October 7, 2008

Via U.S. Mail

Daniel Beltran
Chairman
Lower Lake Rancheria Koi Nation
P.O. Box 3162
Santa Rosa, CA 95402

Re: In re: The June 13, 2008 disapproval of a gaming ordinance for the Lower Lake Rancheria Koi Nation

Dear Chairman Beltran:

I enclose a copy of the National Indian Gaming Commission's decision regarding your appeal of my June 13, 2008 disapproval of the Nation's gaming ordinance. I apologize for the time it took us to make this decision. We did wish to accommodate the Nation's request for an expedited determination but found we were unable to do so. Many events overtook us, and the Commission's desire to thoroughly understand all of the issues presented resulted in our taking more time to make this decision than we would have wished.

If you have any questions, please contact Associate General Counsel, General Law, Michael Gross at (202) 632-7003. Thank you, and I look forward to working with you in the future.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

cc: Michael Anderson, Esq.
Michael Gross, Esq.

In re:	)	
	)	
The June 13, 2008 disapproval	)	**Final decision and order**
of a gaming ordinance	)	
for the Lower Lake Rancheria	)	**October 7, 2008**
Koi Nation	)	
	)	
	)	

On appeal to the National Indian Gaming Commission (NIGC or Commission) from a disapproval of a gaming ordinance for the Lower Lake Rancheria Koi Nation (Nation) under 25 U.S.C. § 2710(b).

Appearances

Michael J. Anderson, Esq., for the Lower Lake Rancheria Koi Nation.
Loretta Tuell, Esq., for the Lower Lake Rancheria Koi Nation.
Matthew Kelly, Esq., for the Lower Lake Rancheria Koi Nation.
John Hay, Esq., for the National Indian Gaming Commission's Chairman.

DECISION AND ORDER

After full review of the agency record and pleadings filed, the Commission finds and orders that:

1. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(b), requires the NIGC Chairman to review and approve (or disapprove) tribal gaming ordinances.

2. On March 17, 2008, the Nation submitted a gaming ordinance for the Chairman's review and approval.

3. The ordinance sought a determination from the Chairman that the Nation was a *restored tribe* within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

4. On June 18, 2008, the Chairman disapproved the ordinance. He deferred to a December 29, 2000 determination of the Assistant Secretary for Indian Affairs, which reaffirmed the government-to-government relationship between the Nation and the United States and found that the Nation had never been terminated.

5. The Chairman did so properly. Determinations about the government-to-government relationships between the United States and Indian tribes per se and without more are properly made by the Secretary of the Interior and the Bureau of Indian Affairs.

6. To the extent that the ordinance sought a *restored lands* determination within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), the matter was not ripe. The Nation is landless, and neither the ordinance nor any of the Nation's submissions identify any land that the Nation might be seeking to place into trust status.

7. The Chairman's June 18, 2008, disapproval is affirmed.

PROCEDURAL HISTORY AND FACTS

Historically, the Lower Lake Rancheria Koi Nation (Nation), *Koi* meaning people of the water, lived on islands in the Clear Lake in what is now Lake County, California, and migrated seasonally to the California coast. *See Administrative Record*,[1] Ex. 27, In the Matter of the Appeal of Lower Lake Rancheria Koi Nation (Nation), Hearing Transcript at 8 (August 1, 2008). The "Purvis Tract" is located on the Northwest corner of the Clear Lake. For thousands of years, the Nation lived near the Purvis Tract. *See Administrative Record*, Ex. 9, Letter to Ada Deer, Assistant Secretary – Indian Affairs, from Polly Girvin, Council on California Indian Policy (Jun. 21, 1995). In that time, the Nation continued to assert its unique identity and maintain control of its area. *See Administrative Record*, Ex. 9.

In 1916, using funds from the Act of August 1, 1914 (38 Stat. 582), Congress purchased the Purvis Tract for the Nation. *Id.* As purchased, the Purvis Tract contained

[1] "Administrative Record" refers to the record of documents considered by the NIGC Chairman and supporting his June 13, 2008 decision disapproving the gaming ordinance under 25 U.S.C. § 2710(b). "Supplemental Record" refers to the record of documents submitted to the full Commission on appeal.

approximately 141 acres and was placed in trust for the Nation. *Id.* This site later became known as the Lower Lake Rancheria.

In 1956, Congress sold all but 40 acres of the Rancheria to Lake County to build an airport. *See Administrative Record*, Ex. 23, Tab 3, Pub. L. 84-443, 70 Stat. 58 (1956). Congress gave the remaining 40 acres in fee simple to Harry Johnson, a tribal member who had continuously used the land. *See Administrative Record*, Ex. 23, Tab 3. Proceeds of the sale went to the United States Treasury to be disbursed into a special account for California Indians. *See Administrative Record*, Ex. 9.

For decades after, the Nation was displaced. *See Administrative Record*, Ex. 27, Hearing Transcript at 9. Tribal members survived as agricultural workers on local farms. *Id.* Tribal leaders continued to contact the Federal government for assistance only to be turned away.

On October 21, 1980, the Bureau of Indian Affairs (BIA) Office of Indian Services contacted the Bureau's Sacramento Area Director regarding the Nation's plight. *See Administrative Record*, Ex. 6. The Office of Indian Services wanted to place the Lower Lake Rancheria Koi Nation on the list of federally recognized tribes. *Id.* The Nation had been left off the previous lists, so the Office of Indian Services requested approval to place them on the next one. *Id.* Additionally, the Office of Indian Services requested that the approval "include [the] date restored." *Id.* But ten days later, the Sacramento Area Director objected. *See Administrative Record*, Ex. 6, Letter from the Sacramento Area Director, to Commissioner of Indian Affairs (October 31, 1980). In his letter, the Director stated that placing the Nation on the federally recognized list would

harm the BIA's current position in several lawsuits. *See Administrative Record*, Ex. 6. The letter stated:

> Attached is a status report for the eleven Rancherias. All of the Rancherias, except Lower Lake, are presently involved in litigation, and it is the position of this office and the Justice Department that inclusion of the eleven would be a detriment to the legal positions being taken by the United States in the suits.

Id. The Director included a memorandum on the BIA's position in the lawsuits and applied the same reasoning to the Nation. *Id.* Specifically, the status report indicated for the Lower Lake Nation that "no tribal entity existed prior to termination." *Id.*

With this statement from the Director, the issue of the Nation's status remained in limbo. The failure to include the Nation on the list of federally recognized tribes had lasting implications. Government officials and outside parties assumed that the Nation was terminated. *See Administrative Record*, Ex. 23, Tab 11, Letter from Roger Walke, American Indian Policy Analyst for the Congressional Research Service, Library of Congress to Stephen Quesenberry, Director of Litigation for California Indian Legal Services (July 27, 1992).

For example, the Council on California Indian Policy, an Advisory Council formed by an Act of Congress, was created to define which California tribes were terminated, recognized, or in a nebulous status that required further action. *See Administrative Record*, Ex. 27, Hearing Transcript at 31-32. In 1995, the Council argued for the Nation's inclusion in the Federal Acknowledgement Process (FAP) to Assistant Secretary Ada Deer. *See Administrative Record*, Ex. 9. Given the Nation's absence from the United States' list of federally recognized tribes, the Council argued to Assistant Secretary Deer that immediate action must be taken to rectify the Nation's situation. *Id.*

What is more, some government officials viewed the Nation as terminated and refused to provide services normally granted to federally recognized tribes. On November 20, 1995, the BIA denied the Nation a $20,000.00 Tribal Government Planning Grant. *See Administrative Record*, Ex. 2, Letter to Dino Beltran from Harold Brafford, Bureau of Indian Affairs (Nov. 20, 1995). The refusal letter explained that the Nation was not on the list of federally recognized tribes and tribal leaders should instead consider the FAP process. *See Administrative Record*, Ex. 2.

About one month later, the Department of Housing and Urban Development (HUD) denied the Nation services normally received by federally recognized tribes. *See Administrative Record*, Ex. 4, Letter to Dino Beltran, from Robert Barth, Housing and Urban Development (Dec. 18, 1995). HUD claimed it must refuse the Nation those services because the Nation was "not recognized as an Indian tribe." *See Administrative Record*, Ex. 4.

The Nation did receive one HUD grant in the next year. On January 29, 1996, HUD approved a financial assistance award for social and economic development. *See Administrative Record*, Ex. 23, Tab 17. This grant, however, was approved with the specific intention that the Nation could begin the process of seeking its federal recognition. *See Administrative Record*, Ex. 27, Hearing Transcript at 11. In other words, HUD still considered the Nation unrecognized.

In September 2000, the matter of the Nation's status came again before the BIA. The BIA Superintendent of the Central California Agency wrote to the Regional Director about the Nation. *See Administrative Record*, Ex. 9, Memorandum from BIA Superintendent of the Central California Agency, to the Regional Director (Sept. 14,

2000). The Superintendent questioned the terminated status of the Nation, noting that Congress had treated it differently than other California tribes. He insisted that the BIA had wrongly concluded that the Nation was "terminated." *Id.* To correct the error, the Superintendent recommended administrative reaffirmation. *Id.*

Specifically, he noted that Congress had not terminated the Nation's status the way it had other tribes in California. The Superintendent laid out the history of the Purvis Tract and its sale by Congress to Lake County for an airport. *See Administrative Record*, Ex. 9. In his letter, he carefully detailed the history of Congress's Lower Lake Rancheria Act. *Id.* The Lower Lake Act, he noted, had terminated only the Nation's land rights. *Id.* Unlike tribes under the Tillie Hardwick Act, the Nation's members did not suffer termination of their federal status upon their receipt of any proceeds from the sale of their land. *Id.* He concluded that the Act was meant to terminate individual land rights and not tribal status rights, and the BIA was wrong to treat the Nation as similarly situated to tribes terminated under the Tillie Hardwick Act. *Id.* The Superintendent recommended reaffirmation of the Nation's status to remove confusion about its status. *Id.*

The Nation received that reaffirmation in the December 29, 2000 letter of then-Assistant Secretary for Indian Affairs Kevin Gover. *See Administrative Record*, Ex. 23, Tab 19, Letter to Daniel Beltran, from Assistant Secretary – Indian Affairs Kevin Gover (Dec. 29, 2000). In a memorandum issued that same day, Mr. Gover referred to the Lower Lake Nation's plight as "an egregious oversight." *See Administrative Record*, Ex. 13, Memorandum to Regional Directors, from Assistant Secretary – Indian Affairs Kevin Gover (Dec. 29, 2000). Additionally, the memorandum stated that: "Records of the BIA demonstrate that the Lower Lake Rancheria is presently considered terminated." *Id.* The

memorandum concluded that this was in error, and the Lower Lake Rancheria Act only terminated the status of land and not individuals. *Id.* Likewise, in his letter to the Nation, Mr. Gover called the previous Federal response to Lower Lake an "unfortunate omission." *See Administrative Record*, Ex. 23, Tab 19. To correct the error, he reaffirmed the Nation's status. *Id.* But the Nation's battle did not end with this decision.

Eight years later, the Nation finds itself before this Commission with the goal of achieving economic self-sufficiency. *See Administrative Record*, Ex. 27, Hearing Transcript at 12. On February 25, 2008, the Nation's attorney, Michael Anderson, requested an Indian lands decision from the National Indian Gaming Commission (NIGC). *See Administrative Record*, Ex. 20, Letter to Penny Coleman, from Michael J. Anderson (Feb. 25, 2008).

On March 17, 2008, the Nation submitted a gaming ordinance. *See Administrative Record*, Ex. 17, Lower Lake Rancheria Koi Nation Gaming Ordinance of 2008 (Gaming Ordinance). This ordinance contained the following definition of "Indian tribe":

> "the Lower Lake Rancheria Koi Nation, a sovereign tribal entity:
>
> (1) listed on the Bureau of Indian Affairs' list of tribes recognized and eligible to receive services from the United States pursuant to the Federally Recognized Indian Nation List Act of 1994 (Pub. L. 103-454, 25 U.S.C. § 479a-1) and entitled to all privileges and immunities available to all federally recognized tribes;
>
> (2) whose government-to-government relationship with the United States, terminated through administrative acts of the Bureau of Indian Affairs, was reaffirmed by letter of Assistant Secretary-Indian Affairs Kevin Gover on December 29, 2000; and
>
> (3) whose history of recognition, non-recognition, and reaffirmation qualifies the Nation as "restored" under section 2719(b)(1)(B)(iii) of the Indian Gaming Regulatory Act ("IGRA")."

See Administrative Record, Ex. 17, Gaming Ordinance § 102(l). By this submission, the Nation sought a determination of its status as a "restored tribe." *See Administrative Record*, Ex. 13, Letter to John Hay, from Michael Anderson, Re: Restored Nation Request of the Lower Lake Rancheria Koi Nation (April 4, 2008).

In essence, the Nation argued that it is a restored tribe within the meaning of IGRA, contrary to Mr. Gover's assertion in his December 2000 letter that the United States continually recognized the Nation. *See Administrative Record*, Ex. 23, Tab 19. The Nation argued that DOI had misinterpreted the Lower Lake Act Rancheria Act of 1956 (70 Stat. 56, *amended* 70 Stat. 595); that it was, in fact, terminated; and that the Nation's absence from the list of Federally recognized tribes, and later inclusion on the list, constituted restoration. *See* Federally Recognized Nations List Act of 1994 (List Act) (25 U.S.C. §§479a, 479a-1).

Specifically, the Nation contended that Mr. Gover's letter restored the Nation's recognition. *See Administrative Record*, Ex. 16, Letter to John Hay, Staff Attorney from Michael J. Anderson, Anderson Tuell, Re: "Restored" Status of Lower Lake Rancheria Koi Nation (March 20, 2008). The Nation argued that Mr. Gover's reaffirmation was the same as "restoration" and that this conclusion would be generally consistent with case law. *Id.*

On June 13, 2008, the NIGC Chairman disapproved the gaming ordinance on the ground that the Nation was not restored within the meaning of IGRA because it was never terminated. *See Administrative Record*, Ex. 1, Letter to Daniel Beltran, Chairman of the Lower Lake Rancheria Koi Nation from Philip Hogen, NIGC Chairman (June 13, 2008). The Chairman deferred to Assistant Secretary Gover's determination about the

relationship between the Nation and the United States. *Id.* Specifically, he adopted Mr. Gover's finding that the Nation was not terminated the way that other California tribes were terminated under the Tillie Hardwick Act. *Id.* The Lower Lake Act only terminated the Nation's land rights and did not affect their tribal status rights. *Id.* This appeal followed.

DISCUSSION

This case arouses the Commission's sympathy. The Nation has obviously been poorly served by the Federal government. This is also an unusual case.

Before the Commission is an appeal from the Chairman's June 13, 2008 disapproval of a gaming ordinance submitted by the Nation. Since its inception, the Commission's Chairman has approved hundreds of ordinances and amendments. But the ordinance was not a typical ordinance authorizing gaming on the Nation's lands that tracked the requirements and language of IGRA.

The ordinance was not a "site-specific" ordinance, one that identifies a specific parcel of land in its definition of *Indian lands*. The submission of a site-specific ordinance requires the Chairman to make an Indian lands determination as part of his review. That determination allows the Chairman to see whether all of the lands where an ordinance authorizes gaming are in fact eligible for gaming under IGRA. If an ordinance authorizes gaming on a parcel that is not Indian land within the meaning of IGRA, or if it authorizes gaming on Indian lands ineligible for gaming under 25 U.S.C. § 2719, the Chairman will disapprove it because it is inconsistent with the requirements of IGRA. Though not routine, site-specific ordinances are not uncommon.

Here, initially, the Nation wrote to the Office of General Counsel and requested a restored lands opinion. *See Administrative Record*, Ex. 20, Letter to Penny Coleman from Michael J. Anderson, Re: Request for Restored Lands Opinion (Feb. 25, 2008). This refers to an analysis of one of the exceptions to IGRA's general prohibition against gaming on trust land acquired after October 17, 1988, 25 U.S.C. § 2719(a), when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Prompted by site-specific ordinances, the Chairman has made Indian lands determinations involving the restored lands exception. *Disapproval of Ponca Tribe of Nebraska Amended Gaming Ordinance* (Oct. 22, 2007, *rev'd* Dec. 31, 2007); *Approval of Cowlitz Indian Tribe's Class II Gaming Ordinance*. (Nov. 22, 2005). *See also In Re Sault Ste. Marie Tribe of Chippewa Indians, Resolution No. 2006-101, amendment to Tribal Code § 42.801, Gaming Ordinance* (September 1, 2006, direct commission decision on site-specific ordinance.)

The Nation's March 2008 ordinance, however, was not site specific. As the Nation is landless, *Administrative Record*, Ex. 20, the ordinance contained no legal description of a particular parcel of land. Instead the ordinance was of a different sort entirely. It contained the following definition:

> the Lower Lake Rancheria Koi Nation, a sovereign tribal entity:
>
> (4) listed on the Bureau of Indian Affairs' list of tribes recognized and eligible to receive services from the United States pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103-454, 25 U.S.C. § 479a-1) and entitled to all privileges and immunities available to all federally recognized tribes;
>
> (5) whose government-to-government relationship with the United States, terminated through administrative acts of the Bureau of

> Indian Affairs, was reaffirmed by letter of Assistant Secretary-Indian Affairs Kevin Gover on December 29, 2000; and
> (6) who history of recognition, non-recognition, and reaffirmation qualifies the Tribe as "restored" under section 2719(b)(1)(B)(iii) of the Indian Gaming Regulatory Act ("IGRA")."

See Administrative Record, Ex. 17, Gaming Ordinance § 102(l). For lack of a better term, the ordinance is a "status-specific" or a "restored tribe-specific" ordinance, one that states that the Nation is a restored tribe under IGRA and could therefore later qualify for IGRA's restored lands exception. *See Administrative Record*, Ex. 1, Letter to Daniel Beltran, Chairman of the Lower Lake Rancheria Koi Nation from Philip Hogen, NIGC Chairman, p. 2 (June 13, 2008).

By its terms, the restored lands exception requires a multi-part analysis. To be an "Indian tribe that is restored to Federal recognition," a tribe must demonstrate a period of recognition by the United States, a termination of that recognition, and reinstatement of that recognition by the United States. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 369 F.3d 960, 967 (6th Cir. 2004). If a tribe is restored, then the land in question meets the restored land exception if it was taken into trust for the tribe as part of the tribe's restoration. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004). That analysis requires consideration of the factual circumstances surrounding the trust acquisition, the location of the trust acquisition, and the temporal relationship of the trust acquisition to the tribal restoration. *See, e.g., Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse*, 198 F. Supp. 2d at 935; *In Re Sault Ste. Marie Tribe*; *In Re Karuk Tribe of California* (restored lands opinion, October 12, 2004).

The Nation's March 2008 ordinance submission asked the Chairman to make only the restored tribe portion of that analysis and to leave for another day the question of whether land was restored as part of the Nation's restoration. As such, the Commission affirms the Chairman's decision because the ordinance was not ripe for determination.

More than this, by asking only for a restored tribe determination and divorcing that question from the remainder of the restored lands analysis, the Nation implicitly sought to attack the December 29, 2000 determination of then-Assistant Secretary for Indian Affairs Kevin Gover. That determination reaffirmed the government-to-government relationship between the United States and the Nation and found that the Nation had never been terminated. To make the positive determination that the Nation desired, the Chairman would have had to disagree with, or re-interpret, Mr. Gover's determination. Under IGRA, the Chairman can and will make determinations about the government-to-government relationship between the United States and an Indian tribe, but only as part of an actual restored lands determination. Determinations about the government-to-government relationship between the United States and an Indian tribe standing alone, outside of a restored lands determination, are the province of the Department of the Interior (DOI). As such, the Chairman properly deferred to Mr. Gover's determination and disapproved the March 2008 ordinance.

A. The "restored tribe" determination

The Nation contends that the Chairman has the power to approve its "Indian tribe" definition because he has the power generally to approve ordinances. *See Supplemental Record*, Ex. 19, Letter to Michael Gross, Esq., National Indian Gaming Commission, from Michael J. Anderson, Re: Lower Lake Rancheria Koi Nation's

Response to NIGC Follow-up Questions (August 7, 2008). The Nation also contends that the determination to be made here is no different than the usual determination that the NIGC and the DOI both make when determining restored lands and is not a request for the Chairman to determine the Tribe's status. *See Supplemental Record*, Ex. 19.

We agree that the Chairman unquestionably has the authority to approve gaming ordinances. 25 U.S.C. § 2710. We also agree that the Chairman necessarily has the authority to make Indian lands determinations for site-specific ordinances, including those that implicate the restore lands exception. This is so because the plain and unambiguous language of IGRA requires it:

> The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides . . . .

25 U.S.C. § 2710(b)(2). By incorporating this language by reference for Class III gaming, IGRA requires the Chairman make this same determination for a site-specific Class III ordinances. 25 U.S.C. § 2710(d)(1)(A)(ii).

Again, IGRA only authorizes the Chairman to approve a site-specific ordinance if it authorizes gaming on *Indian lands*, as IGRA defines the term. Without confirmation that the site-specific ordinance authorizes gaming on Indian lands eligible for gaming, the Chairman would have to disapprove the ordinance. To approve a site-specific ordinance that permitted gaming on ineligible lands would authorize a tribe to violate IGRA. *Cf. AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 908 (9th Cir. 2002) ("the statutory framework suffices to demonstrate that the NIGC must consider the legality of Class III gaming before approving . . . resolutions, ordinances, and management contracts . . . ");

Miami Tribe of Oklahoma v. United States, 927 F. Supp. 1419, 1422 (D. Kan. 1996) (NIGC has authority to determine "Indian lands").

We likewise agree that both the Chairman and the Department of the Interior can make restored lands determinations. We believe that the now-expired memorandum of understanding between the DOI Office of the Solicitor and the NIGC Office of General Counsel sets out the appropriate division of responsibility. In essence, DOI would be primarily responsible for the Indian lands determination when the Secretary of the Interior is considering a fee-to-trust acquisition or when a tribe and state submit a Class III compact. The NIGC would be primarily responsible for determinations when land is already in trust and a tribe requests the Chairman to approve a either management contract, site-specific ordinance, or when there is a question regarding the propriety of existing or proposed tribal gaming operations on trust lands. 25 U.S.C. §§ 2710(b), 2711, 2713.

We do not agree, however, that the determination the Nation sought here is identical to determinations made for restored lands, and we believe the Chairman was requested to determine the Nation's status vis-`a-vis the United States. The record shows that the Nation sought a determination that it was a "restored tribe," separate and apart from any consideration of restored land.

The Nation followed the submission of its ordinance with evidence for its claim as a "restored tribe." *See Administrative Record*, Ex. 13, Letter to John Hay, from Michael J. Anderson, Re: Restore Tribe Request of Lower Lake Rancheria Koi Nation (April 4, 2008). The Nation argued that this evidence showed a "de facto termination" and that "in 2000, AS-IA Gover restored that recognized status." *Id.* Its attorneys

continued to send supporting evidence and arguments for this position throughout the Chairman's 90-day review of the ordinance. *See Administrative Record*, Ex. 9, Letter to John Hay, from Michael J. Anderson, Re: "Restored" Status of Lower Lake Rancheria Koi Nation (June 2, 2008) ("Lower Lake's prior de facto terminated status qualifies it to be considered a "restored tribe" for purposes of the Indian Gaming Regulatory Act.").

In this appeal, the Nation continues the argument, contending that the Chairman's decision was substantively erroneous. Specifically, the Nation argues that the Chairman's decision to disapprove the ordinance was wrong because the evidence shows that it is "restored." *See Administrative Record*, Ex. 23, Brief to the Commission from Michael J. Anderson, Loretta A. Tuell, and Matthew J. Kelly, Re: Appeal to the National Indian Gaming Commission of the Chairman's Disapproval of the Lower Lake Rancheria Koi Nation Gaming Ordinance of 2008 (July 15, 2008). The appeal states:

> The Chairman's disapproval of Lower Lake's Gaming Ordinance acknowledged that Lower Lake was a federally recognized tribe at the time the Lower Lake Act was enacted in 1956, and that it is today a federally recognized tribe. What the Chairman claims Lower Lake did not demonstrate was a period of non-recognition, without which there "cannot be a restoration as contemplated by IGRA." Based on both the evidentiary material demonstrating such non-recognition and on the analysis submitted by Lower Lake, the Chairman's conclusion is clearly erroneous and should be reversed by the full Commission.

Id. at 5.

In later briefings, the Nation admitted that it felt assured that the Chairman would deal with the substantive issue of its status as a "restored tribe" and thus it "decided against withdrawing or amending its gaming ordinance and proceeding to completion with the NIGC review." *See Administrative Record*, Ex. 28, Letter to Michael Gross, Esq., from Michael J. Anderson, Re: Lower Lake Rancheria Koi Nation's Response to

NIGC Follow-up Questions (August 6, 2008). In brief, the Nation stated that it requested a determination of "restored tribe" status from the Chairman due to:

> The NIGC's competence in reviewing such matters; the NIGC's history of prior legal opinions addressing restored tribe issues; and the specific regulatory timetables allowing prompt review of tribal ordinances.

Id.

As such, while the restored tribe determination the Nation sought would be the same exercise undertaken in a restored lands analysis, the Nation's sought a restored tribe determination separate and apart from any restored lands analysis. There are no lands at issue here. The Nation is landless, *Administrative Record*, Ex. 20, and neither the March 2008 ordinance nor any of the Nation's submissions identify any land that the Nation might be seeking to place into trust status. It was not possible for the Chairman to have made a restored lands determination, and the Nation could not have requested one, because the Chairman could not have addressed one of the essential questions in the restored lands analysis: whether land was taken into trust as part of the Nation's restoration.

We conclude from the record that the essence of the Nation's request here, though it takes the form of an ordinance approval, was an attempt to reverse or otherwise interpret Mr. Gover's December 29, 2000 determination. Again, that determination reaffirmed the government-to-government relationship between the United States and the Nation and found that the Nation had never been terminated. *See Administrative Record*, Ex. 23, Tab 19.

In his December 29, 2000 memorandum to the Alaska and Pacific Region Directors, Mr. Gover noted that the BIA had "officially overlooked" a number of tribes,

including the Nation, "even though their government-to-government relationship with the United States was never terminated." *See Administrative Record*, Ex. 23, Tab 4. As such, Mr. Gover's letter of that same date reaffirmed the relationship between the two governments. *See Administrative Record*, Ex. 23, Tab 4.

The Chairman, in his disapproval of the Nation's gaming ordinance, explicitly relied upon that finding: "If there has been no termination or period of non-recognition, then there cannot be a restoration." *See Administrative Record*, Ex. 23, Tab 1. The Nation argues on appeal, however, that Chairman was wrong to interpret Mr. Gover's letter this way. Reduced to its essentials, the Nation's argument is that Mr. Gover's letter shows that it was terminated, and the Chairman was wrong to decide otherwise. The Nation cannot advance this argument against the Chairman's June 2008 decision, however, without also calling into question Mr. Gover's earlier determination.

We do not believe that this is the proper forum to reconsider Mr. Gover's determination or, for that matter, that the Commission is the proper agency to do so in these circumstances. Determination of the existence of a government-to-government relationship between the United States and an Indian tribe *per se* and without more is the province of the Secretary of the Interior and the Bureau of Indian Affairs. The Federal Acknowledgement Process exists precisely to make such a determination in the first instance. 25 C.F.R. part 83. As it turned out here, Mr. Gover determined that the Nation did not need to go through the Federal Acknowledgement Process because he believed that the Nation's government-to-government relationship with the United States never ended:

> The Indian tribes mentioned above should not be required to go through the Federal acknowledgement process outlined in the Federal Register

> [sic] at 25 CFR Part 83 ("acknowledgement regulation") because their government-to-government relationship continued. The acknowledgement regulation does not apply to Indian tribes whose government-to-government regulation was never severed."

See Administrative Record, Ex. 23, Tab 4. We note that Mr. Gover could have decided that the Nation needed to go through the Federal Acknowledgment Process. Had he done so, we very much doubt that the Nation would seek redress from the NIGC, nor would it be appropriate for it to do so. We do not believe that redress for the decision Mr. Gover made is properly sought here either.

Again, IGRA gives to the Chairman the authority to make Indian lands determinations that are necessary to the approval of gaming ordinances, 25 U.S.C. § 2710(b), the approval management contracts, 25 U.S.C. § 2711, the bringing enforcement of actions, 25 U.S.C. § 2713, or making any necessary determination of jurisdiction. This is so because IGRA applies only on Indian lands and limits the Commission's jurisdiction to Indian lands. 25 U.S.C. § 2710(b). The Chairman will make a restored tribe determination when presented with circumstances requiring a complete restored lands determination. In the absence of land, such could not have been the case here. Accordingly, the Chairman properly deferred to Mr. Gover's determination and disapproved the Nation's March 2008 gaming ordinance.

B. Ripeness

Even if we were to construe the Nation's request for the approval of its ordinance to be a request for a restored lands determination, the Chairman properly disapproved the ordinance because the matter was not ripe.

For a matter to be ripe, it must be 1) fit for a decision and 2) cause hardship by its failure to be considered on review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-9

(1967), *overruled on other grounds as stated in Califano v. Sanders*, 430 U.S. 99 (1977); *see Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2005); *see also Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *see also Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967). The ripeness doctrine is meant to avoid premature review based on injuries that are merely speculative and may never truly occur. *Hawaii County Green Party v. Clinton*, 124 F.Supp.2d 1173, 1194 (D. Hawaii 2000).

To satisfy the first part of the test, an issue must be ready for final review because no other administrative proceeding is contemplated. *Id.* at 149. A claim is fit for review if the issues presented are primarily legal questions that do not require greater factual development. *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir 1994). Specifically, a decision-maker must avoid a situation where an agency's future actions could render review of a current issue or request unnecessary. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-33 (1988).

To satisfy the second part of the test, a petitioner must show that judicial review is now appropriate because the issue has a direct and immediate impact on it. *Abbott Laboratories,* 387 U.S. at 152. In other words, the harm must not be speculative. *Hawaii County Green Party*, 124 F.Supp.2d at 1194. Specifically, failure to decide the issue must create "adverse consequences" that leave the petitioner without a means to redress the grievance later. *Toilet Good Ass'n*, 387 U.S. at 164-5.

The matter here satisfies neither part of the test for ripeness. As to the first part, a future determination by the BIA, taking land into trust for the Nation may very well render any decision on the merits now unnecessary. One such possibility is that the Nation seeks to take land into trust, but the BIA will only do so for non-gaming purposes.

Should that prevent IGRA gaming on the land, then any decision here concerning the Nation's restored tribe status is moot. Likewise, the BIA may decline to take land into trust. That too would render a decision here moot.

Similarly, as discussed above, DOI will make a determination on the status of Indian lands if it takes lands into trust for a tribe. Should DOI take land into trust for the Nation for gaming purposes, it would include a "restored tribe" analysis as part of a "restored lands" determination. Because DOI is free to make an independent decision on the tribe's status, this would render any decision on the merits of this case moot if the two agencies arrived at the same conclusion. *Ohio Forestry Ass'n*, 523 U.S. at 732-33. If the agencies disagreed, the Nation would be faced with inconsistent decisions, and we do not see how the Nation would benefit from the legal uncertainty that that would create.

Further, the absence of land here indicates the need for greater factual development of the issues. *Exxon Corp.*, 32 F.3d at 1404. Without knowing what land is at issue or how the Nation came by it, it is impossible for any decision-maker to determine now whether the land was restored to the Nation as part of the Nation's restoration. It is, again, impossible to make the restored lands determination now.

In this vein, the Nation argues that the Chairman can make a "restored tribe" decision under the test set out in *Grand Traverse Band*, 198 F.Supp 2d. at 927, without any land because the two parts of the test can be accomplished separately. *See Administrative Record*, Ex. 28 at 4-5. We do not agree. It is true that finding a "restored tribe" is a threshold question for a restored lands analysis and a failure to find such ends the inquiry. *See Administrative Record,* Ex. 28 at 5. But the "restored tribe" test is only the beginning of the inquiry. The fact-finder that positively determines that a tribe is

"restored" must continue on to the next phase of inquiry and determine the land's status. 198 F. Supp.2d at 927. Because the "restored tribe" portion of the test was only conceived in connection with the determination of the land's status, it cannot be divorced entirely from its mate for the sake of convenience. Thus, again, the Commission cannot reach the merits of the Nation's request without land at issue.

As to the second criterion for ripeness, the Nation cannot show an immediate and direct hardship caused by the Commission's failure to review this issue. Any harm presented is speculative for the Nation's status remains the same. The Nation does point out that uncertainty is an obstacle to economic development under IGRA, but it appears that that uncertainty flows more from the absence of land on which to develop a casino than it does the from Commission's not reviewing Mr. Gover's earlier decision.

Further, the Nation can seek to review that decision before DOI or a court. *Hawaii County Green Party*, 124 F.Supp.2d at 1194. The Nation is also free to find land, take that land into trust, and seek a complete restored lands determination at that time, or even afterward. Even in the absence of any decision here, the Nation still has multiple avenues of redress. Moreover, the absence of any determination here does not impugn any of the substantive arguments that the tribe would make in any of those circumstances.

Accordingly, the Chairman's decision to disapprove the ordinance is affirmed.

CONCLUSION

Given all of the foregoing, the Chairman's June 13, 2008 disapproval of the gaming ordinance is affirmed.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION on this 7th day of October, 2008.

Philip N. Hogen
Chairman

Norman H. DesRosiers
Vice Chairman

Certificate of Service

I certify that this Commission final decision and order was sent by facsimile transmission and certified U.S. mail, return receipt requested, on the 7th of October, 2008 to:

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