United States Department of the Interior

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Washington, D.C. 20240

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Memorandum

To: Regional Director, Great Plains Regional Office, Bureau of Indian Affairs

From: Deputy Associate Solicitor, Division of Indian Affairs

Subject: Trust Acquisition for the Ponca Tribe of Nebraska - Applicability of the Restored Lands Exception to the General Gaming Prohibition under § 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

You have requested a legal opinion regarding whether the proposed trust acquisition of the Ponca Tribe of Nebraska (Tribe) meets one of the exceptions to the general gaming prohibition on lands acquired in trust after October 17, 1988, as found in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* We have reviewed the file you submitted for the Tribe's July 2001 application to place three acres of land located in the City of Crofton, Knox County, Nebraska into trust for gaming purposes. The Tribe intends to renovate the existing building on the land and operate a Class II gaming facility in accordance with the IGRA. Section 20 of IGRA must also be considered for any trust acquisitions for gaming purposes occurring after October 17, 1988. This provision generally prohibits gaming on the after-acquired trust land unless certain conditions or exceptions exist.

One of the exceptions is restored lands for restored tribes. 25 U.S.C. § 2719(b)(1)(B)(iii). For this exception to apply, we must find that the tribe has been restored to a Federal relationship and the lands are restored lands. For the reasons set forth below, we conclude that the Ponca Tribe is a restored tribe and the parcel qualifies as "restored lands" under the IGRA exception; thus, the land is not subject to the general gaming prohibition under Section 20 of IGRA. Prior to conducting any gaming on the land, the Tribe must however comply with all other applicable requirements of IGRA governing such gaming.

Section 20 of IGRA

The question you raised is whether any of the exceptions to the prohibition on gaming on lands acquired after October 17, 1988 apply to this trust application. Specifically, whether the restored lands for restored tribes exception applies.

The IGRA prohibits gaming on trust lands acquired after October 17, 1988, unless certain conditions or exceptions exist. 25 U.S.C. §§ 2719(a) and (b). Gaming would not be prohibited on the after-acquired trust land if:

(1) such lands are located within or contiguous to the boundaries of the reservation of the

Indian tribe on October 17, 1988; or if

(2) the Indian tribe has no reservation on October 17, 1988 and
(A) such lands are located in Oklahoma and –
(I) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

25 U.S.C. § 2719(a).

If the trust lands do not meet those conditions, the IGRA also provides exceptions to the prohibition which may enable the tribe to conduct gaming on after-acquired trust land. Gaming is not prohibited if the Secretary determines that "a gaming establishment would be in the best interests of the Indian tribe and its members" and "would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A). Likewise, gaming is not prohibited if "lands are taken in trust as part of –

(I) a settlement of a land claim,

(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)(B).

Although neither the IGRA nor its legislative history defines or explains the "restored lands" provision of Section 20, the Department has had numerous opportunities to examine it.[1/]

1./Pokagon Band of Potawatomi Indians, Sol. Op., M36991, September 19, 1997; Memorandum to Deputy Commissioner for Indian Affairs, dated November 12, 1997 (Little Traverse Bay Bands of Odawa Indians - Emmet County parcel); Memorandum to Acting Director, Indian Gaming Management Staff, dated March 16, 1998 (Little River Band of Ottawa Indians - Manistee County parcel); Memorandum to Deputy Commissioner for Indian Affairs, dated April 18, 2000 (Paskenta Band of Nomlaki Indians - Tehama County parcel); Letter to Judge Hillman, dated August 31, 2001, filed in *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, Case No. 1:96-CV-466 (W.D. Mich., April 22, 2002) (Grand Traverse Bay Band of Ottawa and Chippewa Indians - Turtle Creek site); Memorandum to Assistant Secretary for Indian Affairs, dated December 5, 2001, filed in *Oregon v. Norton*, Case No. 02-6104-TL (D. Or. 2002) (Confederated Tribes of Coos, Lower Umpqua and Suislaw Indians - Hatch Tract); Memorandum, dated January 18, 2000 (United Auburn Indian Community - Placer County

Since initially addressing this matter, we have consistently held that the inquiry requires a two-part analysis: 1) the tribe must be restored within the meaning of IGRA and 2) the proposed trust lands must also be restored within the meaning of IGRA.

Restored Tribe

In determining whether the tribe is restored, we have previously found that if a tribe existed, the relationship was terminated, and then restored, it meets the definition of a restored tribe. The Ponca Tribe meets this test. The House and Senate Reports for the Ponca Termination Act and the Ponca Restoration Act clearly shows that the Ponca Tribe is a restored tribe. H.R. Rep. No. 101-776 (1990). The report details the tribe's history from the 17th to the 20th centuries – including contact with Lewis and Clark in 1804. In addition, the Ponca were signatories to four treaties with the United States, in 1817, 1825, 1858 and 1865. Thus, the Ponca tribe existed. Then, in 1962, Congress terminated the relationship with the Ponca Tribe with the passage of Pub. L. 87-629, Act of Sept. 5, 1962, 76 Stat. 429, 25 U.S.C. §§ 971-980 (the Termination Act). Termination ended in 1990 when Congress enacted the Ponca Restoration Act restored the Ponca Tribe to federal recognition by Pub. L. 101-484, October 31, 1990, 25 U.S.C. §§ 983-983h.

The Restoration Act and accompanying House Report emphasize the fact that the Ponca Tribe should gain status and be treated as any other federally-recognized Indian tribe and that its members become eligible for all Federal services and benefits furnished to Indian tribes and their members. We have consistently held that such language clearly shows that the tribe is "restored." *See footnote 1,* Paskenta at 3, Pokagon at 5-7. Thus, the Ponca Tribe meets the IGRA test for a restored tribe – it existed, the relationship with it was terminated, and then the relationship was restored.

Restored Lands

The Department has developed the definition of restored lands through several legal opinions. The question whether lands are restored lands under IGRA depends on a variety of factors. One clear definition of restored lands is when Congress provides for restoration of lands as part of the Restoration Act. Thus, we have concluded that, when Congress provides "concrete guidance regarding what lands are to be restored to the tribe pursuant to the restoration act, those lands qualify as 'restored lands' under § 20 'regardless of dictionary definition.'" Paskenta at 2. Therefore, lands made available to a restored tribe as part of its restoration legislation qualify as

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parcel) (Auburn I). More recently, we have issued a supplemental opinion on the Auburn Indian Community acquisition (Auburn II) which affirmed the first Auburn opinion finding that lands made available under the Restoration Act are restored lands within IGRA. Memorandum to Director, Office of Indian Gaming Management, dated January 3, 2002.

"restored lands."[2/]

The Ponca Restoration Act authorizes the acquisition of land for the Tribe under 25 U.S.C. § 983b(c). Pursuant to the Ponca Restoration Act, the Secretary *shall* accept not more than 1,500 acres in Knox or Boyd Counties and *may* accept additional acreage in those counties.

The BIA Regional Office has indicated that no trust property had been acquired in Boyd County for the Tribe and that approximately 141 acres had been acquired in trust in Knox County for the Tribe. Thus, this proposed acquisition will increase the total trust acreage for the Tribe to 144 acres well within the statutory limits for the Tribe.

We can conclude that this three-acre parcel proposed to be taken into trust for the Ponca Tribe is "restored lands" within the meaning of IGRA because the lands at issue are being taken into trust as part of the lands Congress identified in the Restoration Act. Thus, consistent with prior opinions and with Congress's concrete guidance under the Restoration Act, these lands can be considered restored lands.

III. Conclusion

The Ponca Tribe of Nebraska, whose relationship was terminated by Congress in 1962 and restored by Congress in 1990, is a restored tribe within the meaning of the exception in IGRA. Lands within Knox and Boyd Counties in Nebraska are within the geographic area in which Congress has clearly provided for restoration and mandated the Secretary place into trust for the Ponca Tribe pursuant to the Ponca Restoration Act. The land at issue in this trust application is in Knox County and are part of the "restored lands" of a tribe restored to federal recognition within the meaning of IGRA. Therefore, we conclude that this trust acquisition falls within the exception to the prohibition on gaming on lands acquired in trust after the passage of IGRA pursuant to 25 U.S.C. §_ 2719(b)(1)(B)(iii).

2./ In the *Grand Traverse* and *Coos* litigation, the courts found that the interpretation of the restored lands provision which limited restored lands to only those made available in a tribe's Restoration Act to be "unduly narrow" and the courts actually broadened the possible interpretation to include other limited situations when the land is not clearly within Congress' express restoration. The court in *Coos* found that in analyzing the restored lands exception, the Department could look beyond the express terms of the Restoration Acts to determine whether such exception applied. We held in our Auburn II opinion that this broader interpretation was not inconsistent with our previous determinations on restored lands, contained for example in Auburn I, which adhered to the view that lands prescribed within a tribe's Restoration Act qualified as restored lands.