United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

In reply, please address to:
Main Interior, Room 6456

Memorandum

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To: Hilda A. Manuel
Deputy Commissioner for Indian Affairs

From: Derril B. Jordan
Associate Solicitor
Division of Indian Affairs

Subject: Gaming on Trust Land Acquired in Emmet County, Michigan, for the Little Traverse Bay Bands of Odawa Indians

This is in response to a request from the Indian Gaming Management Staff (IGMS) of the BIA for a legal opinion concerning issues relating to the proposed transfer of nine parcels of land totaling 57.7 acres (collectively referred to as the "Mackinaw City Tracts"), in trust for gaming for the Little Traverse Bay Bands of Odawa Indians ("LTBB"). Specifically, the IGMS asked whether the proposed acquisition of the Mackinaw City Tracts is exempt from the requirements of Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719 (1988); and whether the proposed acquisition is exempt from compliance with the requirements of 25 C.F.R. §§ 151.3 and 151.10 and the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347.

For the reasons set forth below, we conclude that the LTBB is a restored tribe and that the Mackinaw City Tracts qualify as "restored" lands within the meaning of Section 20 of IGRA. This means that the LTBB will be able to engage in Class II gaming on the Mackinaw City Tracts. The LTBB will not, however, be allowed to engage in Class III (so-called "casino style" gaming) on such lands unless and until the LTBB complies with the compacting provisions of IGRA.[1]

Moreover, the provisions of 25 C.F.R. §§ 151.3 and 151.10 are not applicable to the proposed acquisition of the Mackinaw City Tracts because Congress has made the acquisition mandatory and the Secretary lacks his usual discretionary authority that the criteria in Section 151.10 are intended to inform. Similarly, the mandatory nature of the acquisition makes compliance with the requirements of NEPA unnecessary in this case. However, under the

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[1] We understand that the LTBB has negotiated a compact with the Governor of Michigan, but that compact has not yet been approved by the Michigan Legislature.

LTBB Act, the acquisition of the Mackinaw City Tracts can only occur if there are no adverse legal claims existing on the properties, which we believe includes potential environmental claims. Therefore, the BIA must comply with the requirements of 602 DM 2, Land Acquisitions: Hazardous Substance Determinations, to determine whether any such potential environmental claims may exist. We also understand that LTBB has complied with the requirements of NEPA associated with its management contract which is pending approval before the National Indian Gaming Commission.

Background

The LTBB have occupied the lands principally surrounding the northern and eastern portion of Lake Michigan and northern Lake Huron for centuries. LTBB participated in several treaties with the United States. In the 1836 Treaty of Washington, 7 Stat. 491, the parties agreed to reserve fifty thousand acres on Little Traverse Bay for the Bands. In the 1855 Treaty of Detroit, 11 Stat. 621, the parties agreed to create reservations for the LTBB that were nearly identical to the land reserved in 1836.

Over time, record title to all of the lands within the reservation passed from the LTBB and their members. In the years following the 1855 Treaty, the United States ceased to deal with the LTBB as a political entity. In 1934, the United States failed to provide the money necessary for the LTBB to reorganize under the Indian Reorganization Act, and thus the United States did not acknowledge the LTBB as a distinct political entity until Congress legislatively acknowledged the Bands in 1994.

By the Act of September 21, 1994, Congress reaffirmed the federal recognition of the Little Traverse Bay Bands of Odawa Indians. See Pub. L. No. 103-324, 108 Stat. 2156, 25 U.S.C. §§ 1300k-1 to 1300k-7)(hereafter "reaffirmation Act" or "Act"). The Act contained congressional findings that the LTBB was the descendant of, and political successor to, signatories of the 1836 Treaty of Washington and the 1855 Treaty of Detroit. 25 U.S.C. 1300k(1). The Act found that the LTBB filed for reorganization of their existing tribal governments in 1935 under the Indian reorganization Act ("IRA"), 25 U.S.C. 461 et seq., but that even after a determination by the Commissioner of Indian Affairs that the LTBB was eligible, the United States failed to appropriate sufficient funds to allow the LTBB to reorganize. 25 U.S.C. § 1300k(5). The LTBB continued their political and social existence with viable tribal governments, id. § 1300k(6); formed the Northern Michigan Ottawa Association in 1948 and successfully pursued a land claim before the Indian Claims Commission. Id. § 1300k(7). Congressional findings indicate that the LTBB were again stymied in their attempt to reorganize under the IRA in 1975. 25 U.S.C.§ 1300k(8). After acknowledging that the United States and the State of Michigan have had continuous dealings with the recognized political leaders of the LTBB from 1836 to present, the Act went on to reaffirm federal recognition of the LTBB as an Indian tribe. 25 U.S.C. § 1300k, et seq.

The Act also mandates that the Secretary of the Interior acquire land in trust for the LTBB:

> The Secretary shall acquire real property in Emmet and Charlevoix Counties for the benefit of the Little Traverse Bay Bands. The Secretary shall also accept any real property located in those counties for the benefit of the [LTBB] if conveyed or otherwise transferred to the Secretary, if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages or taxes owed.

Id. § 1300k-4(a). Finally, the Act specifies that the land acquired by or transferred to the Secretary for the benefit of LTBB under the Act "shall be taken in the name of the United States in trust for the Bands and shall be a part of the respective Bands' reservation." Id. § 1300k-4(d).

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

25 U.S.C. § 2719(b)(1) (emphasis added).[2]

No legislative history explains the "restored" lands provision of Section 20. The other

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[2] Section 20 also does not preclude Indian gaming on trust land that is within or 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).

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 the limitations of section 20, including its requirement of concurrence of 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 LTBB qualifies for the latter exception if it is a "restored" tribe within the meaning of IGRA and if the land taken into trust under their Act is appropriately characterized as "restored" land.

Restoration and the Little Traverse Bay Bands

IGRA does not define what tribes or lands qualify as "restored" under Section 20. Webster's Dictionary, however, provides the commonly understood meaning of the term as follows: "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 prior 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 language of "recognition," "restoration" and "reinstatement," but the undeniable effect, as the title to the Act reflected, 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 LTBB Act, Congress found that the LTBB previously was recognized and is a political successor to signatories of treaties with the United States. 25 U.S.C. § 1300k(1). Based on these findings, the Act provided: "Federal recognition of the Little Traverse Bay Bands of Odawa Indians is hereby reaffirmed." Id. § 1300k-1. Thus, the LTBB Act revested the LTBB 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 "reaffirmed" rather than "restored" in one section of the LTBB's Act. The use of this verb may lead someone to suggest that the Act did not, in fact, "restore" federal recognition or lands to the LTBB within the meaning of IGRA.

Consideration of the Act as a whole, in light of past congressional actions in related contexts, compels the rejection of this suggestion. Congress has used the term "restored" and "affirmed" interchangeably. For example, in the floor debate on passage of the Little Traverse Bay Bands 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 Indians 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).

Congress 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 tribes), 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 and revitalized 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 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. § 1300*l*(a).

More 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 "affirming" or "reaffirming" Federal recognition. See Lac Vieux Desert Band, 25 U.S.C. § 1300h-2(a);[3] 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").

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

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[3] 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).

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 LTBB Act returned the LTBB 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 LTBB 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).[4] Here, however, the statute is clear on its face.

We must also determine whether the Mackinaw City Tracts qualify as "restored" land for purposes of 25 U.S.C. § 2719(b)(1)(B)(iii). In the LTBB Act, Congress found that the LTBB is a political successor to some of the signatories of the 1836 Treaty of Washington that ceded vast amounts of territory to the United States, and the 1855 Treaty of Detroit. 25 U.S.C. § 1300k(1). Congress also directed that the Secretary accept real property located in Emmet and Charlevoix counties for the benefit of the Bands. 25 U.S.C. § 1300k-4(a). Any lands to be acquired that lie within the 1836 ceded area, the 1855 Treaty area, or are otherwise located within Emmet or Charlevoix counties are properly characterized as "restored" lands.[5] The Mackinaw City Tracts, located just outside the city limits of Mackinaw City in Emmet County, Michigan, are clearly within one or more of these areas and thus qualify as "restored" lands.

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[4] 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 in ambiguous circumstances. 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.

[5] We note that these areas overlap each other considerably.

Applicability of 25 C.F.R. § 151 and NEPA to the Proposed Acquisition of the Mackinaw City Tracts

The authority, procedures, and policies governing the Secretary's acquisition of trust land for Indian tribes and individual Indians are set forth in 25 C.F.R. § 151. Section 151.3 sets forth under what conditions land may be acquired in trust by the Secretary for an Indian tribe or individual Indian, but states that it is "subject to the provisions in the acts of Congress which authorize land acquisitions." Under the explicit terms of the LTBB Act, the Secretary is required to accept any real property located in Emmet County in trust for the benefit of the LTBB, if conveyed or otherwise transferred to him, "if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages or taxes owed." 25 U.S.C. § 1300k-4(a). Thus, the explicit mandatory language of the LTBB Act supersedes the provisional language of Section 151.3.

Section 151.10 also provides additional criteria and procedures for the Secretary to consider when a tribe requests to have lands taken in trust. However, 151.10, by its own terms will not apply if the "acquisition is mandated by legislation."[6] We note that the Field Solicitor for Twin Cities has opined that 25 C.F.R. § 151.10 is "inapplicable to these acquisitions because these are mandatory, rather than discretionary acquisitions." See Preliminary Title Report, Twin Cities Field Solicitor (Sept. 18, 1996)(on file with our office). We agree with the Field Solicitor's opinion regarding the inapplicability of Section 151.10 in general, but caution that under the LTBB Act, the acquisition of the Mackinaw City Tracts can only occur if there are no adverse legal claims on the properties. We believe that adverse legal claims include potential environmental liability. While the statutory text mentions outstanding liens, mortgages and taxes as examples of such adverse legal claims, there is no indication that this list is exclusive. Moreover, purchasers of real property in this age of heightened environmental awareness and expansive liability would ordinarily consider environmental contaminant possibilities as part of any real estate transaction. Thus, we believe the general statutory reference to "adverse legal claims" is fairly read to include environmental contamination potential. Thus, in our opinion the BIA must comply with the requirements of the Department of Interior Manual, 602 DM 2, pertaining to hazardous substance determinations in land acquisitions, which are referenced in 25 CFR § 151.10(h). It is our understanding that the BIA has performed a contaminant survey of the land pursuant to the DM requirements.

Although NEPA compliance is generally required for trust acquisitions under the provisions of 25 C.F.R. § 151.10, as well as the terms of NEPA itself and the CEQ regulations, we believe that NEPA compliance is not required in this instance for the same reason Section 151.10 is

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[6] The LTBB Act also provides that the Secretary may accept any additional acreage in each of the Bands' service area outlined in the Act. However, any such acquisitions will be accomplished "pursuant to [the Secretary's] authority under the Act of June 18, 1934 (25 U.S.C. § 461 et seq.; commonly referred to as the 'Indian Reorganization Act')." 25 U.S.C. § 1300k-4(c). We note that the Secretary's authority under Section 461 is discretionary and any land acquisition for the Bands under that authority will be subject to NEPA compliance and the terms of 25 C.F.R. § 151.

not applicable: the acquisition of the property is explicitly mandated by Congress under the LTBB Act. We note that in Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 27 IBIA 48 (1994), the Interior Board of Indian Appeals determined that the BIA was not required to comply with NEPA prior to taking land into trust pursuant to the Coquille Tribe's restoration Act because, *inter alia*, the acquisition was mandated by Congress and the action of the BIA Area Director in taking the land into trust was ministerial in nature. The Coquille Act contains language nearly identical to that found in the LTBB Act. Moreover, given the DM requirements, NEPA compliance is not necessary here to determine whether there are any adverse legal claims on the Mackinaw City Tracts. While NEPA compliance is not required, we note that the LTBB has submitted an Environmental Assessment to the National Indian Gaming Commission that reviews any environmental impacts related to the specific use intended for the property.

Conclusion

For the foregoing reasons, we believe that the Mackinaw City Tracts proposed to be taken into trust by the Secretary of the Interior pursuant to the LTBB Act are "restored" lands within the meaning of Section 2719(b)(1)(B)(iii) of IGRA. Therefore, the LTBB 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. LTBB is not required to comply with the provisions of 25 C.F.R. §§ 151.3 and 151.10, including NEPA compliance (except for compliance with 602 DM 2 to ascertain potential environmental liability).

Director, IGMS
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