

OFFICE OF THE GOVERNOR

May 1, 2006

Via Facsimile (202) 632-7066 and U.S. Mail

Ms. Andrea Lord, Staff Attorney
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, D.C. 20005

Re: Opposition to Ione Band of Miwok Indians' Request for Restored Lands Determination

Dear Ms. Lord:

I am responding to your letter requesting the State's assistance in determining whether certain land of the Ione Band of Miwok Indians (Ione Band or Tribe) constitutes restored lands of an Indian tribe restored to federal recognition pursuant to Title 25 United States Code section 2719(b)(1)(B)(iii) and National Indian Gaming Commission (NIGC) regulations. The Ione Band had requested an opinion from the NIGC on whether land in and near the City of Plymouth in Amador County, California, would meet the requirements of that exception to the Indian Gaming Regulatory Act's (IGRA) general prohibition of gaming on lands acquired into trust after October 17, 1988. Thank you for extending the State's time to comment until May 1, 2006.¹

I. Background

In 1915, Special Indian Agent John J. Terrell conducted, with the Tribe's assistance, a census identifying 101 Ione Band Indians living in Ione and the surrounding vicinities of Jackson and Richey. (Exh. A, 1915 Census; Exh. B, Feb. 10, 1916, letter from Special Indian Agent to Mrs. Lena Oliver.) The census does not indicate the presence of any Ione Band Indians living in

¹ The State is currently awaiting responses from various federal agencies to requests for records under the Freedom of Information Act (5 U.S.C. § 552 et seq.) that are relevant to this analysis. The State reserves the right to submit supplemental comments or supporting material as additional information becomes available.



Ms. Andrea Lord, Staff Attorney
May 1, 2006
Page 2

or near Plymouth, even though it had been established as an active mining town since the 1850s. Ten years earlier, Special Indian Agent C.E. Kelsey identified a family of four mixed-blood Indians living in Plymouth, but there is no indication the family belonged to the Ione Band. (Exh. C, 1905-1906 Census of Non-reservation California Indians.)

In 1915, Terrell negotiated the purchase of a 40-acre parcel of land near Ione for the Tribe. (Exh. D, May 11, 1915, letter from John J. Terrell to Commissioner of Indian Affairs; Exh. E, Nov. 1, 1915, letter from John J. Terrell to Commissioner of Indian Affairs.) The Department of the Interior approved the purchase the following year. (Exh. F.)

In February 1992, the Bureau of Indian Affairs (BIA), Branch of Acknowledgement and Research (BAR) prepared an exhaustive memorandum regarding Ione's land history and federal acknowledgement issues. (Exh. G, Feb. 14, 1992, memorandum from BAR Acting Chief to Director, Office of Tribal Services (BAR Memo).) The memorandum concluded the federal government's attempted Ione land purchase was "distinct from many, if not most, land acquisitions for so-called 'homeless' California Indians during the 1916 era in that the Bureau was attempting to purchase the village in which the majority of the Ione Band actually resided rather than a tract to which a scattered people might be moved." (BAR Memo at p. 2; see *id.* at p. 10.) The BAR further concluded the "Ione Band was clearly described in 1915 by the Special Agent who recommended the land purchase as [sic] an Indian group of 101 members, under a designated leader, based in a historic village containing a sweatlodge and burial ground." (*Id.* at p. 2; see also Exh. D, Terrell's May 11, 1915, letter to Commissioner of Indian Affairs (indicating Tribe erected a "large 'Sweat-House'" on the property); Exh. E, Terrell's Nov. 1, 1915, letter to Commissioner of Indian Affairs ("the proposed purchase embraces the ancient Village of their and their ancestors' home as far back as they have a history").) Terrell also noted the Indians had extensive improvements on the property, and of all the Indians he had visited, the Tribe had "stronger claims to their ancient village than any others," such that it "would be a most serious difficulty to remove these Indians elsewhere" (BAR Memo at p. 9; see also Exh. D, Terrell's May 11, 1915, letter to Commissioner of Indian Affairs (describing 40-acre parcel as the Tribe's "old home spot around which cluster so many sacred memories to this remnant band," and land contained "extensive improvements"); Exh. H, Terrell's Jul. 31, 1917, letter to Commissioner of Indian Affairs (describing 40-acre parcel as the Tribe's "ancient village home").) The BAR also discovered a 1913 map of California Indians, "which identified Ione as an Indian rancheria (meaning merely a settlement or village site rather than the legal designation now given certain Bureau trust lands)." (BAR Memo at p. 9.)

Although the Department of the Interior approved the Ione land purchase in 1916, numerous title encumbrances precluded its completion. In the early 1970s, individual Tribe members filed an action in state court to quiet title to the 40-acre tract. On October 31, 1972, the state court entered judgment, which vested twelve individuals "and other members of the Ione Band of Indians" with fee simple title to the property. (Exh. I, Judgment, *Villa v. Moffatt*,

Amador County Superior Court, No. 8160.) But inclusion of the phrase “and other members of the Ione Band of Indians” left uncertainty about the vested ownership of the subject parcel. (Exh. J, Apr. 11, 1994, letter from Carmen Facio, BIA Acting Area Director to Gerald B. Glazer, Tribal Attorney.)

In 1990, several individuals filed a lawsuit in federal court, purportedly on the Tribe’s behalf, seeking, among other things, quiet title to the 40-acre parcel in Ione. (*Ione Band of Miwok Indians v. Burris*, United States District Court, Eastern District of California, No. CIV S-90-993 LKK.) The district court ultimately dismissed the action because the Tribe was, at that time, without a legitimate government and no individual had authority to act on its behalf. (Exh. K, Aug. 6, 1996, Order.) The court found that without a federally recognized tribal government, none of the Indian parties had standing to challenge Amador County’s jurisdiction over the property. (*Ibid.*)²

During the protracted federal court litigation, Ada Deer, then Assistant Secretary of Indian Affairs, wrote a letter to the Tribe “reaffirming” its relationship with the federal government and stating the Tribe would be included on the list of tribes eligible to receive federal services. (Exh. L, Mar. 22, 1994, letter from Ada Deer to Nicholas Villa, Jr.) Assistant Secretary Deer specified that she was “reaffirming” a portion of a 1972 letter from Louis Bruce, then Commissioner of Indian Affairs, to the Tribe in which he noted Ione had “evidently” been recognized when the Ione land purchase was contemplated, and that the federal government would accept the 40-acre parcel into trust. (*Ibid.*)

The Tribe now proposes to conduct class III gaming on 228 acres of land in and near the City of Plymouth in Amador County. Plymouth is located at the threshold of the Shenandoah Valley, an increasingly popular tourist destination because of its world-class vineyards and wineries. Portions of the proposed site lie within the southern city limits of Plymouth, while the majority is in unincorporated areas of Amador County. The proposed site is located about 13 to 16 miles from the 40-acre parcel near Ione. The Tribe’s website indicates the Tribe has purchased options to buy the land in Plymouth. (See www.ionemiwok.org, last viewed April 15, 2006.)

II. The Tribe Has Not Been “Restored” to Federal Recognition

The State has reviewed letters submitted to NIGC by Amador County in which the County outlines the basis for its position that the Tribe has not been restored to federal recognition. Given the County’s detailed analysis of this issue, we will not provide a similar analysis, but instead briefly summarize our position. The State has conducted an independent

² Since then, the BIA has approved the Tribe’s constitution and formally recognized its elected leadership. (Exh. M.)

review of the materials submitted to NIGC by the Tribe to support its request for a restored lands determination. Based on that review, we do not believe that the Tribe has established that it was restored to federal recognition. Instead, it appears that the Tribe's status as a federally recognized tribe was never terminated. There is not sufficient evidence to show that the federal government took affirmative steps to terminate the Tribe's federal recognition or that the federal government considered the Tribe's federal recognition terminated either through words or actions. Although the Tribe discusses the fact that it was omitted from a list of recognized tribes compiled by the BIA in 1978, this event alone does not support the conclusion that federal recognition was terminated.

Additionally, it does not appear that the Tribe's federal recognition was ever "restored." The Tribe points to a March 22, 1994 letter from Ada Deer, Assistant Secretary of Indian Affairs, to Nicholas Villa, Jr. to support its claim of restoration. In that letter Assistant Secretary Deer clarified the United States' political relationship with the Ione Band by "reaffirming" portions of a 1972 letter from the Commissioner of Indian Affairs, which included a statement concerning the extension of federal recognition to the Tribe. Accordingly, Assistant Secretary Deer was merely reaffirming the previous 1972 affirmation of the Tribe's federal recognition and not restoring recognition that was previously terminated. Because the evidence does not support the Ione Band's status as a "restored tribe," we do not believe that it is necessary for NIGC to address the next issue of whether the subject lands are "restored lands." Nevertheless, we have provided our position on the restored lands issue below.

III. The Tribe Has Not Established a Longstanding Geographical, Historical, or Cultural Nexus to the Proposed Gaming Site

IGRA establishes a comprehensive scheme for the regulation of gaming activities on Indian land. Among other things, IGRA prohibits gaming on land acquired after the Act was passed on October 17, 1988. (25 U.S.C. § 2719(a).) The general prohibition of gaming on newly acquired land is subject to several exceptions. The exception the NIGC has asked the State to analyze is the so-called "restored lands" exception, which provides that Indian lands are exempt from the general prohibition if such "lands are taken into trust as part of . . . the restoration of land for an Indian tribe that is restored to Federal recognition." (25 U.S.C. § 2719(b)(1)(B)(iii).) As the Tribe acknowledges in its supporting legal memorandum, it bears the difficult burden of demonstrating the subject land qualifies as "restored lands" under IGRA. (Aug. 6, 2004, memorandum prepared by the law firm of Fredericks, Pelcyger & Hester (Fredericks Memo), p. 1.)

The NIGC has previously noted that "[t]he phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." (NIGC's *Grand Traverse Opinion*, Aug. 31, 2001, at p. 10; see also Office of the Solicitor's undated *Memorandum Re: Confederated Tribe of Coos*,

Lower Umpqua and Siuslaw Indians v. Babbitt, at p. 8 (“restored land does not mean any aboriginal land that the restored tribe ever occupied”).) The district court in *Confederated Tribe of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt* (D.D.C. 2000) 116 F.Supp.2d 155, 164, held the term “‘restoration’ can”—and impliedly should—“be limited to avoid the result . . . that any property acquired by restored tribes would be eligible for gaming.” (Emphasis added.) Such limitations include “the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the restoration.” (*Ibid.*)

The State does not believe that the record contains sufficient evidence that clearly establishes a “longstanding” or “ancient” geographical, historical, or cultural nexus between modern Ione Band members and the subject property in Plymouth. Instead, the Tribe asserts “some of the Northern Sierra Miwok (ancestors of the Ione Band) lived in a settlement cluster known as Yule (a/k/a Yuleyumne) located near the current City of Plymouth in the County of Amador[,]” and “[s]ome of the displaced California Indians who negotiated the treaties included lineal ancestors of members of today’s Ione Band of Miwok Indians. These ancestors of the Ione Band negotiated Treaty J, which set aside all of the City of Plymouth and much of the County of Amador for the Ione Band.” (Fredericks Memo at p. 5.) To support its aboriginal ties to the land, the Fredericks Memo relies exclusively upon an ethnological and historical report prepared by Dorothea J. Theodoratus, Ph.D., and Kathleen McBride, M.A., in September 2004 titled, “Ethnohistorical Overview of the Ione Band of Miwok Indians” (Ethnohistorical Report). The Ethnohistorical Report, however, does not contain sufficient evidence to support the Tribe’s aboriginal ties to the land.

For instance, the Ethnohistorical Report adduces no empirical data to support a conclusion that the Tribe’s present membership is—either individually or by majority—genealogically linked to any Indians who may have long-established roots on or near the land under consideration here, or who may have negotiated Treaty J. (See Ethnohistorical Report at pp. 14-16, 18, 27.) Indeed, the Tribe’s emphasis on the historical significance of Treaty J and other 1851 treaties between the United States and several Indian groups is misplaced. As the NIGC explained in 2004 in a similar situation involving the Karuk Tribe, the treaties were never ratified and in any event did not specify which portion of the land, if any, was to be set aside for the present Ione Band’s ancestors. (See Oct. 12, 2004, letter from NIGC to B. Downes re Karuk Tribe of California, at pp. 6-7.)

The Ethnohistorical Report also claims the Tribe is a “combined cultural group” descended from various Miwok linguistic groups that each spoke their own Miwok dialects, as well as from the Nisenan, Locolomne and Wapumne groups. (Ethnohistorical Report at pp. 1-2, 5-8, 11, 18.) Yet one of the principle authorities relied upon by the Ethnohistorical Report acknowledges a dispute over whether the territory in the immediate vicinity of Plymouth was historically part of the Maidu or Miwok territory, and historians who believed it was Miwok territory differ over whether it was the Plains or the Amador dialect. (Exh. N, Barrett, The

Geography and Dialects of the Miwok Indians (1908) pp. 346-347, 355.) A general historical Miwok Indian presence does not, by itself, equate to aboriginal ties by this Tribe to the subject land. With at least ten federally recognized tribes in California claiming ancestral lineage with Miwok Indians—three in Amador County alone³—it is incumbent upon the Tribe to affirmatively establish a geographical, cultural or historical nexus to the subject property that distinguishes it from other recognized tribes. It has not done so.

Indeed, the Tribe faces a difficult task in light of BIA records that suggest the 40-acre parcel in Ione may be the Tribe's historic land base. In addition, a recent archeological study conducted for a mining project on the proposed casino site found no historical evidence of Indians or Indian sites within the project area, or within a quarter mile of the project. (Exh. O, Phase I Inventory of Cultural Resources, Pioneer Mining Project (July 2001), pp. 8-9.)⁴ When invited to comment on whether there were any Indian cultural resources near the project area, Dwight Dutschke, a Miwok Indian from Ione, responded with no concerns or comments. (*Id.* at p. 9.) The Tribe itself did not respond to two inquiries from the mining project consultants. (*Ibid.*) While the Tribe's Ethnohistorical Report and the mining project's archeological study suggest Miwok Indians may have once occupied the Plymouth area, there is no record of a permanent Indian settlement at or near the proposed gaming site. This, and the absence of any expressed Tribal concerns about a mining project on its purported aboriginal homeland are contrary to any historical or cultural claim the Tribe may have to the property.

Unlike the Ione land, there is, at this time, no empirical data suggesting the proposed gaming site in Plymouth was an ancient village of the Ione Band, or that a majority of its members—past or present—occupied the property for a significant time period, or that the property contained a single Ione Indian home. Nor does the Tribe adduce any evidence to suggest the property contained an Indian school, sweatlodge, burial ground, or any site or building that is or was culturally significant to the Tribe, or that it held the land sacred in any way. Indeed, the Tribe's Ethnohistorical Report identifies two ceremonial centers within the general Miwok territory—one at Knight's Ferry and one at Ione—but nothing in or near Plymouth or the subject property. (Ethnohistorical Report at pp. 26-27.)

³ They are the Chicken Ranch Rancheria, California Valley Miwok Tribe (formerly known as Sheep Ranch Rancheria of Me-Wuk Indians), Shingle Springs Band of Miwok Indians, Cher-Ae Heights Indian Community, Tuolumne Band of Me-Wuk Indians, United Auburn Indian Community, Federated Indians of the Graton Rancheria, and—in Amador County—Buena Vista Rancheria, Jackson Band of Me-Wuk Indians, and Ione Band of Miwok Indians. Several other tribes that are not federally recognized also claim Miwok Indian heritage.

⁴ The Pioneer Mine Project encompasses about 140 acres of the proposed gaming site. (Compare property description on Exh. O cover with Exh. P, Memorandum of Purchase Agreement, Legal Description, Exh. A, ¶ C.) The Ikon Group, LLC, the Tribe's gaming development investor, owns a purchase contract for land that includes the Pioneer Quartz Mine. (Exh. P.)


Ms. Andrea Lord, Staff Attorney
May 1, 2006
Page 7

The State maintains the Tribe has not clearly demonstrated a significant geographical, cultural, or historical nexus to the specific 228-acre site in Plymouth where it proposes to construct a gaming facility. Further, the Tribe offers no evidence connecting its current membership to Indians who once occupied the Ione property located 13 miles from the land under consideration here. Although the Ethnohistorical Report claims present-day tribal members living on the Ione property are descended from the earliest Indian occupants there, it provides no information to support the conclusion. (Ethnohistorical Report at p. 11.) The BAR observed in 1992 that, “[c]uriously, a comparison of [Terrell’s 1915] census with a recent membership roll of the Ione Band reveals no common surnames. . . . This should emphasize the need of current group members to demonstrate their descent from the 1915 Ione Band.” (BAR Memo at pp. 9-10.) As indicated, evidence establishing a genealogical connection is necessary to qualify the land for IGRA’s restored lands exception. The Tribe’s current submission does not meet this standard.

IV. Conclusion

The Tribe’s submission to the NIGC does not clearly demonstrate that it has been “restored” to federal recognition or that it has maintained any longstanding geographic, historic or cultural ties to the proposed gaming site. Absent affirmative proof this is a restoration of previously used lands, it is the State’s position that the Tribe’s request for a restored lands determination should not be granted at this time. Thank you for considering our comments on the matter.

Sincerely,


ANDREA LYNN HOCH
Legal Affairs Secretary

Attachments

cc: Penny Coleman, Acting General Counsel, NIGC
Philip Hogen, Chairman, NIGC
Matthew Franklin, Chairman, Ione Band of Miwok Indians
Cathy Christian, Esq.