MEMORANDUM

TO: Philip N. Hogen, Chairman

FROM: Penny J. Coleman, Acting General Counsel PJC

DATE: July 31, 2006

RE: The St. Ignace Parcel Does Not Qualify As The Restoration Of Lands For An Indian Tribe Restored To Federal Recognition

On July 3, 2003, the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) notified the Bureau of Indian Affairs (BIA) of its intent to game on a parcel of land near St. Ignace, Michigan (St. Ignace parcel)[1] pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* The National Indian Gaming Commission (NIGC) Office of General Counsel (OGC) requested clarification of the exceptions claimed to the general prohibition of gaming on lands acquired into trust after October 17, 1988, found in 25 U.S.C. § 2719. The Tribe asserted that the St. Ignace parcel meets two exceptions: that it is contiguous to a parcel that should be considered an informal reservation and that it qualifies as restored lands of a tribe restored to federal recognition. This opinion analyzes the applicability of the latter exception, 25 U.S.C. § 2719(b)(1)(B)(iii), which allows gaming on land that constitutes the restoration of lands of a tribe restored to federal recognition.

We conclude that the Sault Ste. Marie Tribe has failed to establish that the St. Ignace parcel qualifies as restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

I. Background

Over ninety percent of the new Kewadin Shores Casino is situated on the St. Ignace parcel, with the remainder on a parcel acquired into trust in 1983.[2] The St. Ignace parcel

[1] Lot 2, Section 19, Town 41 North, Range 3 West, and the South ½ of the Southwest ¼ of said Section 19, Town 41 North, Range 3 West, lying Southerly of a line described as beginning at a point 650 feet Northerly along the centerline of Mackinac Trail and South line of Section 19; thence Northeasterly to the Southeast corner of the Northwest ¼ of the Southwest ¼ of Section 19, Town 41 North, Range 3 West, Michigan Meridian. Michigan.

[2] That portion of Section 19, Town 41 North, Range 3 West described as: All of the NW ¼ of the SW ¼ and all of the S ½ of the SW ¼ Northerly of a line described as beginning 650 feet Northerly along the centerline of Highway

was taken into trust in 2000 and is therefore not eligible for gaming under the IGRA unless an exception to the general prohibition of gaming on after-acquired lands is met.

Although the Tribe asserted that the 2000 parcel met two of the exceptions to the IGRA's general prohibition against gaming on land acquired after October 17, 1988, in order to expedite the opinion, we agreed that the NIGC would initially consider only the argument that the land is contiguous to the boundaries of the Tribe's reservation as of October 17, 1988. Letter from M. Catherine Condon, Greene, Meyer & McElroy, to Andrea Lord, NIGC (Nov. 3, 2004). Pursuant to a Memorandum of Agreement between the NIGC and the Department of the Interior (DOI), NIGC consulted with DOI as to whether the Tribe's trust land adjacent to the St. Ignace parcel constituted a reservation. Memorandum of Agreement between the National Indian Gaming Commission and the Department of the Interior (recently amended May 31, 2006). The DOI responded with a finding that the contiguous 1983 trust land does not constitute a reservation for purposes of the IGRA. Letter from Edith R. Blackwell, Acting Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, DOI, to Philip N. Hogen, Chairman, NIGC (Feb. 14, 2006).

Having received a negative response to the first claimed exception, the Tribe submitted a restored lands analysis to the NIGC via letters dated March 27, June 30, and July 13, 2006. Our opinion considers the applicability of the restored lands exception to the St. Ignace parcel. We find that parcel is not eligible for gaming under this exception.

II. Applicable Provisions of IGRA and NIGC Regulations

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction. 25 U.S.C. §§ 2710(b)(1), 2710(d). IGRA defines "Indian lands" as:

> (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). *See also* 25 C.F.R. § 502.12 (NIGC's implementing regulation further defining Indian lands).

Further, section 2719(a) of the IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions are met. For the purposes of this analysis, the exception laid out in 25 U.S.C. § 2719(b)(1)(B)(iii) is relevant: a tribe may lawfully conduct

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"Mackinac Trail" from the intersection of said centerline with the South section line of Section 19, Town 41 North, Range 3 West; thence Northeasterly to the Southeast corner of the NW ¼ of the SW ¼ of said section. Except the highway right of way and easements of record. Containing 65 acres more or less.

gaming under the IGRA if the lands are taken into trust as "the restoration of lands for an Indian tribe that is restored to federal recognition."

III. Legal Analysis

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction. 25 U.S.C. § 2701; 25 U.S.C. §§ 2710(b)(1) and 2710(d); 25 U.S.C. § 2703(4). Additionally, if the lands at issue are trust lands outside the tribe's reservation, the tribe may conduct gaming on it only if it exercises "governmental power" over the land. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

For purposes of this analysis, we assume that the Tribe has jurisdiction and exercises governmental powers over the St. Ignace parcel based upon the parcel's status as trust land and the Tribe's concrete manifestations of governmental authority in the form of operating a water supply and sewage facility on the land, construction of a casino on the land, and a Mutual Law Enforcement Assistance Agreement between the Sheriff's Department of Mackinac County, the City of St. Ignace Police Department and the Sault Ste. Marie Tribe signed September 24, 1996. Payment Aff. ¶ 22. It is not necessary to further delve into the matter because the St. Ignace parcel does not meet the restored lands of a restored tribe exception.

A. The Tribe Qualifies as a Restored Tribe

To be considered an "Indian tribe that is restored to Federal recognition," as that term is used in IGRA, the word "restored" must be given its plain, primary meaning. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002) (Grand Traverse II), aff'd Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 369 F.3d 960, 967 (6th Cir. 2004) (Grand Traverse III). A tribe must demonstrate a history of: 1) governmental recognition; 2) a period of non-recognition; and 3) reinstatement of recognition. See Grand Traverse III, 369 F.3d at 967; Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt (Coos), 116 F. Supp. 2d 155, 161 (D.D.C. 2000). In addition to court guidance, we also consulted the restored lands of a restored tribe opinions issued by the NIGC and the DOI.

i. History of the Sault Ste. Marie Tribe's governmental relations with the United States

The Sault Ste. Marie Band has been recognized as a successor to some of the Chippewa Tribes that treatied with the United States between 1785 and 1855. *See* Treaty with the Chippewa, June 16, 1820 (7 Stat. 206) (signed at Sault Ste. Marie); Treaty with the Ottawa and Chippewa Nations of Indians, March 28, 1836 (7 Stat. 491); Treaty with the Ottawa and Chippewa, July 31, 1855 (11 Stat. 621) (signed by chiefs and headmen of the Chippewa Indians living near Sault Ste. Marie, Michigan); Treaty with the Chippewa of Sault Ste. Marie, Aug. 2, 1855 (11 Stat. 631); United States v. State of Michigan, 471 F. Supp. 192, 264 (W.D. Mich. 1979) ("Members of the tribes which are parties to this

action can trace their lineage to the Ottawa and Chippewa tribes which were beneficiaries of the Treaty of Ghent and whose leaders signed the Treaties of 1836 and 1855. . . . The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836 (7 Stat. 491)."); 25 U.S.C. § 1300k(2) ("Grand Traverse Band of Ottawa and Chippewa Indians, the Sault Ste. Marie Tribe of Chippewa Indians, and the Bay Mills Band of Chippewa Indians, whose members are also descendants of the signatories to the 1836 Treaty of Washington and 1855 Treaty of Detroit, have been recognized by the Federal Government as distinct Indian tribes.").

The Sault Ste. Marie Tribe entered into two treaties with the United States in 1855. The first, of July 31, 1855, dissolved an artificial amalgam of Ottawa and Chippewa Indians created in a March 28, 1836, treaty for the sole purpose of easing the United States' negotiations for land. It was the understanding of both the Treaty Commissioners and the Tribal representatives that what was being dissolved was not the government-to-government relations of the tribal and federal governments, but rather the artificial entity created in the 1836 treaty. The proceedings of the July 31, 1855, treaty at Detroit were transcribed. The Sault Ste. Marie representative, Wau-be-jeeg, stated "[a]t the treaty of 36, our fathers were in partnership with the Ottawas, but not [sic] the partnership is finished and we who come from the foot of Lake Superior wish to do our business for ourselves." Proceedings of a Council with the Chippeway & Ottawas of Michigan held at the City of Detroit by the Hon. George W. Manypenny & Henry C. Gilbert, Commissioners of the United States July 25, 1855. Wau-be-jeeg later added, "I told you when I first came that I wanted to be separated from the Ottawas and you have not answered me. We have sat here and heard you talk to the Ottawas – while you paid no attention to us." Id. To this Commissioner Manypenny responded, "The very case you suggested is met in the treaty. You are separated as you desire. This treaty you and the Ottawas must sign together because the old treaty of '36 was made in that way. But here we have followed your suggestion and provide that the money shall be paid to the different bands and that no general council shall be called." Id.

The second 1855 treaty was signed just two days later on August 2nd, solely with the Sault Ste. Marie Tribe. The August 2 treaty surrendered the Tribe's fishing rights at the falls of St. Mary's and right to camp nearby in return for annuity payments and a half acre island in the St. Mary's river.

Sault Ste. Marie Tribal members were made United States citizens and were allotted land pursuant to the July 31, 1855, treaty. Letter from E.J. Brooks, Special Agent, Department of the Interior, General Land Office, to E.A. Hayt, Commissioner of Indian Affairs at 1 (Jan. 4, 1878). Mr. Brooks noted of the Michigan Indians that "[t]heir tribal organizations were also dissolved by the [July 31, 1855] treaty and since that date they have been considered and treated as citizens, have voted at the elections, have been held accountable to the laws, and have been subject to taxation." Id. at 4.

In 1932, the Commissioner of Indian Affairs received a letter contending that the Sault Ste. Marie Tribe had not been dissolved via the July 31, 1855, treaty because the United

States had entered into a subsequent treaty with the Tribe two days later on August 2. Letter from C.J. Rhoads, Commissioner, to Frank Bohn, House of Representatives (June 22, 1932). In his response to that letter, Commissioner Rhoads found "[i]f therefore, the subsequent treaty of August 2, 1855, was a recognition of the tribal existence of this band, it was only for the purpose of negotiating a surrender of the fishing and encampment rights reserved by the treaty of July 31, 1855." Id.

In 1935, the Commissioner of Indian Affairs was asked whether the Ottawa and Chippewa Tribes of Michigan might participate in the Indian Reorganization Act of 1934 (IRA), *25* U.S.C. §§ 461 *et seq.* (also known as the Wheeler-Howard Act). Letter from Jonas Shawanesse to John Collier, Commissioner of Indian Affairs (June 1, 1935). Commissioner Collier responded, "[u]pon the fulfillment of the treaty of July 31, 1855, Government wardship over the Indians with whom the treaty was made ceased and they became subject to the laws of the State in which they resided." Letter from John Collier, Commissioner, to Jonas Shawanesse (June 27, 1935).

A DOI memorandum on the status of the Nahma and Beaver Island Indians in Michigan, who may have been signatories of the July 31, 1855, treaty stated as follows:

> Article V of the [July 31,] 1855 treaty provides that the tribal organization of the Ottawa and Chippewa Indians 'is hereby dissolved' and that future negotiations in reference to any matters contained in the treaty should be carried on only with those Indians locally interested. This article has been consistently interpreted by the Interior Department, for as far back as the available files go, as providing for the dissolution of all tribal relations, including band relations, and the Interior Department has refused to recognize any of the Ottawa and Chippewa groups as bands. A sample of this attitude, which is repeated in innumerable instances of correspondence with Ottawa and Chippewa Indians, is the letter of February 15, 1917, to Mr. Eugene Hamlin concerning his credentials as a representative of Ottawa and Chippewa Indians near Harbor Springs, Michigan:
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> 'In answer you are advised that the Ottawa and Chippewa tribes of Indians many years ago became citizens of the United States and of the state in which they reside and are now not under the jurisdiction of the government.'
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> The most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups occurred with relation to the Sault Ste. Marie Bands of Chippewas. A thorough in-vestigation of the history of these bands was undertaken in an effort to prove their band status. It was found that a separate treaty was entered into with these bands

> subsequent to the July 31, 1855 treaty; that they were enrolled as separate bands in the money payment rolls of Ottawas and Chippewas from 1857 to 1867; that they retained their formal band organization down to the present time and continuous correspondence had been carried on between their band representatives and the Indian Office. However, in spite of this evidence tending to show their actual band status the Interior Department refused to accord them legal recognition as a band, in view of the dissolution of the Ottawa and Chippewa Tribe under the 1855 treaty and the cessation of the exercise of guardian over these Indians for nearly half a century.
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> If the Sault Ste. Marie Bands were not in a position to be recognized as a band by the Interior Department it is out of the question to establish any existing band status for the Nahma and Beaver Island Indians in view of the paucity of any evidence on the subject and in view of the fact that there is no showing in any treaty that the Nahma Indians were even recognized originally as a band.

Memorandum from Frederic L. Kirgis, Acting Solicitor, to the Commissioner of Indian Affairs (May 1, 1937).

A delegation from the Sault Ste. Marie Tribe again approached DOI seeking federal recognition and placement of land into trust in 1972. The Interior Department reviewed the Tribe's history and found:

> It was the consensus of the conference that the Sault Ste. Marie band of Chippewa Indians, exclusive of those who are members of the Bay Mills Indian Community, merit Federal recognition and that action should be taken to assist them to acquire the 40-acre tract, to secure the acceptance by the United States of trust title to it, and to perfect an organization under the provisions of the Indian Reorganization Act.

Memorandum from Commissioner of Indian Affairs, to Area Director, Minneapolis (Sep. 7, 1972).

In addition to the September 7, 1972, memorandum from the Commissioner of Indian Affairs granting recognition to the Sault Ste. Marie Tribe, DOI took land into trust for the Tribe on March 2, 1974, and declared it to be a reservation on December 13, 1974. 40 Fed. Reg. 8367 (Feb. 20, 1975). On November 13, 1975, DOI approved the Tribal constitution and by-laws adopted by the Tribe. The Tribe appears on the list of federally recognized tribes published annually by DOI. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 70 Fed. Reg. 71194 (Nov. 25, 2005).

Further, the case City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), tangentially examined the issue of whether the Tribe's government-to-government

relationship with the United States ever ceased. The question before the Andrus court was whether the Tribe had been eligible to organize under the Indian Reorganization Act (IRA), *25* U.S.C. §§ 461 *et seq.* of 1934, such that the Secretary could acquire trust land for the Tribe pursuant to that act. The Andrus court did not determine that the Tribe had ever been terminated, although it noted the existence of the 1937 and 1972 memos. The court found that the 1937 memo "indicates that the Chippewas should not be recognized for purposes of the IRA because the Chippewas were dissolved officially by a treaty of July 31, 1855, with the United States." 532 F. Supp. at 161. The United States filed a joint brief with the Tribe in the Andrus case; the brief argued that the Tribe had a continuous governmental existence, albeit not a federally recognized one in the period before the 1972 memo. Defendants' Response to Plaintiff's Motion For Summary Judgment, And Memorandum In Support of Defendants' Motion for Partial Summary Judgment on the Grounds of Res Judicata and Collateral Estoppel 3, 6-10 (Jan. 28, 1980).

The language of the Andrus court ruling is vague, although it does appear to recognize that a period of non-recognition has existed:

> [A]lthough the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934. The 1972 Memorandum constitutes just such subsequent recognition.

532 F. Supp. at 161.

ii. Comparison of the Tribe's Situation with that of Other Opinions and Court Cases on the Restored Tribe Factor of the Restored Lands Exception

It is clear from the treaties that the United States recognized the government of the Sault Ste. Marie Tribe as a political entity in 1855. The 1878 letter from Special Agent Brooks suggests that this occurred when the allotments had been handed out and the tribal members were treated as United States citizens subject to state jurisdiction in 1872. Regardless, it is clear from the record that by 1917 the Department of the Interior did not consider Sault Ste. Marie a tribal entity with which it maintained government to government relations.[3]

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[3] The Tribe's submissions allege that the United States provided benefits to individual Indians in the period from 1878 to 1972. Charles E. Cleland, The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians 7 (June 28, 2006). However, the 1930's letters declining to let the Tribe organize under the IRA and the 1937 DOI memo finding that the Interior Department continually refused to recognize the Tribe despite the latter 1855 treaty demonstrate that there was a significant period when the federal government did not have a government-to-government relationship with the Sault Ste. Marie Tribal government. A previous OGC opinion considered whether the Karuk tribe, whose government voluntarily cut off contact with the federal government for several decades, could be considered a restored tribe. Letter from Penny J. Coleman, NIGC Acting General Counsel, to Bradley G. Bledsoe Downes, Esq., 3 (Oct. 12,

The Sault Ste. Marie Tribe's situation is similar, but distinguishable from that of the Grand Traverse Band of Chippewa Indians. The Grand Traverse Band was terminated by the Secretary of the Interior and was restored administratively pursuant to the Federal Acknowledgment Process (FAP) adopted by DOI in 1979. Grand Traverse II, 198 F. Supp. 2d at 929; 44 Fed. Reg. 7235 (Jan. 1, 1979). The Sault Ste. Marie Tribe was restored to federal recognition pursuant to administrative action by the Department of the Interior via the 1972 memo.[4]

We find that the evidence submitted by the Tribe, as well as the court pleadings and ruling in City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), demonstrate that the United States unilaterally ended relations with the Tribe as a government from the 1870's until 1972.[5]

B. The St. Ignace Parcel Does Not Constitute Restored Lands of the Tribe

The second half of a "restored lands" exception analysis is whether the parcel was taken into trust as a restoration of lands. 25 U.S.C. § 2719(b)(1)(B)(iii); see also, Grand Traverse II, 198 F. Supp. 2d 920 (W.D. Mich. 2002). We look to court decisions as well as NIGC and DOI Indian lands opinions for guidance.

Federal courts, NIGC, and DOI have established several guideposts for a restoration of land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. Id. at 928; Coos, 116 F. Supp. 2d at 161. In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's

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2004) (NIGC Karuk Opinion). Individual Karuk tribal members received federal services during that time due to their status as Indians. Id. at 3. Although the Karuk case differs from the current situation because the government-to-government relationship was never severed by the United States, the opinion does recognize that it is possible for individual Indians to receive benefits based upon that status whether or not the United States has relations with the governing tribal entity.

[4] We note as a matter of irony that the Tribe brought suit against the United States in order to block the taking of land into trust for the Little Traverse Bay Bands' (LTBB) casino project, arguing that the only way to qualify as a restored tribe for purposes of 25 U.S.C. § 2719 was for the tribe to have been terminated by Congressional action. Sault Ste. Marie Tribe Of Lake Superior Chippewa Indians v. United States, 78 F. Supp. 2d 699 (1999), rev'd on other grounds (standing). With the exception of restoration via a Congressional act, the LTBB history is markedly similar to that of the Sault Ste. Marie. The LTBB took part in the 1836 Treaty of Washington and the 1855 Treaty of Detroit as well, were denied the right to organize under the IRA, maintained a continuous tribal government, and its leaders had continuous dealings with the federal government. Id. The LTBB was found to be restored by the court due to its history, and the Sault Ste. Marie Tribe qualifies as well in spite of its lack of Congressional termination.

[5] We note that, under the preliminary regulations proposed, but not yet adopted, by DOI interpreting 25 U.S.C. § 2719, the Sault Ste. Marie Tribe would not qualify as a restored tribe. Draft section 292.7(3) requires that tribal restoration to federal recognition must have been via one of three methods: congressional legislation, administrative action through the Federal Acknowledgment Process of 25 C.F.R. § 83.8, or judicial determination or court approved stipulated entry of judgment entered into by the United States. The Sault Ste. Marie Tribe was administratively restored before the Federal Acknowledgment Process was implemented in 1979. The Tribe thus would not qualify as a restored tribe under the draft regulations.

restoration to federal recognition. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan (Grand Traverse Band I), 46 F. Supp. 2d 689, 699 (W.D. Mich. 1999), aff'd Grand Traverse II; Coos, 116 F. Supp. 2d at 164.

Nonetheless, there are limits to what constitutes restored lands. As the NIGC stated in its opinion, requested by the court in Grand Traverse II, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." Letter from Kevin K. Washburn, National Indian Gaming Commission General Counsel, to Honorable Douglas W. Hillman, Senior United States District Judge, United States District Court (W.D. Michigan), Re: Whether the Turtle Creek Casino site [h]eld in trust [f]or the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the [IGRA's] general prohibition of gaming on lands acquired after October 17, 1988, 15 (Aug. 31, 2001) (NIGC Grand Traverse Opinion); see also Office of the Solicitor's Memorandum Re: Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt 8 (Dec. 5, 2001) (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied.").

The courts in Coos and Grand Traverse I and Grand Traverse II noted that some limitations might be required on the term "restoration" to avoid a result that "any and all property acquired by restored tribes would be eligible for gaming." Coos, 116 F. Supp. 2d at 164; Grand Traverse I, 46 F. Supp.2d at 700; see also Grand Traverse II, 198 F. Supp. 2d at 935 ("Given the plain meaning of the language, the term 'restoration' may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion"). All three courts proposed that land acquired after restoration be limited by "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration." Id.; see also Letter to Bradley Bledsoe Downs, Dorsey and Whitney LLP, from Penny J. Coleman, Acting General Counsel 5 (Oct. 12, 2004) (adopting the court's suggested three-factor analysis).

The Associate Solicitor, Department of the Interior adopted a similar interpretation in his Coos Opinion on remand from the Coos court. "We believe [t]hat to apply [the] dictionary definition to the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming on restored lands." Office of the Solicitor's Coos Opinion at 6.

Upon review of these three factors, as set forth below, we conclude that the St. Ignace parcel would not be considered restoration of lands to a restored tribe under 25 U.S.C. § 2719(b)(1)(B)(iii).

i) Factual Circumstances of the Acquisition

On balance, the factual circumstances of the acquisition do not weigh in the Tribe's favor. Congress added the exceptions in 25 U.S.C. § 2719(b)(1)(B) to ensure that tribes lacking reservations or other trust lands when IGRA was enacted would not be disadvantaged relative to more established tribes. *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 124 S. Ct. 1888 (2004).

The Sault Ste. Marie Tribe was restored to federal recognition in 1972. Since that time, the Tribe has had several parcels proclaimed to be the Tribe's reservation by the Secretary. In 1975, the Secretary proclaimed a 40 acre tract on Sugar Island as a reservation for the Tribe pursuant to the Indian Reorganization Act. 40 Fed. Reg. 8367-68 (Feb. 27, 1975). An additional 84.8 acres of land were proclaimed to be a reservation in 1984. 40 Fed. Reg. 940 (Jan. 6, 1984). Thus, the Tribe has 120.8 acres currently set aside as its reservation.

In addition, the Tribe has many other acres of land acquired in trust by the United States for its benefit. There are currently approximately 1656 acres in trust for the Tribe according to a Bureau of Indian Affairs' Sault Ste. Marie Trust Land Log, all but approximately 564.38 acres of which were taken into trust before acquisition of the St. Ignace parcel in 2000. In total, the Tribe has approximately 1776.65 acres of trust and reservation land according to the Trust Land Log. The St. Ignace trust parcel is not contiguous to any of the Tribe's parcels that have been proclaimed to be reservation land by the Secretary. This record of trust acquisition indicates that the Tribe has had no difficulties acquiring reservation land or placing land into trust. The Tribe had acquired a substantial land base by the time the St. Ignace parcel was taken into trust.

Several of our past restored lands opinions addressed the number of lands already in trust before the potential gaming site. The Cowlitz Indian Tribe had no land base whatsoever when it applied to have its proposed gaming parcel put into trust. Letter from Penny J. Coleman, Acting General Counsel, to John Barrett, Chairman, Cowlitz Indian Tribe, Re: Cowlitz Indian Tribe's Class II Gaming Ordinance 10 (Nov. 23, 2005) (NIGC Cowlitz Opinion). Similarly, the parcel examined for Bear River Band of the Rohnerville Rancheria was that tribe's first trust acquisition, and the parcel examined for the Mechoopda Indian Tribe of the Chico Rancheria was that tribe's second trust acquisition. Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria 10 (Aug. 5, 2003) (NIGC Rohnerville Opinion); Memorandum from NIGC Acting General Counsel to NIGC Chairman 8 (March 14, 2003) (NIGC Mechoopda Opinion). The DOI Coos Opinion noted that the subject site was a public domain allotment to the ancestor of a tribal member. DOI Coos Opinion at 14. On the other hand, the Karuk and Wyandotte opinions noted that many trust acquisitions had already been made for those tribes and that this weakened the restored land claim. NIGC Karuk Opinion at 9 (11 parcels in trust); *In re: Wyandotte Nation*

Amended Gaming Ordinance, NIGC Final Decision and Order at 13 (Sept. 10, 2004) (NIGC Wyandotte Opinion) (3 parcels, totaling 194.3 acres).

The factual circumstances analysis allows the NIGC to assess the land acquisition status of a tribe when the proposed gaming site was taken into trust. We find very informative the finding of the Grand Traverse II court that the site at issue for the Grand Traverse Band "was part of the very earliest attempts to build a reservation". Grand Traverse II, 198 F. Supp. 2d at 937. In the case of the Sault Ste. Marie Tribe, the many trust and reservation parcels acquired previous to the 2000 parcel indicate that the Tribe had already managed to acquire a significant land base. The factual circumstances here of extensive acreage in trust and reservation status for the Tribe do not support a conclusion that the 2000 parcel was part of the IGRA land restoration process.

ii) Location of the Land

The physical location of a trust acquisition is an important factor in determining whether the parcel constitutes restored lands. NIGC Grand Traverse Opinion at 17-18; NIGC Wyandotte Opinion at 10. In this context, we evaluate the Tribe's historical nexus to the land as well as its modern nexus to the land. Id.

a. Historical Connections to the Land

Several indicators of historical nexus have been developed through agency decisions and IGRA caselaw. These include whether the gaming site is within a former reservation of the tribe, whether the land is near to a tribal center or tribal programs, and how significant the land is to the tribe. Based upon a review of these criteria, we find that the Tribe has a historical nexus to the St. Ignace parcel.

First, both the Grand Traverse I and Coos courts held that "[p]lacement within a prior reservation is significant evidence that the land may be considered in some sense restored." See Grand Traverse I, 46 F. Supp. 2d at 702; and Coos, 116 F. Supp. 2d at 164 (quoting Grand Traverse I). The St. Ignace parcel was in an area ceded by the Tribe in the treaty of 1836,[6] when the Tribe ceded the eastern half of the Upper Peninsula and its land in the Lower Peninsula of Michigan. Treaty of June 16, 1836. The City of St.

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[6] The Indian Claims Commission found:

> With respect to claims under the treaties, history shows that while the treaties named the "Chippewa Nation of Indians" or "Chippewa Tribe of Indians" as parties, the treaties were in fact made with, and the payments to be made under them, were understood to be limited to only those of the numerous bands of Chippewas who were in the area where the lands dealt with in the treaties were situated. After the advent of Lewis Cass in 1817 and Henry R. Schoolcraft in 1822, all responsible officials of the United States were careful in the dealings with the Chippewa Indians to summon to council the headmen of all bands known or believed to be in occupancy of the lands in question or otherwise interested in matters to be discussed, and not to summon other Indians.

Bay Mills, 22 Ind. Cl. Comm. at 88-89 (Nov. 19, 1969)

Ignace is located near the northeastern tip of the Upper Peninsula and was within the land ceded in the 1836 treaty.

Second, the NIGC has taken into consideration the proximity of the land in question to the tribal center prior to termination. In our Rohnerville opinion, the parcel at issue was six miles from the Rohnerville tribe's original Rancheria, whose boundaries had been re-established. NIGC Rohnerville Opinion at 2. Additionally, when the Rohnerville tribe was terminated in 1962, the Rancheria was divided and distributed to individual Indians; at the time the Rohnerville Rancheria boundaries were re-established in 1983, there were still six acres in individual Indian ownership. In our Mechoopda opinion, the parcel was located approximately ten miles from the Tribe's original Rancheria, which it occupied immediately prior to termination. NIGC Mechoopda Opinion at 1, 9. In our Grand Traverse Opinion, we noted that the Turtle Creek site was not on the fringes of the Grand Traverse Tribe's territory, but was part of a tightly circumscribed area that formed the core of the tribe's territory. NIGC Grand Traverse Opinion at 17.

In this instance, the parcel is approximately 50 miles from the Tribal center in Sault Ste. Marie, Michigan. The entire Chippewa nation was located in the area around Lakes Huron and Superior when the first white explorers arrived in the seventeenth century. Bay Mills Indian Cmty., Sault Ste. Marie Bands v. United States, 22 Ind. Cl. Comm. 85, 88 (Nov. 19, 1969).[7] The Chippewa bands that make up the Sault Ste. Marie Tribe ceded the eastern Upper Peninsula and the eastern half of the Lower Peninsula in the 1836 treaty, maintaining a reservation at Point-au-Barbe near the city of St. Ignace as well as reservations near the city of Sault Ste. Marie and on the Mackinac and Sugar Islands.

The case United States v. Michigan found that the Tribal bands largely live and fish in their historical fishing areas. 471 F. Supp. at 225. The BIA has taken into trust lands in or near the cities of Sault. Ste. Marie, St. Ignace, Hessel, Manistique, Munising, and Escanaba for the benefit of tribal members living in these eastern Upper Peninsula areas. The cities of Escanaba, Munising, and Manistique are each over 100 miles from that of Sault Ste. Marie, past nearby St. Ignace. Moreover, the Tribe has historical connections to this large land base as determined by Professor Charles Cleland, an expert on the Chippewa Indians. Cleland Aff. ¶¶ 7-9; Charles E. Cleland, Ph.D., *The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians* (June 28, 2006). An important Tribal center was at the falls of St. Mary in what became the city of Sault Ste. Marie, approximately fifty miles from St. Ignace. The various Chippewa bands used to gather at the falls every year for the abundant fishing which constituted an integral part of the members' diet. Charles E. Cleland, *The Place of the Pike (Gnoozhekaaning): A History of the Bay Mills Indian Community* (2001). The Tribe's fishing and encampment rights at the city of Sault Ste. Marie's falls of St. Mary were preserved when the Tribe ceded territory in the 1820 and 1836 treaties, though ceded in the August 2, 1855 treaty. Considering the extent of the Sault Ste. Marie Tribe's historical territory, we find that the St. Ignace parcel is within the core of the Tribe's

[7] The Indian Court of Claims found that the Bay Mills Indian Community was entitled to bring claims in a representative capacity on behalf of the Sault Ste. Marie Band of Chippewa Indians. Id. at 89-90; Bay Mills, 22 Ind. Cl. Comm. at 83 (Nov. 19, 1969).

territory, which centers around the fishing site at the falls of St. Mary. We do not offer an opinion as to that of the Tribe's other trust parcels as they are not being considered here other than as examples of the breadth of the territory inhabited by the Tribe.

Third, we have also looked at the significance of the land to the tribe. In Grand Traverse, we found that restoration was shown by the "Band's substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." NIGC Grand Traverse Opinion at 15. We further stated, "[a]t the time of termination, Band members lived not far from the [parcel at issue]. For most of the Band's recorded history, it has lived and worked in [the general area of the parcel at issue]". Id. at 18. Finally, it was significant to the NIGC Grand Traverse Opinion that the land had "been at the heart of the Band's culture throughout history..." Id. at 19. In concluding that the parcel at issue was restored land, the Associate Solicitor stated that he considered that the tribes in the Coos opinion were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." Id. at 14. In Mechoopda, three buttes that figured prominently in a tribal myth were located one mile from the parcel; an historic trail linking several tribal villages crossed the parcel; and several Mechoopda villages were located in close proximity to the site. NIGC Mechoopda Opinion at 10-11. In Rohnerville, the parcel was located within one mile of two aboriginal villages and two major tribal trails and was within three miles of five aboriginal villages. NIGC Rohnerville Opinion at 11. Also, the site of a mythic flood in tribal lore was within three or four miles from the Rohnerville site. Id. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important to our determination that tribal members resided on the original Rancheria at the time of termination. NIGC Rohnerville Opinion at 10. The NIGC Cowlitz Opinion, while finding that the historical nexus was not the strongest prong of that tribe's restored lands analysis, noted that the Cowlitz Tribe, throughout its history, used the Lewis River Property area for hunting, fishing, frequent trading expeditions, occasional warfare, and if not permanent settlement, then at least seasonal villages and temporary camps. NIGC Cowlitz Opinion at 11.

In this case, the Sault Ste. Marie Tribe cites to the case of United States v. Michigan and has provided an affidavit and report by Dr. Charles E. Cleland, Ph.D. The Michigan court noted the locations of the bands who signed the 1836 treaty, although it was unsure which bands were from the Ottawa Tribe, which from the Chippewa, and which from both. 471 F. Supp. at 223. The bands at St. Ignace on Lake Huron were included in this list. Id. The court went on to note that both the Bay Mills and Sault Ste. Marie Tribes "are modern political successors in interest to the Indians who were party to the Treaty of 1836." Id. at 264. As to the areas ceded by the Chippewa and Ottawa by treaty, the court found "[t]he Indians were living on the shores of the Great Lakes throughout the [1836] treaty area adjacent to the productive fishing grounds . . . . This settlement pattern is shown in the Treaty of 1836 itself in the location of the reservations and of the chiefs listed in the schedule supplemental to Article Tenth."). The court also found that "Indian fishermen still live in the same areas and fish on the same fishing grounds as did their ancestors for centuries past." 471 F. Supp. at 225.

Professor Cleland's affidavit and report shed further light on the extent of the Sault Ste. Marie Tribe's territory.[8] Professor Cleland concluded that the aboriginal Chippewa peoples, to which the Tribe is a successor, have occupied the coast of Lake Huron in the St. Ignace region since time immemorial and met French traders in the area in the 1650's. Cleland Aff. ¶ 7; Charles E. Cleland, *The Place of the Pike*; *Rites of Conquest: The History and Culture of Michigan's Native Americans* (1992). Professor Cleland states that the Sault Ste. Marie Tribe has never left the St. Ignace area, which is an important hunting, fishing, trapping, and gathering area for the Tribe. Id. Professor Cleland also submitted a report, in which he noted that the Sault Ste. Marie who signed the treaty of 1836 were "composed of six bands that occupied the territory from Marquette on the south shore of Lake Superior east to the Sault." Charles E. Cleland, Ph.D., *The Administrative Termination and Restoration of the Sault Ste. Marie Tribe of Chippewa Indians* (June 28, 2006).

The St. Ignace parcel is within the tribe's last treaty reservation and thus would meet the test set forth in the DOI preliminary regulations on the eligibility of land for gaming under the IGRA as proposed section 292.7(2)(ii)(A). The Tribe would additionally qualify for this factor under the alternative method, found at proposed section 292.7(2)(B), of establishing a historical connection because it has significant documented historical connections to the area noted in court findings.

b. Modern Connections to the Land

We also examine the modern nexus of the tribe to the land at issue. Wyandotte Nation v. National Indian Gaming Comm'n, 2006 U.S. Dist. LEXIS 45905 at *61 (D. Kan. July 6, 2006) (The court "agrees with the NIGC that in order to evaluate this issue fully, the agency must evaluate the present circumstances of the Tribe and its relationship with the land at issue.").

The Tribe has modern-era and present connections to the land at issue. Modern connections to the land can be established through a variety of factors, such as a geographical nexus between the parcel and the seat of tribal government, the tribe's population center, tribal member service facilities, tribal businesses, tribal housing developments, or the tribe's service area as defined by federal agencies. NIGC Wyandotte Opinion at 10; NIGC Grand Traverse Opinion at 20-21.

The St. Ignace site is indisputably within several miles of many tribal programs. On the 1983 trust land contiguous to the St. Ignace parcel, there are fifty-nine Housing and Urban Development (HUD) homes for tribal members maintained by the Tribal housing authority; the Tribe's Lambert Center operates an outpatient medical clinic, family and substance abuse services, and a Head Start center; and the Tribe's Kewadin Shores Casino. Payment Aff. ¶ 22. In the town of St. Ignace the Tribe maintains a building housing a tribal youth facility and the tribal court. Id. The St. Ignace parcel itself contains a tribal water and sewage system for the fifty-nine tribal housing units on the

[8] His work is especially persuasive because he is one of the experts on whom the Michigan court relied.

1983 tract. Id. at ¶ 7. Additionally, the Tribe runs a convenience store and a gas station on a parcel contiguous to the 1983 tract. Id. at ¶22. Therefore, the Tribe has established a modern connection to the St. Ignace area and the adjacent 1983 trust parcel in particular.

We note the preliminary regulations being considered by the DOI on the eligibility of after-acquired trust lands for gaming purposes find a modern connection to the land if a majority of tribal members reside within 50 miles of the gaming site. 292.7(2)(i) of the draft regulations. The Sault Ste. Marie Tribe has over 30,000 members spread out over Michigan's Upper Peninsula, with tribal trust lands in or near the cities of Sault. Ste. Marie, St. Ignace, Hessel, Manistique, Munising, and Escanaba and tribal members living in these areas. Letter from Bruce R. Greene, Greene, Meyer, & McElroy, to Andrea Lord, Attorney, NIGC (July 13, 2006). Approximately 13,000 members live in the Upper Peninsula and 9,200 of those live within 50 miles of the city of St. Ignace. Id. The Tribe would not meet this requirement if the regulations are promulgated in their current form.

iii) Temporal Relationship of the Acquisition to Tribal Restoration

The final factor to be considered in the restored lands analysis is whether there is a reasonable temporal connection between the restoration of federal recognition and the trust acquisition of the land at issue. Grand Traverse II, 198 F. Supp. 2d at 936 ("the land may be considered part of a restoration of lands on the basis of timing alone."); NIGC Mechoopda Opinion at 11 ("the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored").

The NIGC recognizes that, subsequent to the restoration of federal recognition, a tribe needs time to organize, hold elections, and approve a constitution or other governing document before focusing on land acquisition. Consistent with court guidance, we assess whether the site was "part of the first systematic effort to restore tribal lands." Grand Traverse II, 198 F. Supp. 2d at 936. There are two issues inherent to this analysis: 1) the time the land was taken into trust after restoration of the Tribe and 2) how many other parcels were taken into trust or turned into a reservation for the Tribe after Tribal restoration, but before the parcel in question.

The longest gap between tribal restoration and the acquisition of land into trust found to be a restoration of lands by the DOI or the NIGC is 14 years. See Office of the Solicitor Coos Opinion. The Sault Ste. Marie Tribe asks us to double this restoration period to a significant gap of 28 years between tribal restoration, if such occurred, and acquisition of trust land, years in which this Tribe was actively building up its extensive land base.

The Tribe makes much of the fact that draft regulations being considered by DOI allow for a 25 year period between Tribal restoration and trust land acquisition on lands eligible for gaming under the IGRA. However, that 25 year period is to accommodate tribes who have had difficulty placing land into trust, a problem which has not plagued the Sault Ste. Marie Tribe, whose Trust Land Log indicates a continual process of trust acquisitions. In the case of the Grand Traverse Band, for example, years passed between tribal restoration and DOI approval of the tribal constitution, and the Secretary of the DOI would not take land into trust on behalf of the Grand Traverse Band until its constitution had been

approved. Grand Traverse II, F. Supp. 2d at 936. The situation with the Sault Ste. Marie Tribe, however, is not one of a tribe making its first trust acquisition or set of trust acquisitions. The Tribe had its first reservation parcel by 1975, and three reservation parcels by 1984 as well as an additional 184.21 acres in trust. These parcels were taken into trust 3 years and 9 years after Tribal restoration. By the time the St. Ignace parcel was placed into trust in 2000, the Tribe had acquired 50 parcels totaling nearly another 1000 acres into trust. These trust parcels have given it significant acreage devoted to member housing, community services, and economic development that might better be determined part of the Tribe's first systematic effort to restore its land base. The reservation land and at least some of the other acreage acquired into trust by the Tribe in the years between 1972 and 1984 are more likely to be the Sault Ste. Marie Tribe's first systematic attempts to acquire a land base.

Further, the IGRA was passed in 1988. Since that time newly restored tribes have been very conscious of how the IGRA's limitations on after-acquired land will impact their first acquisitions of trust or reservation land. See NIGC Cowlitz Opinion (petition for land to be taken into trust filed on the very day the Cowlitz tribe was restored to federal recognition). The Sault Ste. Marie Tribe certainly knew the importance of timing in selecting trust land for IGRA gaming after passage of the Act. Despite this, the Tribe waited 28 years between restoration of the Sault Ste. Marie Tribe in 1972, and placement of the St. Ignace parcel into trust in 2000.

The Tribe asks us to leap from a 14 year gap to a 28 year one in extending the reasonable temporal period eligible for the restoration of lands for a restored tribe. We decline to do so because a 28 year period has elapsed in which the Tribe has had over a thousand acres placed into trust for it after restoration. At some point, we must establish a limit on the time available to acquire land as part of a Tribe's restoration. Certainly, under the circumstances described here, 28 years is simply too long an interval between restoration and the trust acquisition. The Tribe simply cannot claim under these circumstances that, 28 years later, it was still acquiring its initial land base.

IV. Conclusion

The St. Ignace parcel does not meet the restored lands of a restored tribe exception, laid out in 25 U.S.C. § 2719(b)(1)(B)(iii) to the IGRA's general prohibition of gaming on lands acquired into trust after October 17, 1988. The Sault Ste. Marie Tribe cannot meet the restoration of lands component because two prongs of the analysis, the factual circumstances and temporal connection of restoration with the acquisition of the parcel into trust, have not been met. Therefore, the St. Ignace parcel constitutes Indian lands not eligible for gaming. The Tribe may not game on this land.

The Department of the Interior, Office of the Solicitor, concurs in this opinion.