



October 4, 2018

VIA EMAIL AND FIRST CLASS MAIL

Chairman Virgil Moorehead, Sr.  
Big Lagoon Rancheria  
P.O. Box 3060  
Trinidad, CA 95570

**Re: Big Lagoon Rancheria, Indian Lands Opinion – 2 Parcels**

Dear Chairman Moorehead:

This legal opinion is in response to your request for an Indian lands opinion<sup>1</sup> from the Office of the General Counsel (“OGC”) of the National Indian Gaming Commission regarding whether gaming can be legally conducted on the Big Lagoon Rancheria’s reservation<sup>2</sup> under the Indian Gaming Regulatory Act.<sup>3</sup> More specifically, the Tribe asks whether certain tribal lands held in trust, upon which the Tribe intends to conduct gaming, fall within the definition of “Indian Lands” under IGRA.<sup>4</sup>

According to the Tribe, the parcels of land are located within the exterior boundaries of the Big Lagoon Rancheria, which is situated approximately ten miles north of Trinidad in Humboldt County, California. The lands consist of two adjacent parcels (the “parcels”), which together, comprise approximately 20 acres. The original rancheria parcel consists of 9 acres (BIA Tract No. T5081),<sup>5</sup> was purchased for the Tribe by the United States in 1918, and constitutes the Tribe’s reservation. The second parcel is adjacent to the first, consists of 11 acres (BIA Tract No. 5219) and was taken into trust for the Tribe by the United States in 1994.<sup>6</sup> Both parcels are held in trust by the United States for the benefit of the Big Lagoon Rancheria members.

After carefully reviewing the Tribe’s submissions, coupled with our own investigation of the status and location of the lands at issue, it is our view that the parcels are located within the

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<sup>1</sup> Letter from Chairman Virgil Moorehead, Sr. on behalf of the Big Lagoon Rancheria, to Michael Hoenig, General Counsel, NIGC (August 29, 2016) with attachments.

<sup>2</sup> The terms “reservation” and “rancheria” are used interchangeably throughout this opinion. We note that the definition of a “reservation,” found in 25 C.F.R. § 292.2, specifically includes rancherias.

<sup>3</sup> 25 U.S.C. § 2701 et. seq.

<sup>4</sup> *Id.* at § 2703(4); *see also* 25 C.F.R. § 502.12; *see also* 25 C.F.R. § 292.2.

<sup>5</sup> BIA Map of the Big Lagoon Rancheria with parcel numbers.

<sup>6</sup> Grant Deed, Records Office, Humboldt County, California (December 29, 1989); Acceptance of Conveyance, U.S. Dept. of the Interior, Bureau of Indian Affairs, Sacramento Area Office, (June 29, 1994).

exterior boundaries of the Tribe's reservation. Based on this finding, it is our opinion that the parcels are "Indian lands" under IGRA. We also opine that the Tribe has jurisdiction over the land. Therefore, the Tribe may legally conduct gaming on the lands.

The Department of Interior Office of Solicitor has reviewed this legal opinion and concurs.<sup>7</sup>

### Background

To assist with our analysis, the Tribe has provided us with extensive documentation and written materials. The submissions include, but are not limited to, the following: (1) maps of the Tribe's reservation; (2) Indenture and warranty deed for the original Rancheria, including a legal description; (3) Grant deed and legal description for the after-acquired parcel; (4) the Tribe's constitution; (5) a copy of *Big Lagoon Rancheria v. State of California*;<sup>8</sup> (6) a copy of the treaty between the United States and the Tribe;<sup>9</sup> (7) BIA Indian Agent Reports listing Big Lagoon as a non-reservation tribe, dated 1904;<sup>10</sup> (8) letters, with maps, from the U.S. Department of the Interior, Bureau of Indian Affairs ("BIA" or "Department") addressing the status and condition of the Big Lagoon Rancheria; (9) House resolution listing the Big Lagoon Rancheria as a reservation; (10) the California Rancheria Termination Act of 1958, showing that the Big Lagoon Rancheria was not terminated; (11) memo from BIA stating the Big Lagoon Rancheria was never terminated and land remains in trust status; (12) the Tribe's plan of distribution and Federal Register announcement stating the Big Lagoon Rancheria is not terminated; (13) the Hoopa-Yurok Settlement Act of 1988; and (14) a letter from NIGC approving the Tribe's gaming ordinance.<sup>11</sup>

Beginning in 1906, Congress appropriated funds for the acquisition of lands "for the use of the Indians in California now residing on reservations which do not contain land suitable for cultivation, and for Indians who are not now upon reservations..."<sup>12</sup> Parcels acquired with these funds came to be known as rancherias.<sup>13</sup>

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<sup>7</sup> Letter from Eric Shepard, Associate Solicitor of Indian Affairs, Department of Interior Office of the Solicitor to Michael Hoening, General Counsel, NIGC (September 28, 2018).

<sup>8</sup> *Big Lagoon Rancheria v. State of California*, 789 F. 3d 947 (9<sup>th</sup> Cir. 2015).

<sup>9</sup> Treaty with the Pohlik or Lower Klamath, etc. (October 6, 1851) (Unratified by the U.S. Senate)

<sup>10</sup> Robert F. Heizer, *Federal Concern about Conditions of California Indians 1853 to 1913: Eight Documents*, 101 (Robert F. Heizer ed., Ballena Press, 1979).

<sup>11</sup> The Big Lagoon Rancheria Gaming Ordinance was approved by NIGC Chairman Anthony Hope on August 10, 1994.

<sup>12</sup> Act of June 21, 1906, 34 Stat. 325, 333; Act of 1908, 35 Stat. 70, 76 (April 20, 1908); *see also*, Letter from BIA to California Representative John Raker (October 27, 1913) (stating that "the Office was able to buy the tracts that the Indians had occupied for years and wanted for their homes").

<sup>13</sup> *Duncan v. Andrus*, 517 F. Supp. 1, 2 (N.D. Cal. 1977) ("Parcels of land, called rancherias, were purchased under the 1906 Act and under subsequent acts to implement [Indian Agent C.E.] Kelsey's original scheme"); *see also*, *Williams v. Gover*, 490 F.3d 785, 787 (9<sup>th</sup> Cir. 2007) ("Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of the [twentieth] century – a program triggered by an inquiry (in 1905-06) into the landless, homeless, or penurious state of many California Indians"); *see also* BIA

The Big Lagoon Rancheria is a federally recognized Indian tribe established on July 10, 1918<sup>14</sup> when the Secretary purchased a 9-acre parcel of land in trust for James Charley and his family.<sup>15</sup> This parcel has been held in trust continuously since the purchase.<sup>16</sup> The Big Lagoon Rancheria first appeared on a Congressional list of Indian reservations in 1952.<sup>17</sup> Subsequently, it appeared on the list of “Indian Tribal Entities with a Government-to-Government Relationship with the United States” in 1979.<sup>18</sup> The Tribe’s primary land base consists of the 20-acre parcels we are considering here. The parcels are located in an unincorporated area of Humboldt County in Northern California. The Big Lagoon Rancheria is situated approximately 75 miles south of the Oregon-California border and sits to the west of Highway 101, a major north-south, interstate thoroughfare. According to the Tribe’s Constitution, the territory of the Tribe includes “all lands, water and other resources within the exterior boundaries of the Big Lagoon Rancheria.”<sup>19</sup>

Congress passed the California Rancheria Termination Act of 1958 (the “Act”) which authorized termination of federal recognized tribal status of many of the California rancherias.<sup>20</sup> The California Rancheria Act set out a process by which the Secretary of Interior (“Secretary”) could terminate the tribal status and federal recognition of 41 California rancherias and remove the land from trust status by the federal government, but only if the members of the rancheria approved the termination.<sup>21</sup> Big Lagoon Rancheria was not among the 41 rancherias included in this Act.<sup>22</sup>

The Act provided that the Secretary of the Interior consult with the members of the Rancherias, after which time the tribe would prepare a plan for distribution of Rancheria assets to

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Website available at <http://bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index.htm> (accessed April 26, 2017).

<sup>14</sup> *Constitution of the Big Lagoon Rancheria*, approved by tribal members on May 5, 1985 and signed by the Tribal Chairperson, Tribal Secretary and Tribal Vice Chairperson on May 20, 1985.

<sup>15</sup> *Big Lagoon Rancheria v. State of California*, 789 F.3d 947, 950 (9<sup>th</sup> Cir. 2015) (stating that “[i]n 1918, the BIA purchased the nine-acre parcel for James Charley and his family”); *see also*, Letter from BIA to F.G. Ladd, dated June 19, 1918. (stating that the land purchase is to provide “a permanent home for the landless Indians within the locality of the land and, in particular to embrace the improvements of Jim C[h]arley and family, Indians, consisting of a spring near his home, his house and barn, cultivated land, small pasture and burial lot”).

<sup>16</sup> *See*, Letter from BIA to Hoopa Valley School Superintendent, dated October 22, 1921 (showing the 9-acre parcel held in trust status. “This will advise you that owing to the conditions under which that land was purchased, it would require an Act of Congress authorizing such procedure before an exchange could be made...”).

<sup>17</sup> H. Rep. No. 2503, at 689, 1086 & 1140 (December 15, 1952) (including the Big Lagoon Rancheria on an Alphabetical List of Reservations; Indian Areas Classified by Jurisdiction (1951)).

<sup>18</sup> 44 Fed. Reg. 7235 (February 6, 1979); *see also*, *Big Lagoon Rancheria v. State of California*, 789 F.3d 947, 951 (9<sup>th</sup> Cir. 2015).

<sup>19</sup> *Constitution of the Big Lagoon Rancheria*, Art. II(a).

<sup>20</sup> *An Act to provide for the distribution of the land and assets of certain Indian Rancherias in California, and for other purposes* (“California Rancheria Termination Act”), P.L. 85-671, 72 Stat. 619-621 (1958) (amended 1964).

<sup>21</sup> *Id.*; *see also*, S. Rep. No. 1874, at 2 (1958) (discussion of the California Rancheria Termination Act of 1958. The Purpose of the Bill states that the legislation, “as amended, is purely permissive, and does not impose any kind of a program on the 41 rancherias involved unless the individual groups approve the legislation”).

<sup>22</sup> *Id.*

individual Indians, including land distribution.<sup>23</sup> Prior to conveyance of the land, Congress directed the Secretary to satisfy several trust obligations including the survey and valuation of all Rancheria land,<sup>24</sup> the improvement of Indian roads,<sup>25</sup> the installation and/or repair of irrigation and domestic water systems,<sup>26</sup> and the cancellation of all indebtedness to the United States.<sup>27</sup>

On January 3, 1968, a *Plan for Distribution of the Assets of the Big Lagoon Rancheria in Accordance with the Provisions of Public Law 85-671 As Amended by Public Law 88-419* (“Plan”) was approved by the BIA Area Director.<sup>28</sup> This plan, signed and executed by Tribal members on August 8, 1968, allowed for the termination of the Tribe pursuant to the California Rancheria Act.<sup>29</sup> Additionally, the Plan requested that the Secretary remove the land parcels from trust status and convey them in unrestricted fee title to the individual Big Lagoon tribal members.<sup>30</sup>

The Tribe was not required to submit such a plan because the Big Lagoon Rancheria was not among the 41 rancherias listed in the California Rancheria Termination Act.<sup>31</sup> Regardless, the BIA accepted the Big Lagoon Rancheria’s plan and was therefore obligated to satisfy the provisions of the plan within three years of the plan’s approval by the Tribe.<sup>32</sup> The BIA did not fulfill its obligations to the Tribe under the Plan<sup>33</sup> and on November 4, 1977, the Tribe petitioned the federal government to revoke the plan of distribution.<sup>34</sup> Notice of the revocation was accepted by the BIA and published in the Federal Register on August 9, 1979.<sup>35</sup> The Big Lagoon Rancheria has been included on every list of Recognized Indian Tribes published by the BIA since 1979.<sup>36</sup> Because it was never formally terminated and its land never removed from trust status, neither the Tribe nor its members participated in restoration litigation or stipulated settlements that the terminated rancherias did, such as the Tillie Hardwick litigation.<sup>37</sup>

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<sup>23</sup> See, *California Rancheria Termination Act* at Sec. 2(a).

<sup>24</sup> *Id.* at Sec. 3(a).

<sup>25</sup> *Id.* at Sec. 3(b).

<sup>26</sup> *Id.* at Sec. 3(c).

<sup>27</sup> *Id.* at Sec. 3(d).

<sup>28</sup> *Plan for Distribution of the Assets of the Big Lagoon Rancheria in Accordance with the Provisions of Public Law 85-671 as Amended by Public Law 88-41*, signed and executed by tribal members on August 8, 1968; see also, Big Lagoon Rancheria Petition, November 4, 1977..

<sup>29</sup> *Id.* at pg. 4.

<sup>30</sup> *Id.*; see also, *Big Lagoon Rancheria v. State of California*, 789 F.3d 947, 951 (9<sup>th</sup> Cir. 2015).

<sup>31</sup> See, *California Rancheria Termination Act*, P.L. 85-671, 72 Stat. 619-621 (1958) (amended 1964).

<sup>32</sup> *Id.* at Sec. 2(b).

<sup>33</sup> *Big Lagoon Rancheria v. State of California*, 789 F.3d 947, 951 (9<sup>th</sup> Cir. 2015); see also, Memo from BIA Area Director to the Assistant Secretary for Indian Affairs, dated December 9, 1977.

<sup>34</sup> Big Lagoon Rancheria Petition; see also, Memo from BIA Area Director to the Assistant Secretary for Indian Affairs, dated December 9, 1977.

<sup>35</sup> 44 Fed. Reg. 46952 (August 9, 1979).

<sup>36</sup> 44 Fed. Reg. 7235 (February 4, 1979). Between 1979 and 1997, the Tribe was listed as the “Big Lagoon Rancheria of Smith River Indians, California.” Beginning in 1998 at 63 Fed. Reg. 71941 (December 30, 1998), the Tribe has been listed as the “Big Lagoon Rancheria, California.”

<sup>37</sup> *Tillie Hardwick, et al. v. United States of America*, No. 5:79-CV-1710-JF (N.D. Cal 1979).

In 1985, the Tribe formally organized its Tribal government and adopted a written constitution.<sup>38</sup> In an effort determine use and occupancy of tribal lands and resources in Northern California, the federal government passed the Hoopa-Yurok Settlement Act of 1988.<sup>39</sup> This Act allowed Big Lagoon Tribal members, among other tribes, to vote on whether they would like to merge with the Yurok Tribe.<sup>40</sup> On January 30, 1989, the tribal members voted against the merger, thus maintaining the sovereignty of the Big Lagoon Rancheria.<sup>41</sup>

#### Applicable Law

IGRA permits a tribe to “engage in, or license and regulate, gaming on Indian lands within such tribe’s jurisdiction.”<sup>42</sup> IGRA explicitly defines “Indian lands” as follows:

- (A) all lands within the limits of any Indian reservation; and
- (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.<sup>43</sup>

NIGC regulations further clarify the definition of “Indian lands,” providing that:

“Indian lands” means:

- (a) Land within the limits of an Indian reservation; or
- (b) Land over which an Indian tribe exercises governmental power and that is either -
  - (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
  - (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.<sup>44</sup>

Other statutory and regulatory definitions shed light on what constitutes “Indian lands.” In 25 C.F.R. Part 292, the BIA includes in its definition of “reservation” the following:

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<sup>38</sup> *Constitution of the Big Lagoon Rancheria*, Art. II(a).

<sup>39</sup> See, 25 U.S.C. § 1300i, *The Hoopa-Yurok Settlement Act of 1988*, P.L. No. 100-580, 102 Stat. 2924, 2935 (October 31, 1988).

<sup>40</sup> *Id.*; see also, BIA Notice to Rancherias on Merger under Hoopa-Yurok Settlement Act, Big Lagoon Rancheria, Resighini Rancheria and Trinidad Rancheria (1988).

<sup>41</sup> BIA Certification of Results of the Big Lagoon Merger Election which tallied the election results as follows: 0 votes in favor of merging with the Yurok Tribe, 6 votes against merging with the Yurok Tribe, and 0 ballots found spoiled or mutilated (dated January 30, 1989).

<sup>42</sup> 25 U.S.C. § 2710(b)(1).

<sup>43</sup> 25 U.S.C §§ 2703(4).

<sup>44</sup> 25 C.F.R. § 502.12.

...(2) Land of Indian colonies and Rancherias (including Rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;<sup>45</sup>

However, IGRA prohibits gaming on lands acquired into trust after October 17, 1988, unless certain exceptions are met. In the “contiguous to the boundaries exception,” IGRA states that a tribe may game on after-acquired land if:

- (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988....<sup>46</sup>

Regulations implementing the after-acquired provisions of IGRA were promulgated by DOI in 25 C.F.R. part 292. They say,

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

- (a) If the tribe had a reservation on October 17, 1988 the lands must be located within or contiguous to the boundaries of the reservation.<sup>47</sup>

In those regulations, the term “contiguous” is defined as “two parcels of land having a common boundary notwithstanding the existence of non-navigational waters or a public road or right-of-way and includes parcels that touch at a point.”<sup>48</sup>

### Analysis

To determine if the Big Lagoon Rancheria parcels are eligible for gaming under IGRA, it is necessary to examine whether the parcels constitute “Indian lands” as defined by IGRA and NIGC regulations.<sup>49</sup> Because of the IGRA’s restriction against gaming on parcels taken into trust after 1988, we must break our analysis into two parts, one for the 1918 parcel and the other for the parcel taken into trust in 1994. We will look first to whether the 1918 parcel is Indian land eligible for gaming pursuant to IGRA. We will then turn to whether the parcel placed into trust in 1994 qualifies as “Indian lands” under IGRA and, if so, whether any exception to the after-acquired prohibition applies.

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<sup>45</sup> 25 C.F.R. § 292.2.

<sup>46</sup> 25 U.S.C. § 2719(a)(1).

<sup>47</sup> 25 C.F.R. § 292.4.

<sup>48</sup> 25 C.F.R. § 292.2.

<sup>49</sup> 25 U.S.C. § 2703(4)(A); 25 C.F.R. § 502.12.

**I. The 1918 parcel qualifies as “Indian lands” under IGRA and the Tribe has jurisdiction over it**

IGRA requires that the gaming activity be conducted “on Indian lands.”<sup>50</sup> Accordingly, any lands upon which a tribe intends to conduct gaming must first be determined to be *Indian lands* under IGRA.

*A. The 1918 Big Lagoon Rancheria is an Indian reservation*

We first examine whether the 9-acre 1918 Big Lagoon Rancheria is an Indian reservation under the definition of “Indian lands.”<sup>51</sup> Although the term “reservation” is not defined in IGRA, it is defined in the Department regulations interpreting Section 2719 of IGRA. The regulations set out four definitions of “reservation,”<sup>52</sup> one of which defines reservation to include the land of Indian rancherias that was “set aside by the United States for the permanent settlement of the Indians as its homeland.”<sup>53</sup>

In 1918, the BIA purchased a 9-acre parcel with Congressional funds allocated for the purpose of purchasing land for landless Indians of California.<sup>54</sup> The letter states that the land purchase is to provide “a *permanent home* for the landless Indians within the locality of the land....”<sup>55</sup> The Big Lagoon Rancheria was established when the Secretary placed this parcel into trust for the use and benefit of the individual Indians in the vicinity.<sup>56</sup>

Federal case law and long-standing BIA practice confirm that California rancherias, including the Big Lagoon Rancheria, are Indian reservations. In a case involving the Big Lagoon Rancheria specifically, the United States Court of Appeals for the Ninth Circuit described rancherias as “numerous small Indian reservations or communities in California.”<sup>57</sup> Other federal courts have also described California rancherias as reservations, using the same or similar language.<sup>58</sup> Additionally, the Solicitor of the Department of Interior has opined that “for all practical purposes” California rancherias are reservations.<sup>59</sup>

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<sup>50</sup> 25 U.S.C. §§ 2710(a)(1)(2); 2710(d)(1)(A), (C); *see also*, 25 C.F.R. § 501.2.

<sup>51</sup> 25 U.S.C. § 2703(4)(A). If we determine that the Big Lagoon Rancheria falls within IGRA’s definition at 25 USC § 2703(4)(a), then it is not necessary to consider the application of 25 USC § 2703(4)(b).

<sup>52</sup> 25 C.F.R. § 292.2.

<sup>53</sup> 25 C.F.R. § 292.2 (the second of four definitions).

<sup>54</sup> Letter from BIA to F.G. Ladd, dated June 19, 1918.

<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Id.*; *see also*, Grant Deed, dated July 10, 1918, recorded in Book 144 of Deeds, p. 178, Records Office, Humboldt County, California.

<sup>57</sup> *Big Lagoon Rancheria v. California*, 789 F.3d 947, 951 (June 4, 2015) (Citing *Williams v. Gover*, 490 F.3d 785, 787 (9<sup>th</sup> Cir. 2007) (“Rancherias are numerous small Indian reservations or communities in California...”).

<sup>58</sup> *See, Duncan v. United States*, 667 F.2d 36, 38 (U.S. Ct. Cl. 1981) (“Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use ...”); *see also, Duncan v. Andrus*, 517 F.Supp. 1, 2 (N.D. Cal. 1977) (“Parcels of land, called rancherias, were purchased under the 1906 Act...approximately 82 rancherias located primarily in Northern and Central California were purchased for California Indians.”); *Governing Council of Pinoleville Indian Cmty., v. Mendocino County*, 684 F.Supp. 1042, 1043 (N.D. Cal. 1988) (citing *Duncan v. U.S.*,



As discussed in the Background section of this memo, the Big Lagoon Rancheria was not among the 41 tribes included in the California Rancheria Termination Act of 1958.<sup>60</sup> While the tribal members attempted to distribute the assets of the Rancheria, the BIA did not satisfy its obligations under the plan<sup>61</sup> and the Big Lagoon Rancheria continued to be held in trust by the U.S. government, thus remaining a federally recognized tribe.<sup>62</sup>

These facts establish several critical points, which are dispositive of our analysis: (1) the Big Lagoon Rancheria has remained under federal recognition since 1918; (2) the Big Lagoon Rancheria was never lawfully terminated under the California Rancheria Act;<sup>63</sup> (3) since its inception, the Big Lagoon Rancheria has been continuously treated by the United States as any other federally recognized Indian reservation;<sup>64</sup> (4) the Big Lagoon Rancheria has been included on every list of Recognized Indian Tribes published by the BIA since 1979;<sup>65</sup> and (5) the original 9-acre parcel of the Big Lagoon Rancheria was purchased with funds appropriated pursuant to the California Homeless Indian Acts.<sup>66</sup>

Accordingly, it is our opinion that the 1918 Parcel is the Big Lagoon Rancheria's Indian reservation and, therefore, meets the definition of "Indian lands" under IGRA.<sup>67</sup>

*B. Tribe has jurisdiction over its reservation lands*

Before conducting gaming under IGRA, a tribe must satisfy IGRA's requirement that the tribe is exercising jurisdiction over the Indian lands upon which it intends to game. IGRA states that a tribe may engage in class II gaming "on Indian lands within such tribe's jurisdiction" if, among other things, the tribe has an ordinance approved by the NIGC's Chair.<sup>68</sup> The

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667 F.2d36, 38 (U.S. Ct. Cl. 1981) ("Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use...").

<sup>59</sup> Solicitor's Op. M-28958 (April 26, 1939); 1 Op. Sol. On Indian Affairs 891 (discussing rancherias as "owned by the United States and purchased for the use of landless Indians in California with funds appropriated by Congress... These areas have been assigned to and are now occupied by certain designate bands of Indians. They are, for all practical purposes, small reservations... moreover, there can be no question but what the specified areas are "Indian Country").

<sup>60</sup> *California Rancheria Termination Act*, P.L. 85-671, 72 Stat. 619-621 (1958) (amended 1964).

<sup>61</sup> Memo from BIA Superintendent to Assistant Secretary for Indian Affairs, dated December 9, 1977.

<sup>62</sup> *Id.*; see also, Background section of this memo.

<sup>63</sup> *California Rancheria Termination Act*, P.L. 85-671, 72 Stat. 619-621 (1958) (amended 1964).

<sup>64</sup> Memo from BIA Superintendent to Assistant Secretary for Indian Affairs, dated December 9, 1977. (Indicating the BIA has trust obligations to the Big Lagoon Rancheria.)

<sup>65</sup> 44 Fed. Reg. 7235 (February 4, 1979). Between 1979 and 1997, the Tribe was listed as the "Big Lagoon Rancheria of Smith River Indians, California." Beginning in 1998 at 63 Fed. Reg. 71941 (December 30, 1998), the Tribe has been listed as the "Big Lagoon Rancheria, California."

<sup>66</sup> Letter from BIA to F.G. Ladd, dated June 19, 1918. (The letter states that the land purchase is to provide "a permanent home for the landless Indians within the locality of the land...").

<sup>67</sup> 25 U.S.C. § 2703(4)(A).

<sup>68</sup> 25 U.S.C. § 2710(b)(1).



requirements for conducting class III gaming likewise include: “Class III gaming activities shall be lawful on Indian lands only if such activities are (A) authorized by an ordinance or resolution that (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands . . .”<sup>69</sup>

Generally speaking, Indian tribes possess jurisdiction “over both their members and their territory.”<sup>70</sup> A tribe is presumed to have jurisdiction over its own reservation.<sup>71</sup> Further, it is well settled that a tribe retains primary jurisdiction over the land that the tribe inhabits if the land qualifies as “Indian country,” and reservation land is one type of “Indian country.”<sup>72</sup> In addition, the Tribe’s constitution indicates that the Tribe retains and asserts jurisdiction over the Big Lagoon Rancheria trust lands.<sup>73</sup>

Having already opined that the 1918 Parcel is the Big Lagoon Rancheria’s reservation and qualifies as IGRA “Indian Lands,” accordingly we opine the Tribe has jurisdiction over that parcel for purposes of IGRA.

## **II. The 1994 parcel qualifies as “Indian lands” under IGRA**

Now we can turn to the Tribe’s other trusts parcel, the 11 acres taken into trust in 1994. IGRA defines Indian lands to include trust land over which a tribe exercises governmental power.<sup>74</sup> To determine whether the 1994 parcel qualifies as “Indian lands”, we must therefore evaluate: (1) whether title to the parcel is held in trust by the United States for the benefit of the Tribe; and (2) whether the Tribe exercises governmental power over the parcel.<sup>75</sup>

### *A. The 11-acre parcel is held in trust*

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<sup>69</sup> 25 U.S.C. § 2710(d)(1); *see also*, 25 U.S.C. § 2710(d)(3)(A) (“Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities ....”).

<sup>70</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

<sup>71</sup> *See*, NIGC’s Buena Vista Rancheria Indian lands opinion, dated June 30, 2005, p.6 (explaining that, if the gaming is to occur within a tribe’s reservation under IGRA, we can presume that jurisdiction exists for that tribe over its reservation lands).

<sup>72</sup> “Indian country” is defined in 18 U.S.C. § 1151, in relevant part, as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government...”; *see also*, *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, 567 F.3d 1235, 1240 n.5 (10<sup>th</sup> Cir. 2009).

<sup>73</sup> *Constitution of the Big Lagoon Rancheria*, approved on May 5, 1985. (Art. II – “The jurisdiction of the tribe, its general council, business council and tribal courts shall extend to the fullest extent permitted by applicable law to the following: (a)... all lands, water and other resources within the exterior boundaries of the Big Lagoon Rancheria established by Executive Authority of the Secretary of the Interior dated July 10, 1918. (b) All other lands water and resources as may be hereafter acquired by the tribe...under any grant, transfer, purchase, adjudication, treaty, Executive Order, Act of Congress or other acquisition; (c) All persons within any territory under the jurisdiction of the tribe...”).

<sup>74</sup> 25 U.S.C. § 2703(4).

<sup>75</sup> *Id.*

The Department of Interior took the 11-acre parcel into trust for the Tribe On June 29, 1994.<sup>76</sup>

*B. The Tribe exercises governmental power over the 1994 parcel*

For a tribe to conduct gaming under IGRA on trust lands located outside the exterior boundaries of its reservation, those trust lands must be lands over which the tribe exercises governmental power.<sup>77</sup> For a tribe to exercise governmental power over its trust lands, it must first possess jurisdiction over those lands.<sup>78</sup>

*1. Jurisdiction*

Tribes are presumed to have jurisdiction over their members and lands. The United States Supreme Court, in *Merrion v. Jicarilla Apache Tribe*, held that Indian tribes are “invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.”<sup>79</sup> No treaties or statutes applicable here limit the Tribe’s jurisdiction.

As stated earlier, a tribe retains jurisdiction over the land it inhabits if the land qualifies as “Indian country,”<sup>80</sup> and trust land, such as the 1994 parcel, is Indian country.<sup>81</sup> Because neither IGRA nor the NIGC regulations spell out what constitutes a tribe’s jurisdiction over its lands, the NIGC uses the “Indian country” statutory test, codified at 18 U.S.C. § 1151, as guidance when evaluating whether a tribe has jurisdiction over its Indian lands under IGRA.<sup>82</sup>

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<sup>76</sup> Grant Deed, Records Office, Humboldt County, California (December 29, 1989); Acceptance of Conveyance, U.S. Dept. of the Interior, Bureau of Indian Affairs, Sacramento Area Office, (June 29, 1994).

<sup>77</sup> 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12.

<sup>78</sup> *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994)(IGRA requires a threshold showing by tribe that it possesses jurisdiction over the lands to satisfy the Act’s “having jurisdiction” prong); *superseded by statute*, 25 U.S.C. § 1708(b), as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (“In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]”); *see also*, *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

<sup>79</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *see also*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

<sup>80</sup> “Indian country” is defined in 18 U.S.C. § 1151 as: “(a) all land within the limits of any Indian reservation . . .; (b) all dependent Indian communities . . .; and (c) all Indian allotments, the Indian titles to which have not been extinguished.”

<sup>81</sup> *See*, *United States v. Roberts*, 185 F.3d 1125, 1131 (10<sup>th</sup> Cir. 1999) (“‘[r]eservation’ status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151”); *see also*, *Cohen’s Handbook of Federal Indian Law*, § 3.04[2][c], 192-93 (Nell Jessup Newton ed., 2012) (noting that the Supreme Court has held “that tribal trust land is the equivalent of a reservation and thus Indian Country”).

<sup>82</sup> *See*, e.g., *NIGC’s Ponca Tribe of Oklahoma Opinion* (Jan. 25, 2017); *NIGC’s Pinoleville Band of Pomo Indians Opinion* (Sept. 24, 2015) at 11-12; *NIGC’s Quapaw Tribe of Indians of Oklahoma Opinion* (Nov. 21, 2014) at 6;

Accordingly, because the land is held in trust, the Tribe possesses jurisdiction over the 1994 parcel and, therefore, has jurisdiction to exercise governmental power over it, as required by IGRA's Indian lands' definition.

2. *The Tribe exercises governmental power over the 1994 parcel*

Having determined the Tribe has jurisdiction over the 1994 parcel, we now look to find if it does exercise governmental power over the land.<sup>83</sup> A tribe might exercise governmental power over its land in a variety of methods. For this reason, the NIGC has not formulated a uniform definition of "exercise of governmental power," but instead decides whether it is present in each case, based upon all of the circumstances.<sup>84</sup>

Governmental power may involve "the presence of concrete manifestations of ...authority."<sup>85</sup> Examples of governmental power include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs.<sup>86</sup> While a tribe may exercise governmental power over its lands in many different ways, no one particular fact or set of facts is determinative.

The Tribe has provided us with several examples of its exercise of governmental power over the 1994 parcel.<sup>87</sup> Besides adopting a gaming ordinance<sup>88</sup> regulating gaming on the Tribe's "Indian lands" that NIGC Chairman Anthony J. Hope approved on August 10, 1994, the Tribe adopted an ordinance regulating water pollution on its Reservation and trust lands in 2003.<sup>89</sup> The Tribe also adopted an Animal Control Ordinance requiring people to obtain dog and cat licenses for those animals on all lands under the Tribe's jurisdiction.<sup>90</sup>

Based on the above examples, the Tribe clearly exerts governmental power over lands under its jurisdiction, including the 1994 parcel. Accordingly, in our opinion, the trust land, comprising the Parcel, qualifies as Indian lands within the meaning of 25 U.S.C. § 2703(4)(B).

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NIGC's *Table Mountain Rancheria Opinion* (Sept. 6, 2006) at 4-5. All of these opinions are available at: <https://www.nigc.gov/general-counsel/indian-lands-opinions>.

<sup>83</sup> See, 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b)(1); see also, *Narragansett Indian Tribe*, 19 F.3d at 703.

<sup>84</sup> *National Indian Gaming Commission: Definitions under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

<sup>85</sup> *Narragansett Indian Tribe*, 19 F.3d at 701, 703 (First Circuit guidance on finding an exercise of governmental power).

<sup>86</sup> *Id.*

<sup>87</sup> See, Letter from Virgil Moorehead, Sr., Chairman, Big Lagoon Rancheria, to Michael Hoenig, NIGC General Counsel (Aug. 29, 2016) (on file with NIGC).

<sup>88</sup> Big Lagoon Rancheria Resolution: 94-600 passed on August 5, 1994.

<sup>89</sup> Big Lagoon Rancheria Ordinance Prohibiting the Discharge of any Pollutant into the Waters of Reservation Lands, passed on March 18, 2003 (on file with NIGC); see also, Big Lagoon Rancheria Contingency Plan Implementing Emergency Tribal Authority Over Tribal Waters on Tribal Trust Lands, passed March 18, 2003 (on file with NIGC).

<sup>90</sup> Big Lagoon Rancheria Animal Control Ordinance passed on Feb. 15, 2005, §§ 2 & 14 (on file with NIGC).

### **III. The after acquired parcel is contiguous to the original reservation boundaries**

A determination of whether the 1994 parcel qualifies as Indian lands is not the end of the inquiry. IGRA generally prohibits gaming on lands acquired in trust after October 17, 1988, unless one of the statute's exemptions or exceptions apply.<sup>91</sup> A tribe can game on land acquired into trust after 1988 if, for instance, that land is contiguous to the boundaries of the Tribe's reservation.<sup>92</sup> DOI regulations define "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point."<sup>93</sup> The Tribe maintains that the 1994 parcel is contiguous to the exterior boundaries of the Tribe's Reservation, as it existed on October 17, 1988, and, therefore, satisfies the contiguous lands exception.<sup>94</sup>

As discussed at length in this memo, the original Big Lagoon Rancheria consisted of a 9-acre parcel purchased with funds appropriated for California homeless Indians and taken into trust to create the Big Lagoon Rancheria.<sup>95</sup> Completing the first step of our analysis in this lands opinion and thus concluding that the original 9-acre parcel of the Big Lagoon Rancheria constitutes a reservation, we now examine whether the after-acquired parcel qualifies as land that is "contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988," as required by IGRA.<sup>96</sup>

Contiguous to and directly west of the original 9-acre parcel, is an 11-acre parcel initially owned by the Tribe in fee simple.<sup>97</sup> On December 29, 1989, the Tribe transferred ownership of this parcel to the U.S. Government,<sup>98</sup> and it was placed into trust for the Big Lagoon Rancheria on June 29, 1994.<sup>99</sup>

Based upon our review of the maps, legal descriptions of the Parcels, legal descriptions of the Reservation's exterior boundaries, and other materials provided to us by the Tribe, we

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<sup>91</sup> 25 U.S.C. § 2719.

<sup>92</sup> 25 U.S.C. § 2719(a)(1); 25 C.F.R. § 292.4.

<sup>93</sup> 25 C.F.R. § 292.2.

<sup>94</sup> See, Letter from Chairman Virgil Moorehead, Sr. on behalf of the Big Lagoon Rancheria, to Michael Hoenig, General Counsel, NIGC (August 29, 2016) with attachments.

<sup>95</sup> See, Background section of this memo.

<sup>96</sup> 25 U.S.C. § 2719(a)(1).

<sup>97</sup> BIA Map of the Big Lagoon Rancheria with parcel numbers. (Map shows that the original 9-acre parcel (BIA Tract No. T5081) is contiguous to the after-acquired 11-acre parcel (BIA Tract No. T5219). Additionally, the map shows the after-acquired 2-acre parcel (BIA Tract No. T5206) is contiguous to the 11-acre parcel).

<sup>98</sup> Grant Deed, Records Office, Humboldt County, California (December 29, 1989)("GRANT(S) to the UNITED STATES OF AMERICA, in Trust for Big Lagoon Rancheria, a Federally Recognized Indian Rancheria... This conveyance is made under the authority of the Act of January 12, 1983 (P.L. 97-459; 96 Stat. 2515; 25 USC 2202)").

<sup>99</sup> Acceptance of Conveyance, U.S. Dept. of the Interior, Bureau of Indian Affairs, Sacramento Area Office, (June 29, 1994)(U.S. "hereby accepts that grant of real property described in that Grant Deed dated December 29, 1989 from the Big Lagoon Rancher to the United State of America in Trust for the Big Lagoon Rancheria").

determine that the after acquired parcel is "contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988," as required by IGRA.<sup>100</sup>

Conclusion

Based upon the foregoing analysis, including the language of IGRA, the NIGC regulations, case law and other materials, as well as our review of the Tribe's submissions and our own investigation of the status and location of the Parcels, it is my opinion that the Parcels upon which the Tribe proposes to conduct gaming are Indian lands eligible for gaming under IGRA.

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel at a later date. Moreover, this advisory legal opinion is not binding upon the NIGC Chair, who may opt to exercise his or her prosecutorial discretion to disregard the opinion, or the full National Indian Gaming Commission, which is free to disagree with the opinion in any action that comes before it. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court.

If you have any questions, please contact Suzanne Nunn at (202) 632-7013.

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Hoenig".

Michael Hoenig  
General Counsel

cc: Jeffrey Smith, Esq.

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<sup>100</sup> 25 U.S.C. § 2719(a)(1).