



OCT 12 2004

Bradley G. Bledsoe Downes, Esq.
Dorsey & Whitney LLP
38 Technology Drive
Irvine, CA 92618

Dear Mr. Downes:

On June 12, 2003, on behalf of the Karuk Tribe of California (Tribe or Karuk), you requested that the National Indian Gaming Commission (NIGC) issue an Indian lands determination pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2719. You submitted a discussion of the restored lands exception under section 2719 as well as materials in support of the Tribe's claim that the exception applied. Additionally, on February 5, 2004, you submitted supplemental information at the request of John Hay. The Office of General Counsel has evaluated the Tribe's submission and determined that the land in question would not fall within the "restored lands" exception to section 2719's prohibition against gaming on trust land acquired after October 17, 1988.

Background

The Tribe provided historical background on the Tribe as well as information on the tribe's land acquisitions. The Karuk have 3,222 enrolled members, approximately one-third of whom reside in Siskiyou County. At issue is an approximately 200 acre parcel of land ("Yreka Property") located in the city of Yreka, Siskiyou County, California.

The Karuk began efforts in 1978 to receive Federal recognition. In November 1978, the Bureau of Indian Affairs Central Office (BIA) staff conducted a field trip to Northern California. The BIA determined that the aboriginal subentities of the tribe consisted of three communities located in Happy Camp, Orleans, and Siskiyou (Yreka). See 13 IBIA 76, 78; 1985 WL 69127 (I.B.I.A.). The Assistant Secretary for Indian Affairs, in a memorandum entitled "Revitalization of the Government-to-Government Relationship Between the Karok (sic) Tribe of California and the Federal Government," notified the local offices of the Bureau of Indian Affairs on January 15, 1979, that:

Based on the findings collected . . . , the continued existence of the Karoks as a federally recognized tribe of Indians has been substantiated. In light of this finding, I am directing that the government-to-government relationship, with attendant Bureau services within available resources, be re-established.

The Tribe acquired land in trust in 1979 via Gift Deed from the State of California to the United States for land located in Happy Camp, California. The Tribe also acquired several parcels of land in trust in Happy Camp, California in 1987. Additionally, the Tribe acquired a parcel of land located in Yreka, Siskiyou County ("1989 Trust Land"), that was then accepted in trust by the United States for the benefit of the Tribe on April 26, 1989. In addition to the properties detailed above, the Tribe, throughout the 1990's, acquired numerous other parcels of land in both Siskiyou and Humboldt Counties, that are now held in trust. In 1997 the Tribe acquired additional land ("Yreka Property") contiguous to the Tribe's 1989 Trust Land. The Department of the Interior accepted the Yreka Property in trust in March 2001. It is this property on which the Tribe now wishes to conduct gaming. Because this parcel was taken into trust after October 17, 1988, for gaming to be legal under IGRA, it must fall within one of IGRA's exceptions to the prohibition on gaming on lands acquired into trust after October 17, 1988.

The Tribe submitted the following in support of its claim that the parcel in question was restored: Request for Indian Lands Determination, Dated June 12, 2003; 1989 Trust Land Legal Description; Yreka Property Legal Description(s); Parcel Map; Treaty R (unratified); Schedule of Indian Land Cessions; California Map; Revitalization Memorandum; Karuk Tribal Constitution & Bylaws; Notice of Proposed Decision – November 2000; Near Reservation Designation; Karuk Tribal Housing Authority Ordinance; Cooperative Agreement; Karuk Tribal Sales Tax Ordinance; Karuk Tribal Prevailing Wage Ordinance; Karuk TERO; Karuk Tribal Election Ordinance; 1987 Tribal Resolution; table listing all tribal property; Gift Deed dated August 22, 1979; Grant Deed dated March 6, 1987; maps for Holmes, Borg & Bowers parcels; map for Tebbe parcel; map titled O'Hair annexation; aerial photograph of Karuk land in Yreka; Deed Dated March 24, 1999; Deed Dated May 6, 1999; and a Deed Dated May 6, 1999 for assessors parcel number 062-151-490.

Lands Acquired in Trust by the Secretary After October 17, 1988

Under Section 2719(a) of IGRA, gaming is prohibited on lands acquired by the Secretary of the Interior into trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within certain exceptions listed in 25 U.S.C. § 2719(b). Accordingly, we must review the exceptions to determine whether a tribe can conduct gaming on after-acquired trust lands.

The Tribe contends that the proposed site meets the requirements of the exception set forth at 25 U.S.C. § 2719(b)(1)(B)(iii) – "restoration of lands for an Indian tribe that is restored to Federal recognition" – and therefore is outside the proscriptions on after-acquired land. To determine whether the Tribe meets the restoration exception we must determine, first, whether the Tribe is a "restored" tribe and, second, whether the land was taken into trust as part of a "restoration" of lands to the Tribe.

"Restored" Tribe

The key terms, "restored" and "restoration" are not defined in the text of IGRA. Nor are they defined in the various federal regulations issued by the NIGC and the Department of the Interior to implement IGRA.

The U.S. District Court for the Western District of Michigan addressed the definition of "restored" and "restoration" in *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920 (W.D. Mich. 2002); *aff'd*, 369 F.3d 960 (6th Cir. 2004). At issue was whether the Grand Traverse Band was a restored tribe and whether the parcel on which gaming was conducted were restored lands. The *Grand Traverse* court held that both "restored" and "restoration" should be given their ordinary meaning ("In no sense has a proprietary use of 'restore' or 'restoration' been shown to have occurred." *Id.* at 931). Applying the ordinary meaning of the words, the court concluded that the Band's history showed that the Band was in fact restored:

In sum, the undisputed history of the Band's treaties with the United States and its prior relationship to the Secretary and the BIA demonstrates the Band was recognized and treated with by the United States . . . Only in 1872 was the relationship administratively terminated by the BIA. This history – of recognition by Congress through treaties (and historical administration by the Secretary), subsequent withdrawal of recognition, and yet later re-acknowledgment by the Secretary – fits squarely within the dictionary definitions of "restore" and is reasonably construed as a process of restoration of tribal recognition. The plain language of subsection (b)(1)(B) therefore suggests that this Band is restored.

Grand Traverse Band at 933.

An examination of the Karuk history shows that it is similar to the pattern in the case of Grand Traverse Band. However, there does not seem to be any evidence that this relationship was ever administratively terminated as in the Grand Traverse case. The Karuk entered into a treaty with the United States in 1852. The United States dealt with the Tribe as a government entity in an effort to convince them to settle on the Hoopa Valley Reservation. Though these efforts failed, the United States continued to provide benefits to individual members of the Tribe but did not appear to have any further dealings with the Tribe as an entity. Then, in 1979, by action of the Secretary, the government-to-government relationship was "re-established" with the Tribe.

Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time. However, the Tribe provided no evidence of any affirmative action by the United States to terminate the relationship with the tribe. In other words, we have no evidence supporting a conclusion that the United States withdrew its recognition of the Tribe. The

information provided by the Tribe states only that while the United States provided benefits to individual tribal members that it had no dealings with the Tribe as a distinct entity. The Tribe has provided a memo dated January 15, 1979, from the Assistant Secretary for Indian Affairs to the Sacramento Area Director instructing that the government-to-government relationship be re-established and that the tribes name is to be added to the list of federally recognized tribes. The memo states:

Based on the findings collected. . . , the continued existence of the Karoks (sic) as a federally recognized tribe of Indians has been substantiated. In light of this finding, I am directing that the government-to-government relationship, with attendant Bureau services within available resources, be re-established

67 Fed. Reg. 46328-46333 (2002).

However, no information has been provided to substantiate a claim that the United States terminated the relationship with the tribe. Therefore, without more, we are not prepared to find that the Tribe qualifies as “an Indian tribe that is restored to Federal recognition” under 25 U.S.C. § 2719(b)(1)(B)(iii).

Restoration of Lands

Even if we could conclude that the Tribe is “restored” within the meaning of IGRA, we could not conclude that the land at issue was “taken into trust as a 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).

Federal courts, the Department of the Interior, and NIGC have recently grappled with the concept of restoration of land. In so doing, they established several guideposts for a restoration-of-land analysis. First, “restored” and “restoration” must be given their plain, primary meanings. *Grand Traverse Band II* at 928 (W.D. Mich 2002) aff’d, 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt* (“Coos”), 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be “restored,” lands need not have been restored pursuant to Congressional action or as part of a tribe’s 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); *Coos* at 164. The language of section 2719(b)(1)(B)(iii)—“restoration of lands for an Indian tribe that is restored to Federal recognition”—“implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event.” *Grand Traverse Band II* at 936; *Grand Traverse Band I* at 701.

Nonetheless, there are limits to what constitutes restored lands. As NIGC stated in the *Grand Traverse* Opinion, “[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.” NIGC *Grand Traverse* Opinion,

dated August 31, 2001, at p. 15; *see also* Office of the Solicitor's Memorandum Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt* (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," p. 8).

The courts in *Coos* and *Grand Traverse Band I* and *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* at 164; *Grand Traverse Band I* at 700; *see also Grand Traverse Band II* at *934-935 ("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") *aff'd*, 369 F.3d 960 (6th Cir. 2004). 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.*

In addition to the above referenced sources, we also consulted our restored lands opinions with regard to the Bear River Band of Rohnerville Rancheria, (See 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, dated August 5, 2003) (NIGC Rohnerville Opinion); the Mechoopda Indian Tribe of Chico Rancheria (See Memorandum from NIGC Acting General Counsel to NIGC Chairman, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria, dated March 14, 2003) (NIGC Mechoopda Opinion); and the Wyandotte Tribe, (See Memorandum from NIGC Acting General Counsel to NIGC Chairman Hogen, Re: Legality of Gaming Under IGRA on the Shriner Tract owned by the Wyandotte Tribe, dated March 24, 2004)(NIGC Wyandotte Opinion).

In this case, these factors (factual circumstances, location and temporal relationship) and our review of agency and judicial precedent lead us to conclude that the Tribe's land acquisition is not a "restoration."

1. Factual Circumstances of the Acquisition

The Tribe acquired the Yreka parcel, approximately 200-acres in 1997. The Tribe conveyed the parcel to the United States in May 1999. The Department of Interior accepted the parcel in trust in March 2001. The Tribe's acquisition arose in the following context:

Between 1985 and 1987 the Tribe acquired three parcels of land. In 1987 and 1988, the Tribe applied for the three parcels to be acquired in trust by the United States for the benefit of the Tribe. Those three parcels are located in Happy Camp, California, along the Klamath River east of Happy Camp, and in Yreka, California.

In 1987, the Tribe applied for and received funding from the Department of Housing and Urban Development for the purchase of land ("1989 Trust Land"). On May 3, 1988, the Tribe conveyed the land to the United States to be held in trust. The parcel was accepted in trust in April 1989.

The Yreka Parcel is contiguous to the 1989 Trust Land. Similarly, it was acquired through funding provided by the Department of Housing and Urban Development for the purpose of providing additional housing to Tribal members.

"Restoration" denotes a taking back or being put in a former position. *Coos* at 162. It might mean "reacquired." *Id.* ("The 'restoration of lands' could be construed to mean just that; the tribe would be placed back in its former position by reacquiring lands.") In any event, "restoration" does not mean, "acquired." We therefore must look further for indicia that the land acquisition in some way restores to the Tribe what it previously had.

2. Location

Restored lands may include off-reservation parcels; however, there must be indicia that the land has in some respects been recognized as having a significant relation to the Tribe. *Grand Traverse Band I* at 702. In *Grand Traverse II*, the court held that the lands at issue were restored because they lay within counties that had previously been ceded by the tribe to the United States. *Grand Traverse Band II* at 936. This ruling was consistent with its opinion in *Grand Traverse I*, in which the court stated that the land's location "within a prior reservation . . . is significant evidence that the land may be considered in some sense restored." *Id.* In its *Grand Traverse Opinion*, NIGC further 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." *Grand Traverse Opinion* at 15. The tribe's history includes the ceding of that site to the United States by the ancestors of the present tribe in an 1836 treaty. *Id.* at 9-10, 16. As a result, NIGC concluded that the Band had a "historical nexus" to the land. *Id.* at 17.

A.L. Kroeber, a noted ethnologist, observed that there were at least three Karuk towns that were located at the mouths of Camp Creek, Salmon River, and Clear Creek. Kroeber, A.L., *Handbook of the Indians of California*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 78, p. 99 (G.P.O. 1923). The Tribe used the tributaries of the Klamath River for hunting and gathering territories. *Id.* at 100. Kroeber observed:

The land of the Karok is substantially defined by [an] array of villages along the Klamath. There were few permanent settlements on any affluents. All of these were owned by the Karok, and more or less used as hunting and food gathering territories to their heads; so that technically their northern boundary followed the watershed bordering the Klamath. The only exception was in the case of the largest tributary, the Salmon, about whose forks, a dozen miles up, were the Shastin Konomihu. The

Karoks seem to have had rights along this stream about halfway up to the fork.

Id.

In a treatise published 13 years after his Handbook, Kroeber identified a 60 mile stretch of the Klamath running from the Trinity River confluence east to at least a point east of what is now Happy Camp and opined that it is likely that the historic Karuk settlements were situated an additional 30 miles east on the Klamath, which includes that area where the Yreka parcel is located. Kroeber, A.L., Karok Towns, Univ. of California Publications in American Archaeology and Ethnology, Vol. 35, No. 4. pp. 29-38.

The Karuk lands and property were destroyed upon the arrival of “a swarm of miners and packers” in 1850 and 1851:

The usual friction, thefts, ambushing and slaughters followed in spots. The two sacred villages near the mouth of the Salmon, and no doubt others, were burned by the whites in 1852; and a third, Orleans, was made into a county seat. There were, however, no formal wars; in a few years the smaller richer placers were worked out; . . . and the Karok returned to what was left of their shattered existence. Permanent settlers never came to their lands in numbers; the Government established no reservation and left them to their own devices; and they yielded their old customs and their numbers much more slowly than the majority of California natives.

Handbook at p. 98.

Between March 19, 1851, and January 7, 1852, agents for the United States entered into 18 treaties with the “Indians of California.” *See Thompson v. United States*, 122 Ct. Cl. 348 (Ct. Cl. 1952). Lands constituting the Karuk Tribe’s aboriginal territory were the subject of Treaty R, dated November 4, 1851. The Karuk and other Indians of California agreed to relinquish their claims to their aboriginal territory in exchange for reservations of land totaling an estimated 8,518,900 acres pursuant to the 18 unratified treaties. *See Indians of California v. United States*, 102 Ct.Cl. 837 (Ct.Cl. 1944). Unfortunately, this treaty does not specify which of the 8,518,900 acres belonged to the Karuk and which were attributed to the other Tribes signing the treaty

The Tribe provided the Schedule of Indian Lands Cessions that records their reservation of land and cession of its claim to “all other territory” under the unratified treaty. The record shows a cession of claims to territory noted as “306” and reserved lands as “305” on a map of California. Again, it is not clear from these records which of the area was specifically attributed to the Karuk.

In its Notice of Proposed Decision to take the Yreka parcel into trust dated November 3, 2000, BIA Regional Director Ronald Jaeger stated that, “Within the Karuk’s ancestral territory and neighboring areas, many tribal trust parcels are located

within the Siskiyou and Humboldt County boundaries. One tract is within the city limits of Yreka . . .” However, this proposed decision is not clear as to whether the parcel in question is ancestral territory or a neighboring area and is therefore not helpful to our analysis.

In our Rhonerville opinion, we found that the Tribe has a longstanding historical and cultural connection to the parcel at issue. The parcel was located within one mile of two aboriginal villages and two major trails. It was located within three miles of five aboriginal villages. Also within three or four miles from the parcel was the site of a mythic flood in a tribal story telling. Furthermore, the parcel was located 6 miles from the tribe’s original Rancheria, which was purchased by the United States for the Rohnerville Indians in 1910. The Rhonerville Tribe was terminated in 1962, and the Rancheria was divided and distributed to individual Indians. At the time the Rancheria boundaries were re-established in 1983, there were still 6 acres in individual Indian ownership. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important in our determination that tribal members resided on the original Rancheria at the time of termination. Rhonerville Opinion at 10.

In contrast, we do not find that the Tribe has a sufficient historical nexus to the Yreka parcel to qualify it as restored land. The evidence provided by the Tribe that the parcel was once the location of aboriginal settlements is scant and based largely on the speculation of an ethnologist who stated that it is “likely” that there existed tribal settlements in the parcel area. Additionally, the Tribe has not provided evidence that the parcel remained important to the tribe throughout history.

3. Temporal Relationship of Acquisition to the Tribal Restoration

Although the Karuk were not located on a reservation, no attempt was made to purchase land to establish a reservation for the Karuk. The federal government had attempted to relocate the Karuk from the upper Klamath River region to the Hoopa Valley Reservation with no success. *See Karuk Tribe v. United States*, 41 Fed. Cl. 468 at 469-470 (Ct. Cl. 1998). The Karuk people refused to be relocated and retreated to the high ground away from the Klamath River. *See Karuk Tribe of California v. United States*, 209 F.3d 1366, 1379 (Fed. Cir. 2000).

From the time that the Karuk as a group refused to move to the Hoopa Valley reservation to the filing of the litigation in *Short v. United States*, 202 Ct. Cl. 870 (Ct. Cl. 1973), the Karuk existence as a separate tribal entity was in limbo and largely entangled in the Hoopa – Yurok and Karok (sic) land disputes.

The Karuk began efforts in 1978 to reestablish government-to-government ties. In November 1978, the Bureau of Indian Affairs Central Office staff conducted a field trip to Northern California. The BIA determined that the aboriginal subentities of the tribe consisted of three communities located at Happy Camp, Orleans, and Siskiyou (Yreka). *See* 13 IBIA 76, 78, 1985 WL 69127 (I.B.I.A.). However, the BIA made no

determination as to the significance of these communities throughout the history of the Tribe.

If we were able to conclude that the Tribe was restored in 1979, we would look to the history of the Tribe's land acquisitions. The land at issue was acquired in 1997, and was taken into trust in 2001. According to the list of tribal property supplied by the tribe, the tribe had four parcels of land held in trust prior to 1988. Between 1989 and the present, it appears that the tribe has placed an additional seven parcels of land in trust. The tribe also holds numerous other lands in fee. The parcel at the heart of this determination was taken in to trust in 2001.

At the heart of this inquiry is the question of whether the timing of the acquisition supports a conclusion that the land is restored. In its Office of the Solicitor's Coos Opinion, the Department of the Interior found that a fourteen-year lapse between a tribe's restoration and the acquisition of land into trust did not foreclose a finding that the land was restored. The Associate Solicitor reasoned that, "the mere passage of time should not be determinative" and that "the Tribes quickly acquired the land as soon as it was available and within a reasonable amount of time after being restored." Likewise, the NIGC in its Mechoopda Lands Opinion found that a nine-year lapse between restoration and acquisition was sufficient to establish a sufficient "temporal relationship." The NIGC placed significant weight on the fact that it was the tribe's first land acquisition after being restored. More recently, the NIGC in its Wyandotte Lands Opinion found that an 18 year passage of time was too long to be considered a restoration.

We conclude that the facts surrounding the timing of the acquisition do not support a determination of "restored land." To the extent that we could conclude that the Tribe was restored, the land was still acquired eighteen years after the government-to-government relationship was re-established. It was then another four years before the parcel was taken into trust. Assuming, that the 1979 re-establishment of government-to-government relations is the only possible date for a tribal restoration, the twenty-two-year gap, coupled with the fact that the tribe acquired numerous other parcels of land in trust, during the interim, leads us to conclude that there is not a sufficient "temporal relationship" between any restoration and the lands acquisition. Perhaps if the Tribe met the other factors, we might be willing to push the outer limits of what has previously been considered an acceptable delay. However, that is not the case here. Furthermore, here, the Tribe acquired many parcels of land soon after its relationship with the federal government was re-established. We conclude that, if any land were to be considered restored, it would be the earlier intervening land.

Conclusion

A close examination of the documentation submitted shows that the Tribe does not have a sufficient "temporal relationship" nor is there a sufficient "historical nexus" to fall within the restored lands exception to Section 2719. Further, while not dispositive, the materials submitted by the Tribe raise questions as to whether it was truly restored. The Tribe may not therefore lawfully conduct gaming on its proposed site.

The Office of the Solicitor concurs with this opinion. If you have any questions, John Hay, Staff Attorney, is assigned to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Penny J. Coleman". The signature is written in black ink and is positioned above the printed name and title.

Penny J. Coleman
Acting General Counsel