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MEMORANDUM

TO: Oregon Legislature Joint Committee on Gaming Regulation

FROM: Craig Dorsay, Siletz Tribal Attorney

SUBJECT: Supplemental Submission of the Confederated Tribes of Siletz Indians

DATE: July 21, 2022

I am the tribal attorney for the Confederated Tribes of Siletz Indians ("Siletz Tribe"). I observed the Committee's Hearing yesterday inviting tribal testimony on tribal gaming operations and testimony. Chair Gelser-Blouin invited supplemental submissions to address some of the issues raised or discussed in the hearing. Because of the 24-hour time deadline to submit such submissions, I will try to keep this memo as short as possible.

One Casino per Tribe Alleged Policy:

This issue was obviously the main area of contention between Oregon's tribes in testimony and answering questions. It is the Siletz Tribe's position that no such policy formally exists; it was created by the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe") to oppose other tribes' gaming proposals and to protect the Grand Ronde Tribe's competitive position as the closest tribal casino to the Portland and Salem markets. The Cow Creek Band of Umpqua Tribe of Indians ("Cow Creek Tribe") adopted this alleged policy as a means of opposing the Coquille Tribe's proposal to locate a Class II gaming operation in Medford. The Oregon Legislature should not get involved in inter-tribal disputes about protecting one tribe's market share vis-a-vis other Oregon tribes. If federal law permits such proposals to be submitted, as it does, and the legal process is followed by the applicant tribes, the Oregon Legislature should remain neutral in any resulting tribal disputes. As Chairman Pigsley so aptly stated during her presentation, the Siletz Tribe has always supported the right of any tribe to pursue economic development including gaming if it is able to justify its proposal under law. Siletz did not oppose Grand Ronde establishing Spirit Mountain Casino between it and Portland, did not oppose the Warm Springs Tribe's proposal for Cascade Locks, and did not oppose the Cowlitz Indian Tribe's proposal to establish ilani Casino north of Vancouver, Washington.

The State of Oregon's alleged one casino per tribe policy is not expressed anywhere in state law or regulation. The sole reference to one casino appears is in the various State-Tribal Class III IGRA Compacts. For example, the Siletz Tribe's current Class III Compact with the

State of Oregon, dated September 15, 1999, states at Section 13.A. "Gaming at Another Location or Facility. The Tribe hereby waives any right it may have under IGRA to negotiate a Compact for Class III gaming at any other location or facility for a period of five (5) years from the effective date of the Compact . . . ."[a] This is not a total prohibition on additional casinos; it is a five year moratorium.[b] Five years have long since passed under the Siletz Compact and that Compact expressly authorizes the Siletz Tribe to negotiate a Compact with the State for an additional location or facility after that period expires. If the State had wanted to permanently restrict the Siletz Tribe to one Casino, it knew how to do so, and did not (although the Siletz Tribe states for the record that it believes such a restriction is not allowable under IGRA).

I want to now briefly address the Grand Ronde Tribe's history of opposing tribal proposals for casinos that would compete with the Grand Ronde Tribe's Spirit Mountain Casino.

1. Off-Reservation Casinos.

Grand Ronde's first strategy when other tribes have proposed new casinos was to assert a policy that tribal casinos should be limited to reservations, and that off-reservation casinos should be prohibited. This Grand Ronde policy is expressed most clearly in a Hearing before the U.S. Senate Indian Affairs Committee on February 28, 2006, "Oversight Hearing on Off-Reservation Gaming; Land into Trust and the Two-Part Determination." Senator John McCain was Chairman of the Committee. Relevant pages of Hearing attached as Exhibit 1. Then (and current) Grand Ronde Chairwoman Cheryle Kennedy testified: "Grand Ronde's opposition to off-reservation gaming stems from our concern that off-reservation casinos weaken public and Government support for Indian gaming." Page 13 of report, Ex. 1, p.3.

This position by Grand Ronde was ironic because Grand Ronde's Spirit Mountain Casino is an off-reservation casino. On October 15, 1993, the Department of the Interior, Assistant Secretary for Indian Affairs Ada Deer, rejected the Grand Ronde Tribe's Compact for a casino at Spirit Mountain because the land where the casino would be located was not part of the Grand Ronde Tribe's Reservation and did not qualify for any of the off-reservation gaming exceptions in Section 20 (25 U.S.C. §2719) of the Indian Gaming Regulatory Act. Letter dated Oct. 15, 1993, from Assistant Secretary – Indian Affairs Ada Deer to Mark Mercier, Grand Ronde Chairman, attached as Ex. 2.

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[a] The third finding of the Siletz Compact states that "the public policy of the State is reflected in the Constitution, statutes and administrative rules of the State." There is no "one casino per trib"e policy expressed in any of these authorities.

[b] This next statement is based on my personal memory. My memory is that the moratorium period was based in part on the State's concern about the financial condition of the Tribe if it tried to expand too quickly. For example, in Section 4.F.2 of the Siletz Compact, the State insisted on an odd formula for the Siletz Tribe adding additional slot machines over time, based on revenue per machine per day, because the State was concerned that the Tribe would over-extend itself by adding more machines than it could sustain, The Siletz Tribe did not share the State's concern about the Tribe's financial acumen, but the State insisted that this provision be included in the Compact.

Siletz was in the same situation as Grand Ronde, regarding the Chinook Winds Casino property. Both tribes had to obtain federal legislation enacted in November 1994 qualifying their selected land parcels as "restored land" pursuant to Section 2719(b)(1)(B)(iii) of IGRA, and making the parcels part of each Tribe's reservation. *See* Memo dated March 7, 1995, from Pacific Northwest Region Office of the Regional Solicitor to Director, Indian Gaming Management Staff, Bureau of Indian Affairs, re: Authority of Siletz Indian Tribe to Conduct Gaming on Property Identified in Compact, attached as Ex. 3. *See id.*, p. 2 (comparing Siletz's situation to Grand Ronde's). *See also* Memo dated Sept. 27, 1993, from Assistant Regional Director Vernon Peterson to Associate Solicitor, Division of Indian Affairs Michael Anderson, attached as Ex. 4. This last Solicitor's memo again categorized Grand Ronde's Spirit Mountain Casino property as off-reservation land that did not qualify for an IGRA exception to the Act's prohibition on gaming on land acquired in trust after October 17, 1988. Ex. 4, pp. 6-7. Only with passage of the legislation in late 1994 did the Grand Ronde Spirit Mountain property become part of Grand Ronde's Reservation. One additional interesting part of this September 27, 1993 Solicitor's memo is that it notes that the State opposed Siletz's off-reservation casino proposal at that time while supporting Grand Ronde's off-reservation gaming proposal for Spirit Mountain Casino. Ex. 4, pp. 10 – 12, and trying to distinguish the two situations, was untenable. *Id.*

2. Position of Oregon Governors on Off-Reservation Tribal Casinos.

A couple of the witnesses today noted the personal position of several Oregon governors on off-reservation additional tribal gaming, although the Siletz Tribe notes that Governor Brown has not expressed this position regarding the Siletz Tribe's Salem Casino proposal. She has told that she will let the legal process set out in IGRA play out and will exercise her authority to concur or not concur under Section 20 of IGRA, 25 U.S.C. §2719(b)(1)(A), once the Secretary of Interior approves the Siletz Tribe's application, according to the public policy of the State.

Governor Kulongoski's position on this issue was not raised in Tribes' testimony. The Siletz Tribe brings to the attention of the Committee the fact that Governor Kulongoski supported the Warm Springs Tribe's proposal for a casino in Cascade Locks. *See* Letter dated April 16, 2009, from Governor Kulongoski to Secretary of Interior Ken Salazar, attached as Ex. 5. *See also* Ex. 1, pp. 8-9 (Testimony of Governor Kulongoski before Senate Indian Affairs Committee: "But what really drove me more than anything is the history of the Warm Springs, the tribe. . . . I was driven more by the effort to give the tribe the ability to have some economic self-sufficiency to replace the lost revenue from their tribal general fund . . . . I thought that this was the best way that they would have the ability to add additional revenue to their general fund that would provide for the social programs on their reservation. . . . Just a whole host of issues that I thought it was in the best interest of the tribe as a sovereign people and to the State of Oregon, to this particular reservation to see that they had the opportunity to be able to provide essential services to them. That is what drove me more than anything else to make the decision I did.").

3. Grand Ronde Tribe's Portland Casino Proposal.

The Grand Ronde Tribe's lobbyist, Justin Martin, told the Committee today in response to the question about whether it was indeed seeking a second casino in the Portland metro area that the Grand Ronde Tribe was preserving its options in case other tribal casinos were successful in

obtaining a second Class III casino. Grand Ronde has been making this statement for decades, and it is not a recent position just in opposition to the Siletz Tribe's Salem Casino proposal. *See* Grand Ronde Chairwoman Cheryle Kennedy's testimony in 2006 before the Senate Indian Affairs Committee:

> The CHAIRMAN (John McCain): Chairwoman Kennedy, you state in your testimony that the Grand Ronde has been historically opposed to off-reservation gaming. Is that true?
> Ms. KENNEDY: That is true.
> The CHAIRMAN: Yet I am told the Grand Ronde has sought an urban casino in or near Portland.
> Ms. KENNEDY: That is true.
> The CHAIRMAN: How do you reconcile your two statements?
> Ms. KENNEDY: That is true, We originally held the on-reservation gaming until the Governor of Oregon made his declaration that he would approve off-reservation gaming. Of course, then as in any business, you have to look at your strategies.

Ex. 1, p. 6 (p. 21 of Report).

In her written testimony submitted to the Committee in 2006, Chairwoman Kennedy stated: "As tribes and others rush to surround urban areas with casinos, Grand Ronde and other tribes will no doubt be forced to reassess their own positions on off-reservation gaming to the ultimate detriment of both tribes and the public at large. It is no secret that off-reservation facilities proposed by other tribes and Warm Springs in Oregon and the Cowlitz-Mohegan effort in Washington, will have a significant impact on the Grand Ronde Tribe and the community in which we operate." Ex. 1, pp. 3-4, pp. 13 to 14 of Report.

Obviously the Cowlitz casino in Washington, ilani Casino, is now a reality, so Grand Ronde's threat to pursue a Portland Casino only if the situation changes is obsolete. Grand Ronde is actively pursuing a second casino in Wood Village as evidenced by the fact that it is reported in its tribal newsletter and that it is regularly on the Wood Village City Council's meeting agenda for discussion.

4. Class II Gaming.

I have two points to make about Class II gaming under IGRA. As I pointed out in my earlier background memo, Class II gaming is subject to tribal and NIGC regulation while Class III gaming is subject to tribal and State regulation under a Compact.

My first point is that the testimony of a few tribes at the July 20 hearing that the one casino per tribe alleged policy only applies to Class III casinos is entirely fabricated because it is the only way to explain the fact that two Oregon tribes have two casinos, not one. Assuming for a second that some governors did make statements about one casino per tribe, they never made any distinction between Class II and Class III. For example, Coquille's Medford casino proposal is for a Class II casino. The letter from Val Hoyle in 2013 opposing Coquille's Medford Casino sought to apply Oregon's alleged one casino per tribe policy to Coquille while acknowledging

that Coquille's proposal was for a Class II casino. If Oregon's alleged one casino per tribe policy only applies to Class III casinos, not Class II, and Class II casinos such as Coos' and Warm Springs' are allowed, then state officials and certain tribes should not have opposed Coquille's Class II Medford casino. This attempted distinction in State policy was fabricated by certain tribes out of whole cloth.

Second, I want to respond to a few of the statements made about the distinction between Class II and Class III slot machines made by some of the witnesses, particularly Coos Chairman Kneaper's statement that Class II machines are just bingo machines. They are not bingo machines; they are slot machines that are indistinguishable in the player's experience from a free-standing Class III slot machine. I won't go into the long history and evolution of Class II gaming and IGRA's allowance of "electronic, computer, or other technological aids" used in connection with bingo. 25 U.S.C. §2703(7)(A). *See id.* §2703(7)(B) ("class II gaming does not include . . . electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."). This law developed primarily in Oklahoma, which completely prohibited slot machines and casino gaming but allowed bingo, so Oklahoma tribes developed Class II slot machines that are indistinguishable from regular slot machines but inside the machine are playing a bingo game. There is more case law on that history than you want to know about.

The player at a class II IGRA Casino does not know or care that their machine is playing a bingo game on its computer chip. The machine plays like a slot machine, awards prizes like a slot machine, and duplicates the Class III slot machine experience. The player is unable to tell that inside the machine it is playing a bingo game, except for a tiny bingo logo in the bottom corner of the computer screen. They ae similar to the failed attempt of the Oregon Racing Commission to authorize historical horse race slot machines, which inside the machines were running old horse races. The players of those machines experienced that they were playing a slot machine, not a horse race, which is why the Oregon Department of Justice concluded they are illegal casino gaming.

One final example proves this point. In Washington, all the Indian tribes operate casinos with slot machines, but what the State of Washington authorized in their IGRA Compacts is in fact Class II gaming machines. The Washington slot machines run pull-tab games inside those machines. Pull tabs are class II gaming under IGRA, 25 U.S.C. §27037(A)(i)(III), but that is the only type of slot machine that the State of Washington authorized the tribes to operate. Inside a Washington tribal casino, several pull-tab games are running at the same time, with one pull-tab game running at scattered machines throughout the casino. The player has no idea that they are really playing a pull-tab game and competing against other slot players playing the same pull-tab game; they experience it as a regular slot machine. But like with class II slot machines in Oregon, technically if one player wins the top pull-tab prize on the first play of the slot machine, no other patron in the casino playing the same pull-tab game on other slot machines can win the same big prize until the next pull-tab game starts. This is distinguishable from a Class III slot machine, where – although unlikely – a player could win the same large prize on consecutive plays of the machine.

Class II slot machines are traditional slot machines and play like slot machines, not bingo games. I encourage Committee members to test this out in their site visits.

5. Lodging taxes.

Although not technically gaming regulation, I wanted to briefly respond to one Committee member's question about whether tribes pay lodging taxes. Federal law provides that Indian land in trust is not subject to state and local taxes. Some tribes choose to voluntarily remit an equivalent amount of those taxes to local governments so the Tribe's gaming operation does not have an adverse financial impact on local governments. The Siletz Tribe has service agreements with Lincoln City and Lincoln County to voluntarily contribute an amount to those governments equivalent to what those properties would otherwise have to pay in property taxes if the properties were not in trust. Siletz also pays for all services such as water and law enforcement provided to its gaming operation.

In addition, the Siletz Tribe has voluntarily chosen to continue paying the lodging tax from Chinook Winds Resort Hotel to the City of Lincoln City because the Siletz Tribe knows what an important part of the City budget that tax is. The Tribe imposes its own 2% tribal lodging tax in addition to the lodging tax it is collecting and remitting to the City, because the Siletz Tribe also has a critical need for additional revenue to fund tribal government. I hope this provides some clarity to the Committee person's question about lodging tax.

Finally, I want to clear up one potential point of confusion in a question asked by a Committee member. Chair Meade of Coquille noted in her presentation that the Coquille Tribe, the Siletz Tribe, and the Confederated Tribes of the Warm Springs Reservation of Oregon are no longer members of the Oregon Tribal Gaming Alliance ("OTGA"), and that OTGA does not speak for or represent those tribes. A Committee member soon after – I can't remember who the member was or who the question was directed at – asked if the Tribe was no longer a member of the Oregon Tribal Gaming Commission.

I think that question mixed up two different tribal organizations, and I want to be clear about the distinction. OTGA was originally created by all nine Oregon federally-recognized tribal governments to address and respond to legal and political gaming related issues of potential concern to the tribes and their gaming operations. Siletz, Warm Springs and Coquille are no longer members of that organization. A separate Oregon tribal organization is the Oregon Association of Indian Gaming Commissioners ("OAIGC"). Shawna Gray who testified yesterday is the current Chair of that organization. OAIGC was formed by all the tribal gaming commissions in the State to address and respond to gaming regulatory concerns that affect tribal gaming commissions. All eight tribes in Oregon with current gaming operations continue to be active members of that organization. I didn't want the Committee to be confused about the different structure of the two organizations.

This concludes the Siletz Tribe's supplemental submission to the Joint Committee on Gaming Regulation. We would be glad to answer any other questions the Committee might have.

S. HRG. 109–298, Pt. 2

OFF-RESERVATION GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON OFF-RESERVATION GAMING: LAND INTO TRUST AND THE TWO-PART DETERMINATION

FEBRUARY 28, 2006
WASHINGTON, DC

PART 2

U.S. GOVERNMENT PRINTING OFFICE

26–326 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

Ex. 1, p. 1

but we are very sensitive to the environment of the area. After all, we have lived there from time immemorial and continue to rely on the fish from the Columbia River.

With our partners, we are dedicated to doing a good and careful job on this project. Preparing the EIS is a very public and expensive process. BIA conducted five public open meetings in four locations last September, and held an additional public comment period in December. A draft EIS is expected this summer and will provide for further public input. The final EIS could be out by this fall, at which time the Cascade Locks application packets should go to Washington for review.

Mr. Chairman, this has been an expensive process to comply with IGRA and land-into-trust requirements. To date, we have spent about $4.2 million. Design has cost $8 million. This has all been our own money. To complete the process to the point of starting construction, we expect to spend an additional $9 million. We have committed these resources in reliance on the current process, and welcomed the fairness provision in section 10 of S. 2078, so projects such as ours can be finished by the rules under which we started.

We believe the current processes for gaming land into trust, and the two-part determination, are very demanding and exacting. Most importantly, the two-part determination will not allow a project to go forward without the support of the Governor and the local community.

Since IGRA's enactment, only three tribes have succeeded. But the existing process could be improved with regulations which we understand Interior may be developing. As we have stressed, we believe reaching agreement with the Governor and local governments first before proceeding with the land-into-trust and two-part process is the best way to proceed.

Mr. Chairman, thank you for hearing our story. We believe we are making a model effort under the current rules. There is no guarantee we will succeed, but Warm Springs and our State and local government partners at Cascade Locks are giving it our best try, and we particularly appreciate your bill's intention to let projects like ours complete the process without changing those rules.

Thank you.

[Prepared statement of Mr. Suppah appears in appendix.]

The CHAIRMAN. Thank you very much, Chairman Suppah.

Chairwoman Kennedy.

STATEMENT OF CHERYLE KENNEDY, CHAIRWOMAN, CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

Ms. KENNEDY. Good morning, Mr. Chairman, members of the committee.

My name is Cheryle Kennedy. I am the chairwoman of the Confederated Tribes of Grand Ronde in Oregon. I am proud to be here today representing our approximate 5,000 members of the Confederated Tribes today.

On a personal note, I just want to say that I am very humbled to be here today, given the fact that I come from a terminated

tribe. Back in the 1950's, policy was made, a decision was made to terminate tribes. There was a whole list. I think everyone is pretty familiar, of all the tribes who were listed on that list. The policy of Congress was to terminate all of tribes and to mainstream them into society.

I was a young child at that time, and the humbling part of it is that I am here today representing the Confederated Tribes of Grand Ronde because if things continued on the path that was there originally, I would not be here. So I am grateful to be here representing my tribe.

Prior to termination, the Confederated Tribes of Grand Ronde had a reservation of about 69,000 acres. All of that was done away with. All that remained after that was our cemetery. Our ancestors were allowed to remain in the graves that they lay at.

Since restoration, which happened in 1983, the Confederated Tribes of Grand Ronde now have approximately 11,000 acres. Most of the acreage is not where we live. I might say that in terms of developing a nation and building a nation, it has been a long, hard road. To serve about 5,000 members, we only have approximately 100 homes.

The Grand Ronde Reservation is small in comparison to other reservations in Oregon, some of which are large and have diversified economies. Our casino is located within the heart of the current and historical Grand Ronde Reservation. We are a treaty tribe. Our tribe has seven treaties. The lands that were ceded on behalf of the Confederated Tribes of Grand Ronde were millions and millions of acres, stretching from the borders of Washington State to California State.

Today, we are here to support your efforts to address the issues of off-reservation gaming. We know that a majority of tribes are against opening IGRA to focus on this, or any other issue. It was a difficult decision for our tribe to make, but after consideration and deliberation, we believe that for the continued success of Indian gaming, these difficult issues must be addressed.

Grand Ronde's opposition to off-reservation gaming stems from our concern that off-reservation casinos weaken public and Government support for Indian gaming. They undermine the purpose of IGRA, which is to promote development of strong reservation economies through on-reservation casinos. It invites disputes among tribes when located in areas where one or more tribe has a significant historical connection.

As the Confederated Tribes of Grand Ronde, we look and engage at what is happening not only with our tribe, but within the State of Oregon. We learn that through termination, when you stand by yourself, oftentimes bad things happen to you as it does. So we look to our neighbors and to our fellow citizens for what they are thinking as well.

So in doing so, we conduct public opinion polls regularly to see how the nature of things are. Oregon's citizens are concerned about the expansion of gaming and fear, as does Grand Ronde, that approval of an off-reservation casino under the two-part determination process will lead to a proliferation of casinos near urban areas.

As tribes and others rush to surround urban areas with casinos, Grand Ronde and other tribes will no doubt be forced to reassess

their own positions on off-reservation gaming to the ultimate detriment of both tribes and the public at large. It is no secret that off-reservation facilities proposed by other tribes and Warm Springs in Oregon and the Cowlitz-Mohegan effort in Washington, will have a significant impact on the Grand Ronde Tribe and the community in which we operate. However, our concerns and Oregonians' concerns, as we have seen through public opinion research, are much larger.

We feel strongly that the continuation of these types of proposals will only continue to tarnish the Indian gaming industry as a whole, and jeopardize all of the wonderful advancements that tribes who are abiding by the rules have been able to make for the benefit of their people and the communities in which they operate.

This legislation and the law need to be about a policy that treats all tribes equally. There should be no loopholes for tribes that happen to have already submitted their application for an off-reservation casino. The law should not benefit a few tribes at the expense of the majority of tribes.

In sum, we are here today in support of eliminating IGRA's two-part determination exception to the prohibition against gaming on lands acquired in trust after October 17, 1988. However, the elimination of this exception should be done without a loophole that allows continued consideration of some two-part determination applications and not others.

I appreciate your time in hearing this testimony and taking it into consideration. We have submitted for your reading the full comments that we are providing. Again, thank you for this opportunity.

[Prepared statement of Ms. Kennedy appears in appendix.]

The CHAIRMAN. Thank you very much. Your complete statement will be made part of the record.

Carol York, Commissioner of Hood River County. Welcome.

STATEMENT OF CAROL YORK, COMMISSIONER, HOOD RIVER COUNTY, OR

Ms. YORK. Thank you, and good morning, Chairman McCain and members of the Senate Committee on Indian Affairs.

My name is Carol York, and I am one of five locally elected County Commissioners in Hood River County, OR. Cascade Locks is in my commission district, and Cascade Locks is located about 50 miles from Portland, our metro center in Oregon.

Hood River County is also the home of Representative Greg Walden, a strong supporter of the Warm Springs proposal. I appear before you today to describe our county's activities regarding a proposed off-reservation casino in our county. I am honored to be here and I thank you for the opportunity to testify.

You have my written testimony, but today I would like to speak about my experience and why there needs to be a method within the Indian Gaming Regulatory Act for commonsense decisions for tribes and local governments working in concert. I have discussed the opportunities, threats, challenges and pitfalls of tribal casinos with county officials throughout Oregon and across the Nation. I have also visited several tribal casinos for research, although I

as well as the substantial scrutiny involved by requiring input from neighboring tribes, local governments, State agencies and the concurrence of the Governor.

Mandatory exceptions avoid the Office of Indian Gaming management, circumventing established guidelines and safeguards developed by that office to address the protections, involvement of affected governments and State agencies, and other nearby Indian tribes. Clearly, there is a need for a more collaborative approach to mandatory land acquisitions like the restored lands exception, especially whenever proposed acquisitions present serious environmental, taxation, jurisdictional and infrastructure problems, or a State or local community has a reasonable or legitimate objection.

Perhaps a special provision can be crafted for mandatory applications mandating that the Secretary of the Interior, upon request by a State or its cities, counties or parishes, come together with the affected parties early in the decision process, that there is a requirement to work out a solution to identified environmental, taxation, jurisdictional and infrastructure problems. As an incentive to working cooperatively, a fast track process could be offered greatly reducing the workload of the BIA officials, the need of the tribe to request ad hoc legislation, and most importantly eliminating local opposition and tribal gaming backlash.

We would rather the committee eliminate the mandatory aspects of the exceptions and require that all after-acquired lands go through the two-part determination and gubernatorial concurrence. Gubernatorial concurrence, judiciously used, solves land use problems such as casino development in sensitive environmental locations, or placement of a casino adjacent to public parklands, or social concerns over the health and public welfare that result from casino placements near homes, churches and schools.

Moreover, the elimination of the two-part determination creates reverse incentives, encouraging gaming investors to rewrite tribal histories to meet the exceptions in section 20 of IGRA, as we have and continue to witness in California.

Stand Up For California sincerely appreciates the opportunity to comment on off-reservation gaming and urges only a moderate modification to IGRA so not to upset this delicate balance between tribal, State and Federal levels of government.

Thank you.

[Prepared statement of Ms. Schmit appears in appendix.]

The CHAIRMAN. Thank you very much, Ms. Schmit.

Chairman Suppah, the Grand Ronde Tribe has testified that the Warm Springs Tribe proposed off-reservation would severely impact their on-reservation casino. How do you respond to that?

Mr. SUPPAH. I guess, Mr. Chairman, the simplest way is if you compare, I guess, competition at other places, maybe a good example may be the town of Phoenix, to where you have maybe 9 to 11 casinos and maybe by 4 or 5 different tribes, and all of them make it because I guess you could equate that to if you built a shopping center, you don't just put one store in there in order to attract the customers. You put a whole bunch of different, a variety of stores in there so that you have a better market.

I think that the indirect response would be along the lines of the market is far from saturated in our area, and the competition can only be healthy.

The CHAIRMAN. There is criticism, Mr. Chairman, that this casino would be located in a scenic area that has certain pristine qualities, that there are neither the roads nor infrastructure to handle the kind of traffic that patrons of a casino this size would entail. How do you respond to all of that, particularly the impact on what people claim, I think with validity, is one of the most beautiful parts of the State of Oregon?

Mr. SUPPAH. Mr. Chairman, I sincerely believe that the Confederated Tribes of Warm Springs would in no way ever jeopardize the environmental or the beauty of the Columbia River Gorge. That is our aboriginal home, and we still live there. I guess the best response that I could give to you today is that Warm Springs has been very proactive in putting together its gaming compact.

The EIS will ferret out all of the issues and concerns, and they will be grouped. These issues that you talk about are among those.

So I think that the draft EIS will be out this summer and the final EIS later on this year. So I think that it has been a very open and public process. I think that the tribes have worked vigilantly to respond to any and all of the questions.

The CHAIRMAN. Chairwoman Kennedy, you state in your testimony that the Grand Ronde has been historically opposed to off-reservation gaming. Is that true?

Ms. KENNEDY. That is true.

The CHAIRMAN. Yet I am told the Grand Ronde has sought an urban casino in or near Portland.

Ms. KENNEDY. That is true.

The CHAIRMAN. How do you reconcile your two statements?

Ms. KENNEDY. That is true. We originally held the on-reservation gaming until the Governor of Oregon made his declaration that he would approve off-reservation gaming. Of course, then as in any business, you have to look at your strategies.

The CHAIRMAN. I don't disagree that you have to look at your strategies, but if you say you have been historically opposed to off-reservation gaming, and then you sought a casino that was off-reservation, I do not know how you reconcile those two positions.

Ms. KENNEDY. Well, again we did, after the Governor said that, we have since re-thought that and stick with our original declaration. Of course, when rules change mid-stream, you have to move to protect your investment for your people. In our original testimony, we have invested over $150 million into our Spirit Mountain Casino to keep it very prestigious, to make sure that all of the attractions are there to generate the revenue that we have. It is our only source of revenue that we have. It is our only source of revenue. It is the engine behind which supports all of our tribal government services.

The CHAIRMAN. I understand all those things. I understand all that. Thank you very much.

Ms. KENNEDY. Thank you.

The CHAIRMAN. Commissioner York, you indicate there has been a lot of local discussion of the project. Many local government officials support it. Was there ever a town hall meeting?

Ms. YORK. Yes; in Hood River and in Cascade Locks, more than one in each city.

The CHAIRMAN. And how was the attendance?

Ms. YORK. Attendance was quite full at both of them. In Hood River, there is extreme opposition, particularly to the Hood River site, where the trust land is. In Cascade Locks, all of the town halls and all of the surveys have shown approximately 67 percent or more in favor, and in the last Port election, the Port Commissioner race between a pro-casino candidate and an anti-casino candidate was won by over 79 percent for the pro-casino candidate.

The CHAIRMAN. Mr. Lang, you say that you have been shut out of the NEPA process, but it appears you did participate in the scoping session and weighed in during the process. How would you suggest the process be changed so you are not shut out?

Mr. LANG. As far as being shut out in the process, that is in the two-part determination in particular. We feel that the 10-mile radius circle is something that may work in the Eastern United States, but as you well know, in the West communities are much more disperse. You may have to drive 10 miles to get a gallon of milk.

The CHAIRMAN. My question was, how were you shut out of the process if you were in the scoping and in the NEPA process?

Mr. LANG. Well, within the NEPA process, there was no true hearing. In the scoping meetings that were held, there were a lot of——

The CHAIRMAN. Did you attend those meetings that were scoping?

Mr. LANG. I absolutely did, but I——

The CHAIRMAN. Then I don't think you were shut out, Mr. Lang. Go ahead, please.

In other words, how the process should be improved, in your view.

Mr. LANG. In the NEPA process, how it could be improved is actually hold scoping hearings where the public can speak and participate in them; to have it so that it is not run by the consultants and the tribes. Having the attorneys for the tribe responding and answering questions directed at the BIA does not particularly help the public understand the BIA's role. That would certainly be an improvement.

Also, there were many requests for a scoping hearing near or on the Warm Springs Reservation. None was ever held. To have a hearing on or near the reservation allows tribal members to weigh in on this very important proposal. Petitions circulating now I have heard have 400 opponents, tribal members signed this petition opposed to an off-reservation casino in the gorge. So certainly holding hearings in other communities, in affected communities particularly near the reservation, would be a definite improvement in the process.

The CHAIRMAN. Thank you very much, Mr. Lang. If there are additional ways that you think that the process can be improved to increase participation I would appreciate it if you would submit it for the record. I thank you for your involvement.

Mr. LANG. Thank you very much.

The CHAIRMAN. Ms. Schmit, do you think the process for allowing gaming on initial reservations and restored lands should include gubernatorial concurrence?

Ms. SCHMIT. Definitely.

The CHAIRMAN. Do you think the legislature should play a role?

Ms. SCHMIT. Well, in California, our legislature is a bit predisposed at the moment. They are influenced significantly by campaign contributions from tribal governments. So it is very hard for a Governor to negotiate a compact with the tribe, and then have that compact ratified. We have two of those right now that are ready to be ratified and one of the tribes is now going to sue the State.

The legislature has put the State in a very difficult situation. These are tribes that have established reservations and they are very large tribes in very rural areas of the State. So I am not sure if the legislature needs to do anything more than an up or down vote.

The CHAIRMAN. I am told that the Governor of Oregon is here. Is that correct? Governor, would you mind joining us? We would be very honored to hear from you on this issue, if you would like to come up here and share your views with us. We would appreciate it. If you would like, we would be pleased if you would like to come up.

It is good to see you again, Governor, and thank you for honoring us with your presence. We would certainly for the record like to hear any views or any information you could provide us that could help us with this issue. Thank you, Governor.

STATEMENT OF TED KULONGOSKI, GOVERNOR, STATE OF OREGON

Mr. KULONGOSKI. Thank you, Senator.

Senator Smith, Congressman Wu, if I could, from a Governor's perspective, and I want you to understand how I see this. I am not a fan of gambling. If I were to try to come up with a way to give the tribes economic self-sufficiency, I am not sure I would have chosen this route, but this was what was given to us.

We have nine federally recognized tribes in the State. The Warm Springs are the largest land-based tribe in Oregon, with about a 620,000-acre reservation out in Eastern Oregon. They had a casino on a resort area called Kah-nee-tah. I was the attorney general for the State when that was put in out there. The tribe made their decision.

I want you to know that from my experience at that time, I knew that the issue of gaming was very controversial with the tribe, within the tribal membership itself. They took a vote of whether they wanted to even have the casino out at the resort, at Kah-nee-tah. They did.

When I received the request for them to sit down for another site, I talked to the tribe about other areas other than the Hood River site, which is the tribal land that they have, of which you have heard testimony on. There is a community outside of the reservation called Madras. They looked at that site.

I remember talking to them and my staff talking to them about another site on the highway down from, and Senator Smith and

Congressman Wu know, from Timberline Lodge, where the reservation starts, out on that highway. They did studies of that and found that the traffic flow was not sufficient economically to support the investment that they would have to make in it.

They came to me. I did not want the casino in Hood River. I did not think that was an appropriate site. There was an industrial land site in the community of Cascade Locks. It is a difficult area economically for the citizens in that area.

But what really drove me more than anything is the history of the Warm Springs, the tribe. It is a confederation of three tribes. They have some very serious problems. Their children go to school off-reservation. They have a very large dropout from that school, maybe somewhere between 70 percent and 80 percent.

I was driven more by the effort to give the tribe the ability to have some economic self-sufficiency to replace the lost revenue from their tribal general fund, which was primarily off of timber. They are no different than the Federal Government or the State government or the individual timber owners, that we have over-cut. They are now trying to rebuild.

I thought that this was the best way that they would have the ability to add additional revenue to their general fund that would provide for the social programs on their reservation. I know they want to have a school on the reservation to keep their kids there, and actually make a better effort to keep them, to get them to graduate.

Just a whole host of issues that I thought it was in the best interest of the tribe as a sovereign people and to the State of Oregon, to this particular reservation to see that they had the opportunity to be able to provide essential services to them. That is what drove me more than anything else to make the decision I did.

The CHAIRMAN. Well, Governor, we are very glad you came by. We appreciate your input.

Mr. KULONGOSKI. Thank you, Senator.

The CHAIRMAN. We appreciate your outstanding leadership of the State of Oregon. I know that, different from members of Congress, sometimes you have to make very tough decisions and take responsibility for it.

Mr. KULONGOSKI. I am where I am at, Senator. [Laughter.]

The CHAIRMAN. Thank you, Governor. And you are welcome to stay for the rest of the hearing.

Mr. KULONGOSKI. I am going to sit right in the back and watch.

The CHAIRMAN. You are welcome to remain where you are if you would like. Thank you, Governor.

Mr. KULONGOSKI. Thank you, sir.

The CHAIRMAN. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman. Governor, welcome.

We really need the wisdom of Solomon on this one, Mr. Chairman. These are two great tribes in Oregon against one another, especially the Warm Springs and the Grand Ronde. To followup on your question to Cheryle Kennedy, Cheryle, isn't it, and this is just a flat-out question, if the Warm Springs proposal is denied, will you drop any pursuit of a casino in and around Portland?

Ms. KENNEDY. We certainly will. Again, it was triggered by Mr. Kulongoski's decision to declare that off-reservation was fair game.

Senator SMITH. Ron Suppah, you have heard the expression, we understand the economic need and the advantageousness of the site at Cascade Locks. We understand the tribal needs. You have heard Mr. Lang and others speak to the environmental concerns in this beautiful area of our State. The environmental impact statement and study that will be made, what special efforts will you make to protect the environment in Cascade Locks?

Mr. SUPPAH. Senator Smith, thank you for being here today. We appreciate your presence.

I believe, as we have worked through this process, Senator, beginning when we started negotiating with the Governor, all of these things were kind of like included in the discussions all the way through. Then we started meeting with the locals, again we had several meetings with the communities of Cascade Locks and Hood River and Stevenson, and we discussed these things at that time, too.

But I guess if you maybe take a look at our gaming compact, you will find that as we have built and structured our gaming compact for approval and concurrence by the Governor, all of these things are included in there, including the issue of the increased traffic and the impact on the air.

I think that we intend to work not only with Oregon, but with Washington's Department of Transportation, and there is a regional planning group that already exists. If we work things out, then the alternatives to individual cars versus some sort of mass transport, or whether that is buses, you know, different alternatives to where you can maybe park and go to the casino. I think that we are only beginning to take, we are in the initial phases of that planning.

Senator SMITH. Ron, if eventually you are not successful at the Cascade Locks site, will you pursue, then, your rights in Hood River?

Mr. SUPPAH. Yes; we would have to because in the Whalen report, which did the feasibility and economic study on six different sites——

Senator SMITH. The site that the Governor spoke of earlier, from Timberline Lodge toward, I guess, the Bend area——

Mr. SUPPAH. If you are familiar with Highway 26——

Senator SMITH. I am. There is a lot of development in Bend. Is the traffic sufficient now that the study would come out differently as to the economics?

Mr. SUPPAH. No; we don't believe it would. I think that with the feasibility study that we have accomplished, a site on Highway 26 would not contribute anything more than the existing Kah-nee-tah site.

Senator SMITH. The reason I am struggling, Mr. Chairman, is polling has been mentioned. There is no question that my State is overwhelmingly opposed to a casino along the Columbia River. But at the same time, my State wishes no ill toward the Warm Springs. They would like them to be successful. Finding an answer to this is extremely difficult.

Carol, isn't it a fact that the town halls you had in Cascade Locks favored the casino, and as I think you indicated in Hood River, they were overwhelmingly opposed to a casino there.

Ex. 1, p. 10

Ms. YORK. Yes; that is correct, Senator Smith. I think the position that we are in, as the local government that is there for both sites, is that the tribe has trust land in Hood River, buildable for a casino, but in nearly everyone's mind, an inappropriate location for the casino, which is why we have worked so hard to develop an alternative location in Cascade Locks, to try to be proactive and create something that will work for both the tribes and for our county and the region and the State and the Nation, since it is a National Scenic Area.

Senator SMITH. Well, the interests of the State of Oregon is they really do not want off-reservation gambling. That is just a fact. I do not think that is going to change. The difficulty is that the site that they could do it on, you don't want. The site that they are trying to do it on, Oregon opposes.

I think, Mr. Chairman, this is the great dilemma we have is to craft this legislation in a way that is fair to these newly recognized tribes, but also understand the sensitivities of the environment, the sensitivities of the people. The Governor is in a very tough spot. I wish both these tribes well, and I do not have an easy answer to this. It ultimately should be allowed to run its legal course, and it will be what it will be. But this is a case for Solomon.

The CHAIRMAN. Thank you very much.

Congressman Wu, would you like to say anything?

Mr. WU. Thank you very much, Mr. Chairman.

Chairman Suppah, you were good enough to list out some numbers. I believe you mentioned that over $4 million has been spent by the Warm Springs Tribes in this effort; $8 million for some other efforts; and $9 million to take this process to completion. Could you describe those numbers for us again, exactly what they are, just once again for my recollection?

Mr. SUPPAH. Congressman Wu, good morning. Just generally, all of those numbers, Chairman McCain, are listed in our written testimony. We would be willing to provide a copy to Mr. Wu. But just generally speaking, we have been working on this site for about seven years, and to date the tribe has spent approximately $10 million.

Mr. WU. What were the $4 million, $8 million, and $9 million numbers that you cited earlier?

Mr. SUPPAH. The $4 million would be basically the moneys that we have spent to date just to kind of set up for the eventual approval with the Governor and the State of Oregon, whether that was buying chips such as the 175 acres that we purchased in and around the Hood River site, investment in legal fees, investment in design and conceptual work.

The $8 million is pretty much what we have spent to date on the EIS process; and the $9 million would be kind of like looking further on down the road to where if our project is approved, then we would anticipate that to finish up the environmental impact statement, et cetera, and also hire an official design company to formally say this is what you are going to have. We are anticipating spending around $9 million more.

So we have a really high investment, not only in time, but tribal moneys. But we feel like the investment risk is worth, I guess, the outcome that we are looking toward.

Mr. WU. Yes, Mr. Chairman; so by your own numbers and my arithmetic, I am looking at a $21-million figure when this is all said and done, if it is ever done. I also wanted to go back, when this proposal was first brought up in 1998, if the alternative site had been picked on Highway 26, you might have been able to get a casino built, say, by 2000 or 2001.

So if we count up 5 years of lost revenues from full operation, let's say that you made $2 million a year at the Cascade Locks site, and $1 million a year on the Highway 26 site, this is a $21-million plus $5 million lost revenue adds up to $26 million. It would probably take you 40 years with the Cascade Locks site to make up the revenue that the tribe has lost by choosing to fight in the Columbia River Gorge, rather than building on Highway 26.

The reason why I am going through this numerical exercise is that in many respects, I view the tribe as an equal victim as the Columbia River Gorge because the tribe has been paying a lot of people fees that it would not otherwise have to pay if it had chosen a site on-reservation on Highway 26. It will take you decades, it will take the tribe decades to make that revenue up. I just feel very, very badly that the tribe is victimized in the same way that the gorge might potentially be victimized if the casino is every built.

Mr. SUPPAH. Congressman Wu, I disagree with your math, because if we looked at the Whalen report and we looked at the investment that my tribe would have to make in building a casino on the reservation, and the time for amortization to pay for that back, would ultimately just would not pencil out to, I guess if we put it in the simplest terms, avoidance of deficit budgeting, and stabilizing our financial situation and building toward self-sufficiency.

And the options and alternatives that we had explored, the one that is the best that would stabilize our future for many generations is the Cascade Locks site, and that is why we are aggressively pursuing trying to get this project approved.

The CHAIRMAN. Thank you very much.

Thank you very much, Congressman Wu.

I thank the witnesses for being here. The overall issue of this two-part determination has been submerged a little bit because of this issue, but this is I think an example of the kind of challenges we face with this process. The witnesses have been very helpful today. I know you have all come a long way to be here. I thank you for your attendance today. This has been very helpful to the committee. Thank you very much.

This hearing is adjourned.

[Whereupon, at 11:20 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT 15 1993

Honorable Mark Mercier
Chairman, The Confederated Tribes of the
Grand Ronde Community of Oregon
P.O. Box 38
Grand Ronde, Oregon 97347

Dear Chairman Mercier:

We have completed our review of the Tribal-State Compact for Regulation of Class III Gaming between the Confederated Tribes of the Grande Ronde Community of Oregon (Tribe) and the State of Oregon (State), executed on August 21, 1993. The Compact provides that the gaming facility will be located on trust land known as the "Forestry Site" subject to a determination by the Secretary of the Interior that the Forestry Site land comes within the restoration exception set forth in 25 U.S.C. § 2719 (b)(1)(B)(iii). We have determined that it does not come within the restoration exception. Therefore, the compact is hereby disapproved.

Federal relations with the Grand Ronde Tribe were terminated by Federal statute. In 1983, the Tribe was restored to federal recognition, 25 U.S.C. § 713 (a) (Restoration Act). The Act did not establish any reservation or land base but merely required the development of a reservation plan. 25 U.S.C. § 713 (f). It further required that the reservation must be established by an act of Congress. Id. The reservation plan was prepared and submitted to Congress. It called for 17,000 plus acres to be included in the reservation. As a result, in September 1988, Congress passed Pub. L. 100-425, 102 Stat. 1594 (Reservation Act), which established a reservation out of 10,000 plus acres of publicly owned timber lands. Not included in the reservation was the Forestry Site which is designated by the Tribal-State gaming compact as the gaming site. The Forestry Site was acquired after 1988 and taken into trust in 1990.

The Indian Gaming Regulatory Act (IGRA) generally prohibits gaming on off-reservation lands acquired in trust after passage of the Act, 25 U.S.C. § 2719, with certain exceptions. Subsection (b)(1)(B)(iii) of Section 2719 establishes an exception which authorizes gaming on lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." There is no legislative history to shed any light on the meaning of this exception.

In reviewing the Tribe's Restoration Act and Reservation Act, however, we conclude that Congress' restoration of lands is limited to those identified in the Reservation Act. In passing the Restoration Act, Congress considered and adopted a comprehensive plan to govern the restoration of the Grand Ronde Tribe. In doing so, Congress called for the restoration of the Tribe's reservation by a specific act of Congress after the submission of a reservation plan. In adopting the Reservation Act, which specifically identified 10,000 plus acres and rejected the reservation plan which would have included over 17,000 acres, Congress determined what lands to restore to the Tribe. Conversely, Congress also decided what lands not to restore to the Tribe. The Forestry Site is included in this latter category. Therefore, the Forestry Site is not part of those lands taken into trust as part of the restoration of lands for the Tribe. Consequently, gaming cannot be conducted on those lands under the restoration exception in IGRA.

This conclusion, of course, does not affect the trust status of the Forestry Site. This site was acquired pursuant to 25 U.S.C. § 465. Nothing in the Restoration Act or Reservation Act preclude a trust acquisition under other Departmental authorities. Nor is the Tribe precluded from seeking the concurrence of the governor under 25 U.S.C. § 2719(b)(1)(A) to use the land for gaming.

We regret that our decision could not be more favorable at this time.

Sincerely,

for W. D. Bobby

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosure

Identical letter sent to: Honorable Barbara Roberts
Governor of Oregon
State Capitol
Salem, Oregon 97301

cc: Portland Area Director
Siletz Agency Superintendent
Portland Regional Solicitor
National Indian Gaming Commission

bcc: Secy Surname, Secy RF(2), 101-A, Bureau RF, SOL-DIA,
BIA Surname, Chron, Hold
BIA:HManuel:trw:10/15/93 wp:a:grandron.ltr

Ex. 2, p. 2

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N. E. Multnomah Street, Suite 607
Portland, Oregon 97232

MAR 6 -, 1995

MEMORANDUM

BIA PORTLAND AREA DIRECTOR
RECEIVED
MAR 7 1995

TO: Director, Indian Gaming Management Staff
Bureau of Indian Affairs

FROM: Office of the Regional Solicitor

SUBJECT: Authority of Siletz Indian Tribe to Conduct Gaming on Property Identified in Compact

You have requested our opinion whether the Confederated Tribes of Siletz Indians of Oregon (Tribe) is authorized to game pursuant to the Indian Gaming Regulatory Act (IGRA) on parcels of land, recently acquired in trust for its benefit, located in Lincoln City, Oregon. This question arises because the Tribe has presented for Secretarial approval a compact it has entered into with the State of Oregon which allows for gaming on the property. Based on the analysis outlined below, we conclude that gaming is authorized on the property.

As you are aware, Section 20 of the IGRA imposes restrictions on the ability of tribes to conduct IGRA gaming on property acquired after the enactment of IGRA. See 25 U.S.C. § 2719. Unless the property is located within or contiguous to the boundaries of a reservation existing when IGRA was enacted, the acquisition must fall within one of a number of specified exceptions. See 25 U.S.C. § 2719(b). The property identified in the Siletz compact is not located within, nor contiguous to, a reservation in existence when IGRA was enacted. However, we conclude that this property falls within the exception in § 2719(b)(1)(B)(iii), which provides that IGRA may be conducted on property if the "lands are taken into trust as part of . . . (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."

The Siletz Tribe was restored to federal recognition by Public Law No. 95-195, 91 Stat. 1415, codified at 25 U.S.C. §§ 711-711f (Siletz Restoration Act). Section 7 of the Restoration Act called for the preparation of a plan concerning the establishment of a reservation. 25 U.S.C. § 711e. Following the submission of that plan to it, Congress established a reservation for the Tribe in Public Law No. 96-340, 94 Stat. 1072 (Reservation Act). An amendment to the Reservation Act was enacted last fall. Public Law No. 103-435, 108 Stat. 4566. The amendment directs the Secretary to acquire additional property in trust for the Tribe, and declares that such property "shall be deemed to be a restoration of land pursuant to section 7 of the Siletz Restoration Act."

Ex. 3, p. 1

Because these parcels were acquired pursuant to an explicit interpretation by Congress that their acquisition was a restoration of land to the restored Siletz Tribe, we conclude that these parcels were "taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition." Consequently, the Tribe is authorized to conduct IGRA gaming on them notwithstanding their acquisition after the enactment of IGRA.

This conclusion is consistent with your treatment of the lands identified for gaming in the approved compact between Oregon and the Confederated Tribes of the Grand Ronde Community of Oregon, and the approved compact between Oregon and the Coquille Indian Tribe. The Grand Ronde Tribe was also restored to Federal recognition. 25 U.S.C. §§ 711-711f. The property identified in the Grand Ronde compact was acquired after the enactment of IGRA, and initially was not listed as a part of the lands to be acquired by the Secretary in the Tribe's reservation act. Public Law No. 100-425, 102 Stat. 1594, as amended. However, last summer Congress amended the reservation act to include the gaming site. Public Law No. 103-263, 108 Stat. 707. Thereafter, the Assistant Secretary approved the compact. 59 Fed. Reg. 31500 (June 17, 1994). With respect to the Coquille Tribe, its restoration act directed the Secretary to accept the first 1,000 acres of land conveyed to the United States in trust for the Tribe, and consider it a part of the Tribe's reservation. 25 U.S.C. § 715c. The property identified in its compact was a part of the first 1,000 acres, and the Assistant Secretary approved its compact. 60 Fed. Reg. 9258 (February 16, 1995).

If you have any questions please contact me at (503) 231-2138.

For the Regional Solicitor

Colleen Kelley

Colleen Kelley
Attorney
Pacific Northwest Region

cc: Associate Solicitor, Division of Indian Affairs
Assistant Area Director, Program Services

H.R. E+T

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N. E. Multnomah Street, Suite 607
Portland, Oregon 97232

MEMORANDUM

TO: Michael Anderson, Associate Solicitor
Division of Indian Affairs

FROM: Vernon Peterson, Assistant Regional Solicitor
Pacific Northwest Region

SUBJECT: Scope of "Restoration Exception" in IGRA

The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe") has entered into a gaming compact with the State of Oregon dated August 21, 1993. The compact provides that the gaming will be conducted on trust land acquired in March 1990. Acknowledging the Indian Gaming Regulatory Act's (IGRA) general restriction against gaming on lands acquired after October 17, 1988 ("newly acquired lands"), the compact also provides that the State's participation in the compact is contingent upon the Secretary determining that the trust land falls within the "restoration exception" set forth in Section 20(b)(1)(B)(iii) of IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). See Section 12.F. of the compact.[1]

In addition, we have been informed by counsel for the Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe") that the Tribe believes its Salem property would also fall within the restoration exception. This property is the parcel that the Tribe attempted to have the United States acquire in trust last year.[2] At the request of your staff, this memorandum will

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[1] IGRA does not explicitly require that the Secretary make such a determination, cf. Section 20(b)(1)(A), but IGRA does require Secretarial approval of the compact, and one of the few grounds for disapproving a compact is that it violates any provision of IGRA. Therefore, if the Secretary approves this compact, he has impliedly found that gaming on the newly acquired land fits within the restoration exception to Section 20, as specified in the compact.

[2] Last year the Tribe requested the acquisition pursuant to another exception in IGRA. In December 1992 the Assistant Secretary informed the Tribe that he would not acquire the property in trust status for gaming purposes. The decision was based on Governor Roberts' refusal to concur in the Secretary's determination that the acquisition would be in the best interest of the Siletz Tribe and would not be detrimental to the surrounding community. Following the Assistant Secretary's

address our views of the scope of the restoration exception and arguments about whether either of the properties identified by these tribes falls within it.[3]

We begin by noting that IGRA imposes limits on where tribes are permitted to conduct IGRA gaming. First, the gaming must occur on "Indian lands" as defined in Section 4, 25 U.S.C. § 2703(4). Second, Section 20 establishes a general requirement that the Indian lands must have been acquired prior to October 17, 1988, the day IGRA became law. However, Section 20 also sets forth numerous exceptions to this requirement.

The broadest exception is for trust land within or contiguous to a tribe's reservation as it existed when IGRA was enacted. Section 20(a)(1), 25 U.S.C. § 2719(a)(1). A second general exception is for trust land whose acquisition meets the gubernatorial concurrence requirement of Section 20(b)(1)(A), 25 U.S.C. § 2719(b)(1)(A).[4]

The remaining exceptions are more focused. If a tribe had no reservation when IGRA was enacted, it may game on any trust lands it can acquire within the area encompassed by its "last recognized reservation within the State or States within which [it] is presently located." 25 U.S.C. § 2719(a)(2)(B).[5] In addition, if the lands are acquired as part of a settlement of a land claim, or are the initial reservation of an Indian tribe acknowledged by the Federal acknowledgment process, the tribe may conduct IGRA gaming on them. 25 U.S.C. § 2719(b)(1)(B)(i) & (ii). Finally, lands taken into trust "as part of the restoration of lands for an Indian tribe that is restored to Federal recognition" may be used for IGRA gaming. 25 U.S.C. § 2719(b)(1)(B)(iii). It is this last exception that the tribes

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decision, the Tribe challenged the constitutionality of this exception in Confederated Tribes of Siletz Indians of Oregon v. United States, No. 92-1621-JU (D. Or.). The lawsuit is still pending.

[3] We understand that the Coquille Indian Tribe may also be planning to rely on IGRA's restoration exception for the acquisition of property for a gaming facility. However, Coquille's counsel declined to submit the Tribe's views, and no application for a trust acquisition for gaming has been made to the Bureau. Therefore, we cannot directly address the application of this exception to any Coquille property.

[4] This is the exception unsuccessfully relied upon by the Siletz Tribe last year for the Salem property.

[5] This exception does not apply to lands located in Oklahoma which are treated separately in 25 U.S.C. § 2719(a)(2)(A).

conclude applies to their proposed gaming facilities.

There is no legislative history explaining the intent behind the restoration exception. We speculate that this exception, like those for tribes without reservations, acknowledged tribes, and for land claim settlements, was an attempt to ensure that the opportunities provided by IGRA were available to all tribes. One of the purposes of IGRA was to provide a statutory basis for a form of tribal economic development. 25 U.S.C. § 2702(1). Without exceptions tailored for their circumstances, tribes without reservations, acknowledged tribes, and restored tribes would be unlikely to have much if any land upon which to operate a gaming facility.

For example, if a tribe did not have any reservation when IGRA was enacted, it could never meet the test of within or contiguous to its reservation. Thus, those tribes are allowed to use land acquired after IGRA so long as it is within the "last recognized reservation" within the State where the tribe is currently located. Acknowledged tribes likely never had a recognized reservation and so are allowed to use land within their "initial reservation." Land acquired as part of a settlement of a land claim can also be used, presumably because the land is a form of compensation to the tribe for what had been wrongfully taken in the past. These exceptions are all similar in that they allow post-IGRA acquisitions of property which will act as the equitable equivalent to a pre-IGRA reservation.

We presume Congress included an exception specifically for restored tribes for the same purpose. An exception just for restored tribes was needed because some restored tribes would not necessarily fit within any of the other exceptions. For example, to have included restored tribes within acknowledged tribes may in certain circumstances have created too large an exception to Section 20. Restored tribes may have had "initial" reservations from treaties in the 19th century upon which Congress may not have wanted to allow IGRA gaming after the passage of years.[6] Alternatively, while some restored tribes might have fit within the exception in subsection (a) for tribes without a reservation when IGRA was enacted,[7] other restored tribes without previous

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[6] If the Siletz Tribe could conduct gaming on newly acquired land within its "initial reservation", that might have been interpreted to encompass 120 miles of the western portion of Oregon from the Coast Range to the ocean, the vast majority of which was taken from the Tribe long before termination.

[7] The Klamath Tribe's first trust acquisition after restoration came after the enactment of IGRA. Thus, it arguably can conduct IGRA gaming on any newly acquired property within the boundaries of its reservation at the time of termination.

reservations would not have been able to have their land acquisitions fall within that exception.[1] Thus, we speculate that restored tribes were given a specific exception to provide them some parity with tribes which had not been forced to experience termination, and the attendant loss of a tribal land base.

Although we can easily speculate on the intent behind the restoration exception, it is difficult to determine what scope Congress intended in the exception. Last recognized reservation, initial reservation, and land claim settlement lands are usually easy to identify. But because of the vast differences in the way Congress addressed the land issue for restored tribes, it is difficult to decide what land Congress intended to have fit within this exception.

In 1977 the Siletz Tribe became the first Oregon tribe to be restored to recognition. 25 U.S.C. § 711a(a). Rather than provide a land base for the Tribe in the restoration act itself, Congress instructed the Secretary to prepare a plan for the reservation, which would be established by Congress later. 25 U.S.C. § 711e. The plan called for the acquisition of timberlands to generate revenue and of the former agency offices for tribal governmental offices. It also identified a need for other land for housing and economic development. Following the submission of the plan to Congress, in 1980 Congress established a reservation out of publicly owned timberlands. Pub. L. 96-340, 94 Stat. 1072 ("reservation act"). The reservation act also provided that the former agency offices to be transferred by the City of Siletz to the United States in trust for the Tribe would be part of the reservation. No further property has been provided by Congress for the Tribe, although the Tribe has purchased additional land which has been acquired in trust by the Secretary under 25 U.S.C. § 465.

The Grand Ronde Tribe was restored to federal recognition in 1983. 25 U.S.C. § 713b(a). Similar to Siletz, the restoration act did not establish any reservation or land base, but merely required the development of a reservation plan. 25 U.S.C. § 713f. Pursuant to the act, Congress was presented with a reservation plan which called for the acquisition of timber lands to provide revenue to the Tribe, and other lands for housing, business enterprises, and community facilities. Congress responded in September of 1988 with Public Law 100-425, 102 Stat. 1594 ("reservation act"), which established a reservation out of scattered parcels of publicly owned timber lands. The act did not provide other lands, although the Tribe has subsequently

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[1] The Coquille Tribe had no reservation when IGRA was enacted (it was not restored until 1989), but it also had no "last recognized reservation" within which to acquire land.

purchased additional land which has been acquired in trust by the Secretary under 25 U.S.C. § 465.

Other examples of restoration legislation for tribes in Oregon include 25 U.S.C. §§ 566d (providing that Secretary shall accept into trust for the Klamath Tribe as its reservation any property conveyed to him), 714e (providing a reservation for the Coos, Lower Umpqua, and Siuslaw Indians out of three particularly described parcels of land), and 715c (providing that the first 1,000 acres acquired by the Coquille Tribe in Coos and Curry Counties shall be accepted into trust for the Tribe as its reservation). The restoration act for the Cow Creek Band of Umpqua Tribe makes no reference to any reservation or land acquisitions. 25 U.S.C. §§ 712-712d. Acquisition acts in other states include 25 U.S.C. § 903d (providing that Secretary shall accept in trust as a reservation for the Menominee Tribe property located within Menominee County, Wisconsin) and 25 U.S.C. § 983b (providing in addition to reservation plan that Secretary shall accept in trust for the Ponca Tribe not more than 1,500 acres of land located in Knox or Boyd Counties, Nebraska).

These diverse acts demonstrate that there is no single method by which Congress provided for the restoration of lands for a restored tribe. Thus it is not clear what Congress intended to except from Section 20's restriction against newly-acquired lands. The most generous reading of these words encompasses <u>any</u> land which the Secretary decides to take into trust for a restored tribe. This interpretation is supported by reasoning that all lands acquired by a restored tribe are related to the restoration of lands to that tribe because all acquisitions can only occur due to the tribe's restoration by Congress. Under this interpretation, of course, both tribes' parcels would qualify for the exception. However, this interpretation grants restored tribes a much broader exception to Section 20's prohibition--<u>no</u> restrictions as to geographical location--than even tribes without reservations or acknowledged tribes are provided.

Another interpretation of the IGRA language is that only lands either identified by Congress in a tribe's restoration act or affirmatively provided by Congress through a specific restoration process qualify for the restoration exception. This interpretation is comparable to the "initial reservation" exception for acknowledged tribes and is compatible with the concept of being "a part of" the act of restoring the tribe to recognition. Under this interpretation the outcome for the Siletz and Grand Ronde Tribes is more questionable. Both tribes had land restored to them by an affirmative act of Congress. Although these reservation acts were not the same legislation by which the Tribes were restored to recognition, the reservation acts were clearly contemplated and directed as part of the original conception of the restoration acts. This land,

therefore, should clearly qualify under the restoration exception. However, both reservations were established prior to IGRA and would not be considered newly-acquired lands. Instead, both Tribes are seeking to have other property, not identified in the reservation acts but purchased subsequently, considered to fall within the exception.

Counsel for the Grand Ronde Tribe argues that the site identified in the compact with the State, currently used for forestry management purposes, also fits within the restoration exception for two reasons. First, it is located within the boundaries of the former Grand Ronde Reservation and thus the property fits the definition of "restoration" of lands because the Tribe formerly owned the property. Second, the Tribe was reimbursed with federal funds for the cost of the property's acquisition. The reimbursement is important, counsel argues, because it demonstrates a connection to the reservation act and Congressional intent. After the reservation act the Tribe testified before Congress that it needed assets to manage the timber lands conveyed in the reservation act because the BIA lacked the resources to do so. By means of a 638 grant the Tribe received money to not only pay for the previously purchased property upon which its forestry management operation was housed, but also money to purchase equipment to manage the timberlands provided by the reservation act. Congressional intent that the 638 grant monies from BIA's forestry account be used for these purposes is demonstrated by a letter from Congressman AuCoin to the BIA Area Director (copy attached). Counsel also argues that the reservation plan required by the restoration act indicated a need for both timber lands and other property for governmental and economic development plans. Thus, the subsequent 638 grant which allowed the Tribe to recoup its costs for the acquisition of further land also should be read as evidence of Congress's intent that the Tribe acquire property beyond that specifically provided for in the reservation act.

In our mind, this connection is less clear than property provided for in legislation itself.[9] Here, Congressional intent must be inferred by the connection between what the reservation plan desired, what lands were actually provided in the reservation

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[9] For example, the Coquille restoration act provides that "the Secretary shall accept any real property located in Coos and Curry Counties not to exceed one thousand acres for the benefit of the Tribe . . . [and] the land transferred . . . shall be part of its reservation." 25 U.S.C. § 715c(a), (b). While not identifying any specific parcels, this does demonstrate a clear directive by Congress, as part of the initial restoration process, that up to 1,000 acres of land will be acquired for the Tribe.

act, and a subsequent decision to pay for the acquisition of further property. Thus, the acquisition of the gaming property is a more tenuous connection to the restoration action of Congress than the property provided by the reservation act.

Like Grand Ronde, the parcel under consideration by the Siletz Tribe is not a part of the property provided by Congress in its reservation act. Nor is it located within the boundaries of any former Siletz Reservation. Counsel for Siletz has not made any argument that the Salem property was acquired, or the Tribe reimbursed for its acquisition, with federal funds. Rather, counsel argues that it fits within the exception because, given the canons of construction to be applied to legislation for the benefit of Indians, the property's location within the Tribe's service area and aboriginal territory is sufficient to make it "lands restored to a tribe". He argues that nothing in IGRA suggests that the exception should be narrowly construed, and that a purpose of IGRA, promoting gaming as an economic development tool, is best fulfilled by broadly construing the exception.

Relying on an aboriginal relationship to the property is tricky, however, given the history of Indians in Oregon. While there was an historical band known as the Siletz Indians, it was located along the northern coast of Oregon. The current Tribe is a successor entity to that created by all of the Indians located on the Siletz Reservation. What eventually became known as the Siletz Reservation began its existence as the Coast Reservation in 1855. At formation it extended 120 miles along the coast of Oregon and inland to the peak of the Coast Range. In 1865 it was divided into two reservations, with the northern one called the Siletz Reservation. It was further diminished by approximately one-half in 1875, and was subsequently allotted in 1892. The Indians which were located on the Siletz Reservation came from over most of western Oregon. Thus, it is likely that descendants of native people who lived in the Salem area now are members of the Siletz Tribe. Complicating the matter, however, is the fact that the Grand Ronde Reservation was also populated with Indians located there from over much of western Oregon. Thus, descendants of the native people from the Salem area will also be members of the Grand Ronde Tribe. Therefore, basing an interpretation of the restoration exception on a finding that the Salem property falls within the aboriginal land of the Siletz Tribe may generate a contest between the western Oregon tribes over this factual basis.[10]

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[10] In connection with the Siletz Tribe's request to have the Salem property acquired in trust last year, the Tribe submitted a document substantiating its assertion that the current Siletz Tribe has connections to "tribes and bands whose traditional homelands were in the mid-Willamette Valley." See Tab 7 of the

In addition, there is some question about whether Congress would have intended mere aboriginal ties to be sufficient to overcome the restrictions generally imposed by Section 20. For example, for those tribes without a reservation at enactment of IGRA, they could not acquire land within aboriginal territory or any former reservation, only the last recognized reservation within the State where they are currently located. This suggests Congress intended some limits in time for making an equitable claim to the land. Counsel for Siletz rightly argues, however, that if Congress had wanted to limit acquisitions for restored tribes to newly-acquired lands within the former reservation it could have used such language to do so.[11]

Counsel's suggestion that this land should qualify for the restoration exception because it falls within the service area of the Siletz Tribe is also troublesome. The concept of "service area" is only tangentially related to any intent of Congress to create a reservation or land base for the tribe. The service area concept was used because it was understood that many tribal members had been forced by termination to move away from the traditional location of the tribe. In addition, of course, there was no reservation at restoration. Therefore, if members of restored tribes were required to live "on or near their reservation" in order to receive BIA services, see 25 C.F.R. § 20.20(a), none would have qualified. It was thought to be more equitable to allow members to live off-reservation so long as they lived within an area where a significant number of members still lived. This is not necessarily the same area within which Congress would have expected tribal land acquisition or economic development to occur upon restoration. Also, as a practical matter, many tribes in western Oregon have overlapping service areas. Marion County, where the Salem property is located, is within both the Siletz and Grand Ronde service areas. Indeed, Portland is located within the Siletz Tribe's service area.

One other circumstance should be discussed. Both the Siletz and Grand Ronde restoration acts not only directed the Secretary to prepare a reservation plan, but identified provisions to be included within those plans. See 25 U.S.C. §§ 711e(d), 713f(c). In both cases one of the provisions is that the Secretary shall

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application. However, this document also confirms that members of the Grand Ronde Tribe also descend from Indians traditionally living in the Salem area.

[11] Inferring such a limitation in the restoration exception would provide one way to distinguish between the Grand Ronde and Siletz property. However, requiring that the land be within the boundaries of the former reservation would hinder tribes like Coquille which arguably never had a reservation, and raises an issue as to which former reservation was intended.

not accept any real property in trust for the benefit of the tribe or it members which is not located within Lincoln (for Siletz) and Polk, Yamhill, or Tillamook (for Grand Ronde) Counties. 25 U.S.C. §§ 711e(d)(3), 713f(c)(3). Somewhat incredibly, neither plan contains any provision limiting trust acquisitions to these counties. However, the particular parcels identified in the plans and the land Congress provided to the tribes in the reservation acts meet these restrictions.

Counsel for both tribes have suggested that these geographical restrictions apply only to the reservation to be created by congressional act.[12] On the other hand, these restrictions might also be read as expressing Congress's understanding as to the general geographical area within which the restored tribes were to constitute a presence as a governmental entity. But while it may be tempting to rely on these restrictions to establish a bright line test for determining what lands fit within IGRA's restoration exception, doing so requires one first to interpret the restoration act as limiting all acquisitions to those counties and then transfer that intent into IGRA. In addition to a questionable legal basis, it creates a serious practical problem.

IGRA itself does not limit its restoration exception to land within certain counties. Therefore, to find such a restriction in IGRA requires one to import it from another statute. But it would only be reasonable to import such a restriction if the other statute had established a comprehensive restriction on all acquisitions of land, including ones for gaming. Although the restoration acts do set requirements for the reservation plans, we question whether Congress intended an absolute prohibition against any acquisitions outside these counties. The language in these restoration acts differs from both earlier and later restoration acts which more explicitly limit acquisitions and do not just set forth provisions for inclusion in plans. See 25 U.S.C. §§ 715c(a) (Coquille), 903d (Menominee), 983b(c) (Ponca).

This interpretation of the restoration act would also be inconsistent with the Department's recent position on the Siletz Tribe's Salem property. As you recall, when the Assistant Secretary-Indian Affairs declined to acquire the property for gaming purposes, he informed the Tribe to resubmit its application for trust acquisition for other than gaming purposes. To now decide that such an acquisition is prohibited by the

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[12] A brief memorandum from the Regional Solicitor, dated November 1, 1978, agreed with this interpretation. A copy of that memorandum is attached. Interestingly, all land subsequently acquired in trust on behalf of the two tribes and their members is located within these counties. However, the Salem property is not within Lincoln County.

restoration act would be problematic, to say the least. In addition, neither tribe would support such an absolute limit on acquisitions for any purpose. Thus, we do not believe an interpretation of IGRA's restoration exception to limit the land to that located within the respective counties would be defensible.

The State of Oregon has provided us with its views on the restoration exception (attached). While we could agree with some of what the State concludes, a significant portion of its discussion is premised on an unreasonable analysis of Section 20. First, the State interprets Section 20's exceptions as organized according to different classes of tribes, rather than classes of land. There is no basis for this conclusion. The language of Section 20 is not written in terms of types of tribes, but types of land.

Furthermore, under the State's analysis of Section 20 tribes which were restored prior to the enactment of IGRA may not rely on the restoration exception. This conclusion is based on the State's incorrect assumption that all restoration acts provide for a reservation for the restored tribe. Thus, it reasons, tribes restored prior to IGRA could rely on the within or contiguous to a reservation provision in Section 20 (a)(1). As a factual matter, this assumption is incorrect, see Cow Creek restoration act, 25 U.S.C. § 712-712d. But even more troubling is the lack of legal basis for such an interpretation. There is no language in IGRA which suggests that the exceptions set forth in subsection (b) have any time limits upon them. Certainly, the State could not reasonably argue that only post-IGRA acknowledged tribes may game on their initial reservations.

Moreover, the State's analysis is shown to be flawed when it attempts to fit the Grande Ronde situation within its interpretation of IGRA. The State acknowledges that both the Grand Ronde and Siletz Tribes were restored prior to IGRA. Thus, under its interpretation, neither tribe should be allowed to rely on the restored lands exception and must limit its gaming to its reservation lands, lands subject to the gubernatorial concurrence, or some other exception. Grand Ronde, of course, is not planning to game on or contiguous to the land provided by its reservation act, and has not proceeded under the gubernatorial concurrence exception. The State gets around this factual dilemma by asserting that the Grand Ronde property could fit under either of two other exceptions--(1) the reservation at time of IGRA (subsection (a)(1)) or (2) no reservation at time of IGRA (subsection (a)(2)(B)).[13] Neither theory is supportable.

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[13] How this conclusion works with the language of the compact is unclear to us. The State entered into the compact dependent on the Secretary's determination that the land fits within the

Moreover, the facts relied upon by the State apply almost as well to the Siletz Tribe as they do for the Grand Ronde Tribe.

The State's basis for both these theories is its conclusion that the gaming property is such an integral part of the Grand Ronde Reservation that it should be considered to have been a part of the reservation at the time of IGRA, or its importance meant that no reservation existed until it was acquired in trust (18 months after IGRA). The State cites the reservation plan and Section 2 of the reservation act for its conclusion about the importance of the gaming property. But while both documents mention the need for and possibility of further additions to the reservation, neither identify the gaming property or indicate a definite decision to include it as a part of the reservation. Further, it strains credibility to argue that the Grand Ronde Reservation did not exist until 18 months after the reservation act was passed. Indeed the AuCoin letter and 638 grant describing the acquisition of the gaming property indicated it was to be used to manage the forestry program on "its newly established reservation." Lastly, the exact language in the Grand Ronde reservation act relied upon by the State also appears in Section 4 of the Siletz reservation act, and the Siletz reservation plan also called for more land to be added to the reservation. The State's interpretation is unreasonable and it fails to adequately distinguish between the Grand Ronde and Siletz circumstances.

Although the State attempts to support its decision to enter into a compact for gaming on the Grand Ronde's property with an "interpretation" of IGRA, we direct your attention to the next to the last paragraph for an insight into what we suggest may be the prime motivating factor for the State's position. In challenging the Siletz Tribe's suggestion that the Salem property's location within its aboriginal territory makes it qualify for the restoration exception, the State argues

> [s]uch an interpretation would enable location of an Indian Class III gaming facility in the middle of densely populated urban communities, and effectively eliminate the requirements in IGRA that such a proposal be reviewed by the Secretary and the governor not only for the proposal's benefit to the tribe, but also to determine whether there would be any detriment to the local community.

By this statement the State appears to believe that one goal of IGRA was to keep Indian Class III gaming out of "densely populated urban communities". IGRA, of course, has no such goal, and suggesting that it does smacks of a result oriented

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restoration exception, yet its letter to us suggests that the land does not qualify based on that exception but on some other provision of Section 20.

interpretation. In addition, there are many situations--absent the application of the restored lands exception--wherein urban Indian gaming may occur without a governor's concurrence. The State need only look north and see that Washington's Governor would have no ability to prevent class III gaming in an urban environment on the Tulalip, Muckleshoot, or Puyallup Reservations, among others. To suggest that an outcome such as that violates IGRA is ridiculous. Indeed, the State's position seems justified only as a means to prevent the Siletz Tribe from gaming on its Salem property.

In conclusion, in our opinion the most defensible interpretation of the restoration exception in IGRA would be that the newly-acquired land be specifically provided for in a restored tribe's restoration act, or its acquisition anticipated by Congress through a special restoration process. Under this interpretation we question whether either the Grand Ronde or the Siletz properties would fit. It might also be defensible (though less so) to argue broadly that all lands obtained by a restored tribe fit the exception. However, we cannot identify any defensible position in which a distinction can be made between the Grand Ronde and Siletz properties.

However, the State of Oregon has entered into a compact with the Grand Ronde Tribe and is seemingly willing to conclude that the Grand Ronde property may be used for gaming even if it does not fall within the exception (even though the specific terms of the compact require DOI to conclude the property fits the restoration exception). Further, we anticipate that the Secretary does not want to prevent the Grand Ronde Tribe from pursuing its gaming project if the State is willing to enter into a compact. Even though we do not believe that the property fits within the most legally defensible interpretation of the restoration exception, another solution would be for the Tribe to seek gubernatorial concurrence pursuant to that exception. This solution is not without risks however. Although it appears that the State supports the Grand Ronde Tribe's proposal, requiring the Governor to affirmatively (and publicly) concur in a determination that it is not detrimental to the surrounding community may be more difficult, particularly because it will focus attention on what the State believed was detrimental about the Siletz proposal and how it differs from the Grand Ronde's.

If you wish to discuss this issue with us or have any questions please call me or Colleen Kelley of my staff. After you have reviewed this issue with the Assistant Secretary's office, we would be happy to assist in drafting a decision document.

Attachments

THEODORE R. KULONGOSKI
GOVERNOR

April 16, 2009

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Salazar:

I am writing to memorialize our April 16, 2009 conversation regarding the Confederated Tribes of the Warm Springs Indian Reservation's proposal to develop an off-reservation casino in Cascade Locks, Oregon, which now is pending before you. I write to convey my support for the project under the terms I negotiated in my gaming compact with the Tribe. Generally speaking, I am not in favor of off-reservation gaming; however, this project presents unique circumstances, and in no way sets a precedent for future off-reservation gaming in Oregon. I spent a great deal of resources evaluating the Cascade Locks proposal and negotiating a gaming compact, which includes numerous agreements between the State and the Tribe most significantly, a land exchange, substantial tribal investment in transportation and community infrastructure and environmental mitigation.

What makes this proposal so unique is that the Cascade Locks site is a far more appropriate location for development of a casino and resort than the Tribe's originally planned site outside Hood River, Oregon. The Tribe is the beneficial owner of trust land where they planned to develop a casino. The trust land and surrounding parcels the Tribe owns in fee are sensitive forest lands that cross the Columbia River Historic Highway near the Mark O. Hatfield Trailhead. The City of Cascade Locks, a depressed, former timber town 17 miles west of Hood River, asked the Tribe to consider developing the casino in an empty industrial park within their urban growth boundary. I took this opportunity to negotiate for protection of the Hood River forest lands as part of a gaming compact.

The Tribe agreed to grant a conservation easement over their Hood River trust land and to give title to the fee lands in the area to the State, thereby forever protecting the site from development, all consistent with the Columbia Gorge Scenic Act. The Tribe's proposal to develop a resort facility in Cascade Locks must be viewed in the context of the protections for the Hood River lands that were negotiated in the compacting process. Essentially, the Tribe agreed to "swap" gaming rights that the Tribe claims for its Hood River lands for new rights at

Ex. 5, P. 1

Cascade Locks. The support of the local governments was critical to my decision to negotiate and execute a compact to allow gaming in Cascade Locks.

Overall, based on information currently available and based on the agreements contained in the compact, I believe that the Tribe's Cascade Locks proposal is in the best interests of the entire Columbia River Gorge, the local community, and the Tribe, and not detrimental to the environment of the Gorge.

I am happy to discuss this project in greater detail. Thank you for your consideration.

Sincerely,

THEODORE R. KULONGOSKI
Governor

TRK:ksmh
c: Oregon Congressional Delegation
Dan DeSimone, Oregon Federal Affairs Director