, as follows:

> 3. The status of the named individual plaintiffs and other class members of the seventeen Rancherias named and described in paragraph 1 as Indians under the laws of the United States shall be restored and confirmed. In restoring and confirming their status as Indians, said class members shall be relieved of Sections 2(d) [subjecting any property so distributed to taxation] and 10(b) [terminating services provided to Indians] of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indians because of their status as Indians, if otherwise qualified under applicable laws and regulations.

> 4. The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities or groups of the seventeen rancherias listed in paragraph 1 as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act, and said Tribes, Bands, Communities and groups shall be included on the Bureau of Indian Affairs' Federal Register list of recognized tribal entities pursuant to 25 CFr, Section 83.6(b). Said Tribes, Bands, Communities or groups of Indians shall be relieved From the application of section 11[revoking constitutions under the Indian Reorganization Act[4]] of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indian Tribes, Bands, Communities or groups because of their status as Indian Tribes, Bands, Communities or groups.
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> 10. The Secretary of the Interior, named individual plaintiffs, and other class members agree that the distribution plans for these Rancherias shall be of no further force and effect and shall not be further implemented; however, this provision shall not affect any vested rights created thereunder.

Hardwick, Stipulation and Order, December 22, 1983.

The stipulation with the United States left "for further proceedings" the question of whether to restore former boundaries of the Rancherias. *Id.*, Paragraph 5 at 4. ("The court shall not include in any judgment entered pursuant to this stipulation any determination of whether or to what extent the boundaries of the Rancherias listed and described in paragraph 1 shall be restored and shall retain jurisdiction to resolve this issue in further proceedings herein.")

In 1987, during such further proceedings, the County of Madera and the Picayune Rancheria reached the following stipulation:

The original boundaries of the [Picayune Rancheria] as described in paragraph 2.B.1 above [Exhibit A to the Stipulation for Entry of Judgment, filed herein on August 2,

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[4] 25 U.S.C.§ 461 et seq.

> 1983, and made the judgment of this Court on December 22, 1983, in Order Approving Entry of Final Judgment] are hereby restored, and all land within these restored boundaries of the [Picayune Rancheria] is declared to be "Indian Country." (emphasis in original)

Hardwick, Stipulation and Order (Madera County) Para. 2.C., at 4, May 20, 1987. Although the United States was not among the parties that signed the 1987 stipulation, which was primarily designed to resolve issues surrounding the payment of real property taxes to the County of Madera, the 1987 Stipulation was accepted by the federal court and was entered as a judgment. Hardwick, Stipulation and Judgment, filed June 16, 1987.

Based on these judicial proceedings, the Department concluded that the Picayune Tribal parcel was "Indian land." As the Department noted in the Picayune Rancheria opinion, the 1983 Stipulation reflects the United States' agreement that the individual members of the Rancherias would be restored to their status as Indians and that the United States would recognize the Indian Tribes, Bands, Communities or groups of the seventeen Plaintiff Rancherias as Indian entities with the *same status* that they possessed prior to the California Rancheria Act. Restoring reservation boundaries is consistent with restoring the Rancherias to their previous status.

The 1983 Stipulation further provided:

> The [Picayune Rancheria] shall be treated by the County of Madera and the United States of America, as any other federally recognized Indian Reservation,[5] and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the [Picayune Rancheria]. . . .

Hardwick, 1983 Stipulation and Order, Paragraph 2.D. at 4. To implement the terms of the settlement, the Department of the Interior published a notice in the Federal Register, 49 Fed. Reg. 24084 (1984), stating that the seventeen Rancherias in the Hardwick litigation were relieved from application of the California Rancheria Act. Moreover, the 1987 Stipulation, which was accepted by the federal court in the Hardwick case confirms that the land is "Indian country as defined by 18 U.S.C. § 1151." Hardwick, Stipulation (with County of Madera) Paragraph 1.G. at 2.

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[5] Both stipulations are consistent with the long-standing position of the Department of the Interior that Rancherias are reservations "for all practical purposes." 1 Op. Sol. On Indian Affairs 891 (U.S.D.I. 1979).

When reviewing the Hardwick stipulations, the Northern District of California confirmed that the Pinoleville Ranchera should be treated as a reservation. In Governing Council of Pinoleville Indian Community v. Mendocino County, the Pinoleville Rancheria challenged the moratorium on new industrial uses on the Rancheria. 684 F. Supp 1042, 1043 (N.D. Cal. 1988). The Pinoleville Rancheria, like the Picayune Rancheria, was terminated according to the Rancheria Act and subsequently restored in the Hardwick settlement stipulations. Pinoleville, 684 F. Supp at 1043-44. The court considered the effect of the Hardwick judgments on the Tribal Council's power to regulate, and determined that "the clear and fundamental intent of the judgment [was] to restore *all* land within the original Rancheria as Indian Country and Mendocino Country's express undertaking [was] to treat the *entire* Rancheria as reservation[.] Id. at 1046 (emphasis in original). The court held that the Tribal Council had the authority to zone non-Indian fee land within the boundaries of the Rancheria. Id. at 1045. The court also cited a letter from the Bureau of Indian Affairs which stated: "[I]t is our opinion that the Pinoleville Indian Community has the authority to enact an ordinance which restricts land use by anyone within their exterior boundaries when such use has been deemed detrimental to the health or welfare of the Pinoleville Indian Community. B.I.A. letter at 1 (emphasis in original)." Id. at 1042. Thus, Rancherias restored by the Hardwick stipulated judgments are treated by the County and the Bureau of Indian Affairs like any other Indian reservation.[6]

2. Indian Lands need not be held in trust nor be handled in accordance with § 2719.

The specific language of 25 U.S.C. § 2703(4)(A) defines Indian lands to include "all lands within the limits of any Indian reservation". When analyzing the trust question, the Department correctly states:

> The Tribe is correct that they need not have the land taken into trust. Subsection (A) defines Indian lands to include "all lands within the limits of any Indian reservation." It does not require that lands within the boundaries of a reservation be held in trust. By providing that "all lands" within a reservation are Indian lands, it is clear that Congress did not intend to include an additional requirement that the lands also be held in trust.

[6] Furthermore, when discussing the status of the Robinson Rancheria (not a Hardwick Rancheria), the Duncan court held that "Congress clearly contemplated that this land have the same general status as reservation lands". *See generally* United States Department of the Interior, Federal Indian Law 609 (rev. ed 1958) (not necessary that Congress use the word "reservation" to create Indian reservation lands); United States v. McGowan, 302 U.S. 535, 538-39 (1938). Duncan v. United States, 667 F.2d 36, 41, 229 Ct. Cl 120, 128 (1981), cert. denied, 463 U.S. 1228, 103 S.Ct. 3569, 77 L.Ed2d 1410 (1983)

Subsection (B) allows lands to be Indian lands if the land 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. The Indian lands definition is subject to the requirements of subsection (B) only if subsection (A) does not apply. Because the Picayune Rancheria is a reservation, subsection (B) need not apply to our analysis.

Likewise, because the Picayune Rancheria is a reservation and the gaming operation is located within the exterior boundary on the reservation, 25 U.S.C. § 2719 is not applicable. This section is in regard to land acquired after 1988. This section does not apply to those lands that are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988.

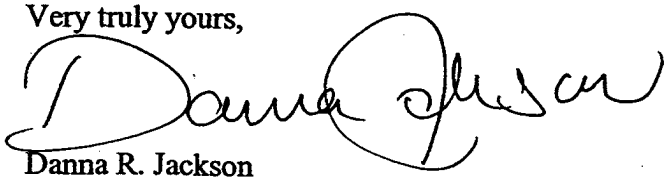
3. Venetie does not apply to this analysis.

In your letter, California cites Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 118 S. Ct. 948 (1998) for the proposition that the Picayune Rancheria is not Indian Country because none of the Rancherias has been set aside by the federal government for the tribe, nor is any of it under federal superintendence. Venetie was about 18 U.S.C. § 1151(b). This section pertains to "dependent Indian communities", opposed to section 1151(a), which concerns Indian reservations. "Dependent Indian communities" refers to a category of Indian lands that are neither reservation nor allotments. Venetie, 522 U.S. at 520. Because we have determined that Hardwick restored the Picayune Rancheria to reservation status, Venetie has no connection to our analysis. Furthermore, the "set aside" and "superintendence" analysis is not relevant at this time because such analysis does not apply to reservation land.

CONCLUSION

In concurring with the Department, we likewise conclude that the proposed gaming operation is located on lands considered "Indian lands" pursuant to 25 U.S.C. §2703(4)(A). We thank you for your comments. If you should have any additional questions regarding this matter, do not hesitate to call.

Very truly yours,



Danna R. Jackson
Staff Attorney

cc: Picayune Rancheria of Chukchansi Indians