United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

September 19, 1997

Memorandum

To: Secretary

From: Solicitor

Subject: Pokagon Band of Potawatomi Indians

This Opinion addresses whether lands taken in trust for the Pokagon Band of Potawatomi Indians pursuant to its Restoration Act should be considered "restored" lands within the meaning of Section 20 of the Indian Gaming Regulatory Act (IGRA)(25 U.S.C. § 2719). If so, these lands would be exempt from the limitations on Indian gaming on post-1988 trust land acquisitions found in Section 20.

For the reasons set forth below, we conclude that these lands qualify as "restored" lands within Section 20. This means that the Band will be able to engage in Class II gaming on such lands. The Band will not, however, be allowed to engage in Class III (so-called "casino style") gaming on such lands unless and until the Band complies with the provisions of IGRA regarding compacting with the State to set the scope of gaming and other terms under which such gaming would occur.[1]

Background

The Senate Report on the Pokagon Restoration Act provides a useful summary of the history of the Band:

> The Pokagon Band of Potawatomi Indians are located in the St. Joseph River valley of southwestern Michigan and northern Indiana. This area has been their home since at least the time of first European contact in 1634. A majority of the Pokagon Band members continue to reside in the St. Joseph River valley. The Pokagon Band of Potawatomi Indians are the descendants of, and political successors to, at least eleven treaties negotiated between representatives of the United States and Indian tribal governments.

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[1] We understand the Band has negotiated a compact with the Governor of Michigan that limits Class III gaming to a single site, but the compact has not yet been approved by the Michigan Legislature.

S. Rep. No. 103-266, 103d Cong. 2d Sess. at 1 (1994). "The tribal government has had a continuous line of leaders, variously denominated chiefs, business committee chairmen and tribal chairmen from treaty times to the present." Id. at 3.

Enacted in 1994, the Restoration Act contained a congressional finding that the Band negotiated the right to remain in its aboriginal territory at a time when other Potawatomi Bands were forced to move elsewhere. 25 U.S.C. § 1300j(2). It also recited that several other Potawatomi Bands whose ancestors also were signatories to the Treaties have been recognized by the Secretary of the Interior as Indian tribes. Id. § 1300j(4). The Act went on to provide federal recognition to the Band as an Indian tribe. 25 U.S.C. § 1300j, et seq.

The Restoration Act also mandates that the Secretary of the Interior acquire land in trust for the Band: "The Secretary shall acquire real property for the Band. Any such real property shall be taken by the Secretary in the name of the United States in trust for the benefit of the Band and shall become part of the Band's reservation." 25 U.S.C. § 1300j-5. There is no limitation or direction in the Act as to where such lands should be located,[2] or how much land should be acquired.

Section 20 of the Indian Gaming Regulatory Act

Section 20 of IGRA generally provides that Indian gaming regulated by the Act is prohibited on off-reservation lands acquired in trust after October 17, 1988 unless certain conditions are met. Gaming is permitted on such lands only if the Secretary determines that (1) "a gaming establishment would be in the best interest of the Indian tribe and its members;" and (2) such gaming "would not be detrimental to the surrounding community." Even then, gaming is not permitted unless "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." Id., § 2719(b)(1)(A).

These limitations are, however, not applicable when:

> (B) lands are taken in trust as part of --
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> (i) a settlement of a land claim,
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> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process, or

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[2] The Act defines a 10 county area in Michigan and Indiana as the Band's "service area." Id. § 1300j-6. That area is defined as a "reservation" for purposes of the Indian Child Welfare Act, but is not referenced in the land acquisition section as establishing a limit on the location of new trust lands. The Secretary could, however, take the service area's existence into account in exercising his discretion whether to take a particular parcel in trust.

(iii) the restoration of lands for an Indian tribe that is restored to federal recognition.

25 U.S.C. § 2719(b)(1) (emphasis added).[3]

No legislative history explains the "restored" lands provision of Section 20. The other exemptions to section 20, however, indicate a congressional intent to "grandfather" certain lands acquired after IGRA by treating them similarly to lands held by tribes already recognized at the time IGRA was adopted. For example, the provision excepting land acquired through settlement of a land claim treats the land as though it were held in trust for Indians in 1988. Similarly, the provision excepting tribes recognized through the federal acknowledgment process from the bar on gaming treats the initial reservation as though it existed in 1988. 25 U.S.C. § 2719(b)(1)(B)(ii). In these cases, tribes are provided the opportunity to engage in some gaming free from section 20's limitations, including its requirement of concurrence by the Governor of the affected State. The same is true with respect to tribes restored to recognized status that also have lands returned to their possession. Id. § 2719(b)(1)(B)(iii).

The Pokagon Band qualifies for the latter exception if it is a "restored" tribe within the meaning of IGRA and if the land taken into trust under the Restoration Act is appropriately characterized as "restored" land.

Restoration and the Pokagon Band

IGRA does not define what tribes or lands qualify as "restored" under IGRA's Section 20. The dictionary definition is: "1) to give back (as something lost or taken away): make restitution of: return; 2) to put or bring back (as into existence or use)." Webster's Third New International Dictionary.

In a number of restoration statutes, Congress has treated as "restored" an Indian tribe whose federal recognition has been legislatively terminated and later legislatively restored. For example, an early restoration statute, the Menominee Restoration Act of 1973, 25 U.S.C. §§ 903-903f, repealed the statute that had terminated the tribe, and went on to provide that "[f]ederal recognition is hereby extended to the Menominee Indian Tribe of Wisconsin." Id. § 903a. The Act further "reinstated all rights and privileges of the tribe or its members under federal treaty, statute or otherwise which may have been diminished or lost pursuant to that [termination] Act." Id. § 903a(b). Here Congress was mixing the terms "recognition," "restoration" and "reinstatement," but the undeniable effect, as the title to the Act reflected,

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[3] Section 20 also does not preclude Indian gaming on off-reservation trust land that is contiguous to a tribe's reservation as it existed in 1988. 25 U.S.C. § 2719(a)(1). Other exceptions provide for gaming on post-1988 trust land within former reservations in Oklahoma, id. § 2719(a)(2)(i), or a tribe's "last recognized reservation" in other states. Id. § 2719(a)(2)(B).

was restoration. See generally F. Cohen, Handbook of Federal Indian Law at 811-818 (1982 ed.) (summary of termination era and listing of terminated tribes).

In the Pokagon Restoration Act, Congress found that the Pokagon Band previously was recognized and is a political successor to signatories of at least eleven treaties with the United States. 25 U.S.C. § 1300j(1). The Senate Report described the federal government's prior recognition of the Pokagon Band this way:

> In 1888, the Secretary of the Interior approved a contract between the Pokagon Band and its attorney. Moreover, the Secretary specifically confirmed that the band was "residing in tribal relations" (Office of Indian Affairs, Letter Received, National Archives, 1182-1888). The Committee notes that the term "tribal relations" is a term of art used to designate groups that the United States formally acknowledges as an Indian tribe. Hence, the Secretary of the Interior's approval of the attorney contract is significant because such approval was necessarily predicated upon existence of a political relationship between the United States and the Pokagon Band.

S. Rep. No. 103-266, 103d Cong., 2d Sess. at 3. Congress went on in the Act to find that the Band had been administratively terminated. 25 U.S.C. § 1300j(6). The Senate Report described this termination as wrongful:

> The Committee concludes that the Band was not terminated through an act of Congress, but rather the Pokagon Band was unfairly terminated as a result of both faulty and inconsistent administrative decisions contrary to the intent of the Congress, federal Indian law and the trust responsibility of the United States. * * * Documentation submitted to and testimony presented before the Committee has confirmed that the Pokagon Band has continuously been recognized as a viable tribal political entity. The Band's claim of rights and status as a treaty-based tribe, and the need to restore and clarify that status, has been clearly demonstrated.

S. Rep. No. 103-266, at 6 (emphasis added).

Based on these findings and testimony of the Interior Department, the Act provided: "Federal recognition of the Pokagon Band of Potawatomi Indians is hereby affirmed." Id. § 1300j-1. Thus, the Restoration Act revested the Band in its former status as a tribe with a government-to-government relationship with the United States.

As noted in the previous paragraph, Congress used the term "affirmed" rather than "restored" in one section of the Restoration Act. The use of this verb has led some to suggest that the Restoration Act did not, in fact, "restore" federal recognition or lands to the Band within the meaning of IGRA. Indiana Governor O'Bannon makes this point in his letter of June 20, 1997, to the Secretary.[4]

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[4] Governor O'Bannon's letter also asserts that the Pokagon Band argued that it was not being "restored" when Congress was considering passage of the Act. We find no

Consideration of the Act as a whole, in light of past congressional actions in related contexts, compels the rejection of this suggestion. Most obviously, Congress titled this statute the Pokagon Restoration Act. Moreover, in other cases Congress has used the term "restored" and "reaffirmed" interchangeably. For example, in a companion statute dealing with the Little Traverse Bay Bands of Odawa Indians, Congress "reaffirmed" federal recognition of those bands. 25 U.S.C. § 1300k-2 (passed the same day as the Pokagon Restoration Act). In the floor debate on passage of the Little Traverse Bay Band Act, Congressman Kildee, author of the Act, used the term "reaffirm" synonymously with "restore." Rep. Kildee stated:

> Mr. Chairman, I use the words "reaffirm" and "restore" rather than "recognize" because historical documentation proves that these tribes have in fact, had formal government-to-government relations with the United States from the time Americans first entered the Great Lakes region to the present. It is simply the legal status of that relationship that we seek to clarify through this legislation.

140 Cong. Rec. H6715 (daily ed. Aug. 3, 1994).

Other restoration statutes use a variety of synonymous and descriptive words, rather than a single formulation or term of art, to reestablish a federal-tribal relationship. In 1978, Congress sought to clarify the status of the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma. Federal supervision of the tribes had been terminated in 1956 pursuant to the termination policy in H.R. Con. Res. 108. 25 U.S.C. § 861. Congress provided that: "Federal recognition is hereby extended or confirmed with respect to the Wyandotte Indian Tribe of Oklahoma, the Ottawa Indian Tribe of Oklahoma, and the Peoria Indian Tribe of Oklahoma," 25 U.S.C. § 861(a), and provided further that: "[t]he Modoc Indian Tribe of Oklahoma is hereby recognized as a tribe of Indians residing in Oklahoma," 25 U.S.C. § 861a(a)(1).

In 1979 and 1980, when Congress was considering the status of certain Paiute Indian Bands of Utah, which had been terminated in 1954 pursuant to H.R. Con. Res. 108, the Department commented on the fact that the bill was framed in terms of recognition but that it was more appropriate, at least as to four of the bands, to consider the legislation "restoration legislation," because what had been terminated was the trust relationship, not the tribal status. H.R. Rep. No. 96-712, 96th Cong., 1st Sess. 7-10 (1979). Ultimately, Congress provided: "The Federal trust relationship is restored to the Shivwits, Kanosh, Koosharem, and Indian Peaks Bands of Paiute Indians of Utah and restored or confirmed with respect to the Cedar City Band of Paiute Indians of Utah." 25 U.S.C. § 762(a).

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support for that position in either the House or Senate Committee Reports. The Senate Report states: "The Pokagon Band have submitted extensive documentation to the Committee which demonstrates how inequitable historical treatment by the federal government and wide fluctuations in federal Indian policy account for their present day unacknowledged status." S. Rep. No.103-266, supra, at 4 (emphasis added).

In more recent statutes, Congress has continued to use the terms "recognition" and "restoration" interchangeably. When it legislated in 1987 on the status of the Alabama and Coushatta Tribes of Texas (which had also been terminated in 1954 pursuant to H.R. Con. Res. 108, just a few days before the Paiute Bands), Congress provided: "The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored." 25 U.S.C. § 733(a). Thus, in this statute Congress "restored" rather than "extended" recognition, and "restored" the trust relationship.

Three years later, when it reinstated the relationship with the Ponca Tribe which had been terminated under the same policy, it provided: "Federal recognition is hereby extended to the Ponca Tribe of Nebraska." 25 U.S.C. § 983a. The same Act went on to provide: "All rights and privileges of the Tribe which may have been abrogated or diminished before October 31, 1990, by reason of any provision of Public Law 87-629 [25 U.S.C. § 971 et seq.] are hereby restored and such law shall no longer apply with respect to the Tribe or the members." 25 U.S.C. § 983b(a).

Similarly, when Congress in 1994 acted to reestablish the federal-tribal relationship with the Auburn Rancheria (terminated pursuant to the California Rancheria Act of 1958, as amended), it provided: "Federal recognition is hereby extended to the tribe." 25 U.S.C. § 13001(a).

Other recent legislation has dealt with tribes that were not terminated pursuant to H.R. Con. Res. 108, but whose status was uncertain for other reasons. In these Acts, Congress has spoken in terms of "reaffirming" Federal recognition. See Lac Vieux Desert Band, 25 U.S.C. § 1300h-2(a)[5]; Little Traverse Bay Bands and Little River Band, 25 U.S.C. § 1300k-2(a). Other examples of relatively recent status clarification legislation include: Ysleta Del Sur Pueblo: Restoration of Federal Supervision, Pub. L. No. 100-89, Aug. 18, 1987, 101 Stat. 666, 25 U.S.C. § 1300g-1300g-7 ("[t]he Federal trust relationship between the United States and the tribe is hereby restored"); Status of Pascua Yaqui Indian People, Pub. L. No. 103-357, Oct. 14, 1994, 108 Stat. 3418, 25 U.S.C. §§ 1300f-1300f-3 ("[t]he Pascua Yaqui Tribe, a historic Indian tribe, is acknowledged as a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such tribal status"); Texas Band of Kickapoo Act, Pub. L. No. 97-429, Jan. 8, 1983, 96 Stat. 2269, 25 U.S.C. §§ 1300b-11 through 1300b-16 ("Congress therefore declares that the Band should be recognized by the United States . . . that services which the United States provides to Indians because of their status as Indians should be provided to members of the band").

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[5] Regarding the Lac Vieux Desert Band, federal recognition had never been terminated; that is, the United States had recognized the Band as part of the Keweenaw Bay Indian Community, though not as a separate and distinct tribe. When Congress decided to deal with the Band as a separate tribal entity, it provided: "[t]he Federal recognition of the Band and the trust relationship between the United States and the Band is hereby reaffirmed . . . The Band is hereby recognized as an independent tribal entity, separate from the Keweenaw Bay Indian Community or any other tribe." 25 U.S.C. § 1300h-2(a).

The common thread among all these statutes is that, before their enactment, the tribe was not included on the list of Federally Recognized Tribes published annually in the Federal Register. Inclusion on the list is a prerequisite to acknowledgment that a tribe has "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 61 Fed. Reg. 58,211 (Nov. 13, 1996); see 25 U.S.C. § 479a-1 (requiring annual publication of list of recognized tribes). Returning a tribe to its former status as a recognized tribe ought to be considered a "restoration" of the tribe, and such tribes ought to be considered "restored" regardless of the exact terms used. The Pokagon Restoration Act returned the Band to its previous status as a federally recognized tribe. We think this is sufficient to bring the tribe within the "restored tribe" provision of IGRA's section 20.

It is also significant that in some other post-IGRA restoration legislation, Congress has expressly addressed and excluded the possibility of gaming. See, e.g., Pub. L. 103-116, § 10 (1993), 107 Stat. 1126 (Catawba Tribe restored but provisions of IGRA made inapplicable). Even if the Pokagon Restoration Act were considered ambiguous, it would bring into play the canon of construction that ambiguities in statutes dealing with Indians ought to be construed in a manner that benefits them. See Bryan v. Itasca County, 426 U.S. 373 (1976).[6] Here, however, I find the statute clear on its face.

The final question is whether the land proposed for trust acquisition is "restored" land. In the Restoration Act, Congress found that the Band is the political successor to the signatories of numerous treaties that ceded vast amounts of territory. These cessions included ten counties in two states described as the Band's "service area." 25 U.S.C. § 1300j(1). See "Trust Land Application" at Map 3 (depicting tribal land cessions) (on file with the Department). In addition, Congress mandated that the Secretary acquire land in trust for the Band. 25 U.S.C. § 1300j-5. Since the lands proposed for acquisition lie within this ten county area and are thus part of the territory the Bands' predecessors ceded to the U.S. in

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[6] Section 5(b) of the Technical Corrections Act of 1994 (Pub. Law 103-263; 108 Stat. 707) also counsels against straining to find distinctions among tribes where legislation does not clearly create such distributions. The Act added the following new subsection to Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476 (emphasis added):

> (f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS.-Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

earlier treaties, these proposed acquisitions made pursuant to the Restoration Act are properly characterized as "restored" lands.

Conclusion

For the foregoing reasons, I believe that the Pokagon Band is a "restored" Tribe and that the lands proposed to be taken into trust by the Secretary of the Interior pursuant to the Pokagon Restoration Act are "restored" lands within the meaning of Section 2719(b)(1)(B)(iii) of IGRA. Therefore, the Pokagon Band is authorized to conduct Class II gaming on such lands, but may not engage is Class III gaming absent compliance with the compacting provisions of IGRA.