Exhibit 1

NATIONAL INDIAN GAMING COMMISSION

NOTICE OF VIOLATION

NOV-09-35

TO: Fort Sill Apache Tribe of Oklahoma
Agent for Service of Process
Attn: Jeff Houser, Chairman
Route 2, Box 121
Apache, OK 73006
Fax: (580) 588-3133

Fort Sill Apache Tribe of Oklahoma
Office of the Gaming Commission
Attn: Sam Horton, Chairman
P.O. Box 809
Lawton, OK 73502-0809
Fax: (580) 354-1500

1. Notification of Violation

The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that the Fort Sill Apache Tribe of Oklahoma (Respondent or Tribe), located in Apache, Oklahoma, has violated the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, by gaming on Indian lands ineligible for gaming at 20885 Frontage Road Southeast, Deming, New Mexico, otherwise known as "Akela Flats."

2. Authority

Under the Indian Gaming Regulatory Act (IGRA) and NIGC regulations, the Chairman of the NIGC (Chairman) may issue a Notice of Violation (NOV) to any person for violation of any provision of the IGRA, NIGC regulations, or any provision of a tribal gaming ordinance or resolution approved by the Chairman. 25 U.S.C. § 2713; 25 C.F.R. § 573.3.

3. Applicable Federal Laws and Regulations

A. IGRA provides that a Tribe may engage in class II gaming only on Indian lands. 25 U.S.C. § 2710(b).

B. IGRA defines Indian lands to mean (A) all lands within the limits of any Indian reservation and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercised governmental power. 25 U.S.C. § 2703(4).

C. NIGC regulations defines Indian lands to mean (a) land within the limits of an Indian reservation; or (b) land over which an Indian tribe exercises governmental power and that is either (1) held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by an Indian tribe or individual subject to restriction by the United States against alienation. 25 C.F.R. § 502.12.

D. IGRA further provides in 25 U.S.C. § 2719:

(a) that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 unless --

(1) such lands are located within or contiguous to the boundaries if the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and

(A) such lands are located in Oklahoma and

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when –

(A). . .

(B) lands are taken into trust as part of –

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process, or

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

C. Under 25 C.F.R. § 292.7, gaming may occur on newly acquired lands under the "restored lands" exception only when all of the following conditions are met:

(a) The tribe at one time was federally recognized, as evidenced by meeting the criteria in § 292.8;

(b) The Tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of "restored lands" in § 292.11.

D. For a tribe to qualify as having lost its government-to-government relationship under 25 C.F.R. § 292.9, it must show that its government-to-government relationship was terminated by one of the following means:

(a) Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

4. Role of Prohibition against Gaming on Land Acquired after October 17, 1988

IGRA explicitly limits the trust lands where Indian gaming can be conducted to trust lands acquired before October 17, 1988 and, in limited circumstances, upon trust lands acquired after that date as set forth in 25 U.S.C. § 2719. There is no legislative history regarding § 2719. However, it is apparent from the statutory scheme that Congress intended to limit the expansion of Indian gaming on trust land acquired after October 17, 1988.

5. Circumstances of the Violation

A. Respondent is a federally recognized Indian Tribe with tribal headquarters in Apache, Oklahoma.

B. On June 26, 2002, the parcel known as Akela Flats located in Deming, New Mexico was acquired into trust by the United States on behalf of the Fort Sill Apache Tribe.

C. On May 19, 2008, the NIGC Office of General Counsel issued an advisory legal opinion that considered whether the Tribe could lawfully game under IGRA on Akela Flats. Because the land is held in trust for the benefit of the Tribe by the United States, it qualifies as "Indian lands" under IGRA, 25 U.S.C. § 2703(4)(B). However, the Tribe acquired the land into trust after October 17, 1988. Therefore, the advisory legal opinion considered whether Akela Flats was eligible for gaming under the after acquired trust land prohibition of IGRA, 25 U.S.C. § 2719.

D. The May 19, 2008 advisory legal opinion concluded that the Tribe did not meet any of the exceptions to the general prohibition of gaming on after acquired trust land or as the Tribe's last recognized reservation within the State that it is presently located. Therefore, the NIGC Office of General Counsel concluded that the Tribe could not lawfully game under IGRA on Akela Flats.

E. On April 30, 2009, the Office of General Counsel issued an addendum to the May 19, 2008 advisory legal opinion. This legal opinion supplements the Office of General Counsel's May 19, 2008 legal opinion and considers a new argument made by the Tribe after the Office of General Counsel issued its May 19, 2008 legal advisory opinion. Specifically, the Tribe contends that it should be considered a restored tribe pursuant to the restored lands exception, 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. § 292.7, because the United States once maintained a government-to-government relationship with the Chirachua and the Warn Springs Apache Tribes, of which the Fort Sill Apache Tribe is the successor of interest, and the United States no longer recognize the Chirachua and the Warn Springs Apache Tribes was a Federally recognized Tribe.

Therefore, the Tribe contends that its government-to-government relationship was terminated as required by 25 C.F.R. § 292.9.

F. The OGC legal advisory addendum concluded that the Tribe had not demonstrated historical written documentation from the Federal government effectively stating that it no longer recognizes a government-to-government relationship with the Fort Sill Apache Tribe or its members or taking action to end the government-to-government relationship. Therefore, the opinion concluded that the Tribe failed to produce the necessary documentation to support a claim that its government-to-government relationship was terminated as required by 25 C.F.R. § 292.9(b).

G. Nor did the Tribe establish government-to-government termination by legislative termination or Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship, as required by 25 C.F.R. § 292.9 (a) and (c).

H. Because the Tribe cannot establish that its government-to-government relationship was terminated, it does not meet the requirements of the restored lands exception defined in 25 C.F.R. § 292.7. As a consequence, the Akela Flats site, although Indian lands, remains ineligible for gaming under IGRA.

I. Today, I adopt the Office of General Counsel's reasoning and conclusions set forth in its advisory legal opinions, dated May 19, 2008 and April 30, 2009.

J. As a consequence, the Akela Flats parcel, although Indian lands, is ineligible for gaming under IGRA because it fails to satisfy any exception to the prohibition on gaming on after acquired trust lands.

K. On or about April 9, 2009, the Tribe opened its gaming facility, Apache Homeland Casino, at Akela Flats.

L. The Tribe operated its gaming facility, Apache Homeland Casino, during April 2009, undertaking the play of Class II gaming at the gaming facility. Specifically, on April 16, 2009, at approximately 6:15 pm, sixty-five (65) people engaged in a game of bingo at the Apache Homeland Casino and received monetary prizes for winning eight (8) different bingo games.

M. As of July 16, 2009, the Tribe was continuing to conduct class II gaming at the Apache Homeland Casino located on the Akela Flats parcel.

N. By conducting Indian gaming on Indian lands ineligible for gaming, the Tribe is in violation of IGRA, 25 U.S.C. § 2719.

6. Measures Required to Correct the Violation

There is no way for the Tribe to cure any past action of gaming on lands ineligible for gaming under IGRA. To correct the on-going violation, the Tribe must immediately cease all gaming operations at Akela Flats.

7. Appeal

Within thirty (30) days after service of this Notice of Violation, Respondent may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal, and, if desired, request for hearing to the National Indian Gaming Commission, 1441 L Street NW, Ninth Floor, Washington, DC 20005. Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must reference this Notice of Violation.

Within ten (10) days after filing a notice of appeal, Respondent must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If Respondent wishes to present oral testimony or witnesses at the hearing, Respondent must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. Respondent may waives its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

8. Fine-Submission of Information

The violation cited above may result in the assessment of a civil fine against Respondent in an amount not to exceed $25,000 per violation per day. Under 25 C.F.R. § 575.5(a), Respondent may submit written information about the violation to the Chairman within fifteen (15) days after service of this notice of violation (or such longer period as the Chairman may grant for good cause). The Chairman shall consider any information submitted in determining the facts surrounding the violation and the amount of the civil fine, if any.

Dated this 21 of July, 2009

PHILIP N. HOGEN
Chairman

Certificate of Service

I certify that this **Notice of Violation** was sent by facsimile transmission and certified U.S. mail, return receipt requested, on this 21st day of July, 2009 to:

Fort Sill Apache Tribe of Oklahoma
Agent for Service of Process
Attn: Jeff Houser, Chairman
Route 2, Box 121
Apache, OK 73006
Fax: (580) 588-3133

Fort Sill Apache Tribe of Oklahoma
Office of the Gaming Commission
Attn: Sam Horton, Chairman
P.O. Box 809
Lawton, OK 73502-0809
Fax: (580) 354-1500

Dena Wynn

MEMORANDUM

To: Philip N. Hogen, Chairman
From: Penny J. Coleman, Acting General Counsel
Re: The Merits of the Fort Sill Apache Tribe's New Argument
Date: April 30, 2009

Introduction

This opinion supplements the Office of General Counsel's May 19, 2008 opinion and considers the Fort Sill Apache Tribe's (Tribe) new argument that its settlement agreement (Agreement) establishes that the Tribe's government-to-government relationship was terminated as required by 25 C.F.R. § 292.9.

On March 10, 2008, the Tribe submitted a site-specific amended gaming ordinance for the Chairman's consideration. On May 19, 2008, the Tribe withdrew its gaming ordinance from the Chairman's consideration. The Office of General Counsel, however, issued an advisory legal opinion that concluded the site was Indian lands, but not eligible for gaming under IGRA. *See* Memorandum from Penny J. Coleman, Acting General Counsel, NIGC, to Philip N. Hogen, Chairman, NIGC (May 19, 2008). In reaching this decision, the Office of General Counsel reviewed all documents that the Tribe presented and found insufficient evidence to support, among other things, the Tribe's restored lands claim.

However, on September 26, 2008, the Tribe filed a brief containing a new argument to support its claim of restored lands with the U.S. District Court for the Western District of Oklahoma. *See* Brief for Defendant, *Comanche Nation v. United States*, Reply to Opposition to Motion for Enforcement of Agreement of Compromise and Settlement, (W.D. OK 2008) (No. CIV 05-328-F). In 2005, the Comanche Nation sued the United States over a parcel of Comanche land that the United States had put in trust for the Fort Sill Apache Tribe.[1] The Fort Sill Apache Tribe intervened in the

[1] On April 2, 1999, the Fort Sill Apache acquired into trust a .53 acre parcel of land that was located in lands of the former Kiowa, Comanche and Apache Reservation in Oklahoma. *Comanche Nation v. United States*, Agreement of Compromise and Settlement Recitals (Agreement), CIV-05-328-F at 1. The Department of Interior approved the trust acquisition without acquiring the written consent of the Comanche Nation. *Id.* The Comanche Nation sought a declaration voiding the trust transfer. *Id.* The parties entered into the Agreement to settle the matter.

litigation. In 2007, the suit was resolved by a settlement agreement. In its September 26, 2008 brief, the Fort Sill Apache Tribe asserted that the advisory legal opinion of the NIGC Office of General Counsel breached its Agreement with the United States by failing to acknowledge the Tribe's restored tribal status allegedly set forth in the Agreement. *Id.* Specifically, the Tribe cited paragraph 7(i) of the Agreement for the proposition that the United States acknowledged that it terminated the federal recognition of the Chiricahua and/or Warm Springs Apache Tribes, to which the Fort Sill Apache Tribe is the successor in interest. As a consequence, the Tribe argued that the advisory legal opinion of the Office of General Counsel was incorrect because it failed to acknowledge the termination of its federal recognition and, thus, the Fort Sill Apache Tribe's restored status. *Id.* at 2.

The Office of General Counsel now considers the Tribe's new argument in light of the presented evidence. This memorandum supplements our May 19, 2008 opinion. We conclude that the Tribe has failed to provide additional evidence, and the presented evidence remains insufficient to support its claim that it is a restored tribe.[2]

Legal Background

The United States Department of the Interior (DOI) issued regulations interpreting the restored lands exception of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719. Those regulations specifically address the standards to demonstrate the termination of the government-to-government relationship. *See* 25 C.F.R. part 292; 73 Fed. Reg. 29,354. These regulations became effective on August 25, 2008. See 73 Fed. Reg. 35579 (June 24, 2008). The Commission subsequently adopted the regulations. Accordingly, the regulations are applied to this case for the limited purpose of determining whether the Tribe's government-to-government relationship with the United States was terminated.

We note that the Tribe advised us that it did not believe that the new regulations should be used in this analysis. *See* Letter from Jeff Houser, Tribal Chairman, Fort Sill Apache Tribe, to Jo-Ann Shyloski, Associate General Counsel – Litigation and Enforcement, and Esther Dittler, Staff Attorney, National Indian Gaming Commission. We understand and appreciate that concern. The regulations were not intended to disrupt tribal gaming operations that were developed in reliance on the existing caselaw and earlier opinions that were issued. Consequently, we are focusing our analysis on the one and only argument presented by the Tribe and its impact on the Tribe's ability to game on the New Mexico site. We believe that this approach is appropriate because the regulations and the caselaw do not essentially establish different standards for concluding that a tribe had a period of time that it did not have a government-to-government relationship with the federal government. In other words, as described below, the regulatory standard for

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[2] The Fort Sill Apache Tribe asserts that it was "formally recognized by the Federal government in 1976." *See* Memorandum in Support of Fort Sill Apache Tribal Gaming Commission Luna County, New Mexico Gaming License, 16 (Feb. 22, 2008). As the Tribe may have been recognized after 1934, we understand that the trust status of the Akela Flats property might be impacted by the recent decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (Feb. 24, 2009). However, we need not address this matter as we conclude that the Tribe may not game on the Akela Flats property.

the tribe having "lost its government to government relationship," 25 C.F.R. § 292.9, is not significantly different from the requirement in caselaw that there was a termination of federal recognition.

Under the regulations, a tribe seeking to establish itself as a restored tribe must, among other things, demonstrate that "[t]he tribe at one time was federally recognized" and "[t]he tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9 . . .." 25 C.F.R. § 292.7. For a tribe to qualify as having lost its government-to-government relationship under 25 C.F.R. § 292.7, it must show that its government-to-government relationship was terminated by one of the following means:

(a) Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

25 C.F.R. § 292.9.

Section 292.7 of DOI's regulations capture the elements outlined by courts for determining whether a tribe has demonstrated that the federal government terminated its federal recognition and whether such recognition has been restored. For example, the U.S. District Court for the Western District of Michigan stated:

> In order to determine whether the Band meets the restoration exception under [25 U.S.C.] § 2710(b)(1)(B)(iii), the court must first determine whether the Band is a "restored" tribe within the meaning of the provision, and second, whether the land was taken into trust as part of a "restoration" of lands to such restored tribe.

Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan,198 F. Supp.2d 920, 927 (W.D. MI 2002). For a tribe to establish that it is a restored tribe, it must establish: 1) federal government recognition; 2) withdrawal of recognition; and 3) restoration of recognition. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004).

The Section 20 regulations build upon the caselaw. As mentioned above, 25 C.F.R. § 292.9 specifies how a tribe qualifies as having its government-to-government relationship terminated. Because the Tribe does not contend the termination of its

government-to-government relationship was evidenced by legislative termination or Congressional restoration legislation, we can focus on section 292.9(b) which requires consistent historical written documentation from the federal government effectively stating that it no longer recognizes a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship.

ANALYSIS

We conclude that the Tribe has not provided consistent historical written documentation effectively stating that the federal government no longer recognized a government-to-government relationship with the Tribe or its members or taking action to end the government-to-government relationship.

1. Paragraph 7(i) of the Agreement and the Tribe's history do not evidence that the Tribe's government-to-government relationship was terminated and fails to support the Tribe's claim that it is a restored tribe

In this instance, the Tribe argues that it has met its burden to show that it is a restored tribe and relies on two pieces of evidence. On January 9, 2007, the Fort Sill Apache and the Comanche Nation entered into a settlement agreement with the United States concerning the federal government's transfer of Comanche trust land for the benefit of the Fort Sill Apache Tribe. *Comanche Nation*, Agreement of Compromise and Settlement Recitals, CIV-05-328-F at 1-2. The Agreement states:

g) The Fort Sill Apache Tribe is a successor-in-interest to the Chiricahua and Warm Springs Apache Tribes whose aboriginal territory, as defined by the Indian Claims Commission and as affirmed by the United States Court of Claims, includes those parts of Arizona and New Mexico where the United States currently holds land in trust for the benefit of the Fort Sill Apache Tribe. See Fort Sill Apache Tribe v. United States, 19 Ind. Cl. Comm. 212 (1968); Fort Sill Apache Tribe v. United States, 477 F.2d 1360, 201 Ct.Cl. 630 (1973), cert. denied, 416 U.S. 933 (1974).

h) The United States once maintained a government-to-government relationship with the Chiricahua and Warm Springs Apache Tribes, as evidenced by treaties, negotiations with tribal leaders, provision of services to the tribes and tribal members, and other government-to-government relationships clearly identified in numerous legal actions maintained before the Indian Claims Commission, United States Court of Claims, United States District Courts, and the United States Department of Interior Board of Indian Appeals. See e.g., Fort Sill Apache Tribe v. United States, supra, 19 Ind. Cl. Comm. at 212.

i) The United States does not acknowledge and/or recognize the Chiricahua and/or Warm Springs Apache Tribes as "Federally Recognized Tribes", or as entities "acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 70 Fed. Reg. 71194 at 1 (Nov. 25, 2005).

j) On or about August 16, 1976, the Commissioner of Indian Affairs formally approved the Constitution of the Fort Sill Apache Tribe, and thereafter the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe, and has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date. See 70 Fed. Reg. 71194.

Id. at 7(g) - (j).

The Agreement acknowledges that the Tribe is a successor in interest to the Chiricahua and Warm Springs Apache Tribes who once maintained a government-to-government relationship with the United States and this satisfies the first requirement of the restored lands exception. 25 C.F.R § 292.7(a). As we stated in our May 19, 2008 opinion, these stipulations support the view that the Tribe was once recognized as the Chiricahua and Warm Springs Apache Tribes and that the Chiricahua and Warm Springs Apache Tribes were subsequently recognized as the Fort Sill Apache Tribe.

The Tribe argues that the Agreement shows that the federal government has already acknowledged its restored status. Specifically, the Tribe focuses on the language of paragraph 7(i) as evidence that the federal government acknowledges its status as a successor in interest to tribes once terminated and its status as a restored tribe. *See* Brief for Defendant at 2.

Further, the Tribe also relies on the history presented to the Federal Court of Claims to support its argument that the federal government terminated the federal recognition from its ancestors, the Chiricahua and Warm Springs Apache, to whom it is a successor in interest. The history presented in the Federal Court of Claims is already set forth in the General Counsel's May 19, 2008 advisory legal opinion. Simply put, the Tribe argues that the Federal Court of Claims acknowledged the termination of federal recognition of the Chiricahua and Warm Springs Apache tribes when it noted that the Chiricahua and Warm Springs Apache were taken as prisoners of war. *Fort Sill Apache Tribe v. United States*, 19 Ind. Cl. Comm. 212, 244-5 (June 28, 1968).

Based upon these two pieces of evidence, and its new argument, the Fort Sill Apache Tribe argues that the General Counsel's May 19, 2008 advisory legal opinion is incorrect. Upon closer review of the Agreement, we do not agree. These pieces of

evidence remain insufficient to support the Tribe's claim, and the advisory legal opinion's reasoning with this addition remains sound.

As stated in the advisory legal opinion, the Tribe's evidence from the Federal Court of Claims case remains insufficient to support its claim that its government-to-government relationship was terminated. The evidence is insufficient because taking Chiricahua and Warm Springs Apache members as prisoners of war in 1886 did not necessarily constitute the federal government's termination of the Chiricahua and Warm Springs Apaches' federal recognition and a cessation of the government-to-government relationship. In fact, the United States military force's decision to take the Chiricahuas as prisoners of war indicates that the Tribe was still considered a hostile but separate and sovereign entity. Because this history fails to indicate or acknowledge any type of loss of federal recognition, it does not support the Tribe's assertion that the federal government terminated the federal recognition of the Chiricahua and Warm Springs Apache tribes.

Nor does the Tribe's Agreement with the United States and the Comanche Nation constitute consistent historical written documentation from the federal government effectively stating that it no longer recognized a government-to-government relationship with the Chiricahua and Warm Springs Apache tribes or its members or taking action to end the government-to-government relationship. The Agreement provides

> The United States does not acknowledge and/or recognize the Chiricahua and/or Warm Springs Apache Tribes as "Federally Recognized Tribes", or as entities "acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."

Comanche Nation, Agreement of Compromise and Settlement Recitals, CIV-05-328-F at 7(i). While the language of the Agreement acknowledges that the United States does not recognize the Chiricahua and Warm Springs Apache Tribes, this document states the facts as they were on the date the Agreement was entered into. It reflects that the successor tribe, the Fort Sill Apache Tribe is a Federally recognized tribe. In other words, the fact that the Chiricahua or Warm Springs are not presently recognized is not evidence that the federal government terminated the government-to-government relationship within the meaning of 25 C.F.R. § 292.9. It merely evidences that in the present day the Chiricahua and Warm Springs Apache are no longer recognized[3] and does not explain

[3] This interpretation is consistent with the U.S. District Court for the Western District of Oklahoma's Order denying the Tribe's motion for Enforcement of Agreement of Compromise and Settlement. The U.S. District Court noted that ". . . it was made abundantly clear to the court that the Chiricahua Tribe and the Warm Springs Apache Tribe are not federally recognized Indian tribes. No such status, with respect to those tribes, has been confirmed by publication in the Federal Register, nor has any such status been memorialized in any list of federally recognized tribes maintained by or at the direction of the Secretary of the Interior or any subordinate official in the Department of the Interior." *See Comanche Nation v. United States* No. CIV 05-328-F (W.D. Okla. Oct. 7, 2008) (order denying motion for Enforcement of Agreement of Compromise and Settlement). The court specifically found "that the Chiricahua Apache and Warm Springs Apache Tribes have not been recognized by the United States of America, the United States

why or how its successor, the Fort Sill Apache Tribe, took its place or how or if its successor in interest's recognition or government-to-government relationship was terminated. Because the Tribe has not demonstrated that its government-to-government relationship was terminated, it does not meet the requirements for the restored lands exception under 25 C.F.R. § 292.7.

This analysis is consistent with previous NIGC legal opinions. As explained below, the statute and regulations require evidence of action on the part of the federal government ending or terminating federal recognition. A tribe's attempt to prove the termination of federal recognition has always required greater evidence than the Fort Sill Apache Tribe provided in this case.

For example, the Cowlitz Indian Tribe presented numerous records from the federal government where the government explicitly denied its federal recognition of the Tribe. *See* Memorandum to Philip N. Hogen, Chairman from Penny J. Coleman, Acting General Counsel, Re: Cowlitz Tribe Restored Lands Opinion at 8-9 (Nov. 22, 2005). The Bureau of Indian Affairs refused to discuss enrollment in the Cowlitz Tribe with an individual on the grounds that they did not recognize the Tribe. *Id.* Further, the Department of the Interior represented to Congress that the Cowlitz Tribe was no longer federally recognized. These acts and other documentation represents consistent written documentation from the federal government stating that it no longer recognized a government-to-government relationship with the Tribe or its members, and constitutes action to end the government-to-government relationship.

In contrast, the Karuk Tribe of California presented no evidence of the federal government's termination of recognition to support its restored tribe claim. *See* Letter to Bradley G. Beldsoe Downes, Esq., Dorsey & Whitney LLP from Penny J. Coleman, Acting General Counsel (Oct. 12, 2004). While the federal government appeared to have no dealings with the Tribe for a time, individual members still received benefits from the federal government. *Id.* at 3. Because the Tribe presented no evidence of action by the federal government to terminate recognition, the Office of General Counsel concluded that the Tribe was not restored. *Id.*

In the present matter, the evidence presented by the Fort Sill Apache Tribe is more analogous to the evidence presented by the Karuk Tribe than the Cowlitz Indian Tribe. In support of its claim as a restored tribe, the Cowlitz Indian Tribe presented evidence of an explicit denial of the Tribe. The Karuk Tribe, on the other hand, failed to provide any proof of a termination of recognition. *See* Letter to Bradley Bledsoe Downes from Penny J. Coleman, Acting General Counsel (Oct. 12, 2004). The lack of evidence to support its claim led the Office of General Counsel to find that it was not a restored tribe. *Id.*

Department of the Interior, or any subordinate officer or agency thereof." *Id.* Thus, the U.S. District Court's Order is only evidence of the fact that the United States does not recognize the Chiricahua and Warm Springs Apache Tribes, not evidence of the United States' action to end the government-to-government relationship.

The lack of sufficient evidence presented here leads to the same result. In presenting its case for restoration, the Fort Sill Apache Tribe failed to provide evidence of consistent historical written documentation from the federal government effectively stating that it no longer recognized a government-to-government relationship with the Chiricahua and Warm Springs Apache tribes or its members or taking action to end the government-to-government relationship. Without such evidence to support its claim, the Tribe fails to meet the requirements of the restored lands exception.

Conclusion

The Tribe presented a new argument with the same evidence, challenging the General Counsel's May 19, 2008 advisory legal opinion as incorrect. The Tribe's argument, however, fails to change the previous analysis undertaken by the Office of General Counsel. The Tribe presented no additional evidence to support its claim as a restored tribe. Because the Agreement does not constitute historical written documentation from the federal government effectively stating that it no longer recognizes a government-to-government relationship with the Fort Sill Apache Tribe or its members or take action to end the government-to-government relationship, it cannot support the Tribe's claim that its government-to-government relationship was terminated as required by 25 C.F.R. § 292.9(b). Because the Tribe cannot establish that its government-to-government relationship was terminated, its does not meet the requirements of the restored lands exception. 25 C.F.R. § 292.7. As a consequence, the Akela Flats site, although Indian lands, remains ineligible for gaming under IGRA.

Memorandum

Date: May 19, 2008

To: Philip N. Hogen, Chairman

From: Penny J. Coleman, Acting General Counsel PJC

Re: Ft. Sill Apache Tribe Luna Co., NM Property

Introduction

Chairman Houser informed the General Counsel at a meeting in Scottsdale, Arizona, on January 16, 2008, that the Ft. Sill Apache Tribe (Tribe) planned to open a new Class II gaming operation on trust lands, known as Akela Flats, in Luna County, New Mexico. Chairman Houser expressed concern about the potential applicability of new National Indian Gaming Commission (NIGC) facility license regulations which were scheduled to become effective on March 3, 2008. The regulations require a tribe to notify the NIGC 120 days in advance of its plans to license a new facility. Although I assured the Tribe that the NIGC would work with the Tribe to diminish any adverse consequences of the 120 day rule, the Tribe apparently attempted to open its gaming facility at Akela Flats on February 28, 2008. It did not do so however.

On March 10, 2008, the Tribe submitted an amended gaming ordinance for the Chairman's consideration. The amended gaming ordinance is site specific and the Tribe's goal in submitting the amendment is to attain final agency action. As a result, the Office of General Counsel has worked with all due diligence to review the Tribe's claims that it is entitled to operate gaming on its New Mexico property pursuant to the Indian Gaming Regulatory Act (IGRA). As detailed below, we conclude that the NM property does not qualify for gaming under IGRA.

On February 22, 2008, the Fort Sill Apache Tribe (Tribe) submitted its analysis that the Tribe's trust land located in Luna County, New Mexico, is Indian lands upon which it may lawfully game pursuant to IGRA. 25 U.S.C. § 2701 *et seq.* Specifically, the Tribe asserted that the land satisfies the "last recognized reservation" exception, 25 U.S.C. § 2719(a)(2)(B), and the "restored lands" exception, 25 U.S.C. § 2719(b)(1)(B)(iii). In

addition, the Tribe indicated that it also wishes to claim the "initial reservation" exception.[1] 25 U.S.C. § 2719(b)(1)(B)(ii).

The Land Acquisition

On October 23, 1998, the Tribe acquired approximately thirty (30) acres of land in fee, in Luna County, New Mexico. The legal description of the land known as Akela Flats follows:

> That part of the North half (NH) of Section Eleven (11), lying North of the Interstate 10 right-of-way, Township Twenty-four (24) south, Range Six (6) west, N.M.P.M., Luna County, New Mexico, being described as follows: Beginning at a spike in the center of an abandoned asphalt roadway at the Northeast corner of said Section Eleven (11) and Northeast corner of this tract; Thence S0°21'53"W., along the east line of Section Eleven (11), a distance of 500.76 feet to a no. 5 steel rod at the Southeast corner of this tract and on the North boundary of the Interstate 10 right-of-way; Thence adjoining the North boundary of said I-10 right-of-way through the following courses and distances; along a curve to the left from a tangent which bears N.89°56'18"W., having a radius of 789.30 feet, a delta angle of 32°47'40", a cord which bears S.73°39'52"W., 445.63 feet through an arc length of 451.77 feet to I-10 P.C. marker 10+30.62; Thence S.57°12'44"W., a distance of 231.01 feet to I-10 P.T. marker 8+00; Thence along a curve to the right from a tangent which bears S.57°16'18"W., having a radius of 1096.00 feet, a delta angle of 39°58'50", a cord which bears S.77°15'43"W., 749.36 feet through an arc length of 764.78 feet to I-10 P.C. marker 45+11.53; Thence N.82°45'27"W., a distance of 340.58 feet to a no. 5 steel rod at the Southwest corner of this tract; Thence N.0°21'53"E., along a line parallel with the east line of Section Eleven (11), a distance of 871.49 feet to a no. 5 steel rod at the Northwest corner of this tract; Thence N.89°55'55"E.,

[1] On February 25, 2008, Richard Grellner, an attorney representing the Tribe, sent an e-mail to Staff Attorney Esther Dittler, expressing the Tribe's intention to claim the settlement of a land claim exception. 25 U.S.C. § 2719 (b)(1)(B)(i). The Tribe has submitted no other information supporting this exception. The Tribe might have argued that it settled a land claim in *Comanche Nation v. United States of America*. The resolution of that case is embodied in the Agreement of Compromise and Settlement Recitals that was executed on January 9, 2007 *See Comanche Nation v. United States of America*, Agreement of Compromise and Settlement Recitals, CIV-05-328-F at 7(i) (W.D.OK, March 8, 2007). The land, however, was taken into trust on July 23, 2001 which was several years before the Tribe filed its complaint in *Comanche Nation* and prior to the execution of the settlement. The settlement of a land claim exception requires that land be taken into trust as part of a settlement of a land claim. As the land was taken into trust prior to the date the settlement was executed, this exception is not applicable.

> along the North line of Section Eleven (11), a distance of 1688.27 feet to the point of beginning.[2]

Initially, the Tribe requested that the Bureau of Indian Affairs (BIA) take the land into trust under 25 C.F.R. Part 151 and Section 20 of the IGRA. However, the Governor of New Mexico declined to concur with the Tribe's request.[3] The Tribe reconsidered the use of the land, passing a resolution that its use would not change. At that time, the land known as Akela Flats was vacant and undeveloped. *See* Tribal Council Resolution No. FSAABC-2000-19 (Feb. 15, 2000).

On July 23, 2001, the BIA issued a trust acquisition approval letter. In approving the acquisition the BIA noted that:

> The acquisition was in the best interest of the Fort Sill Apache of Oklahoma thereby promoting tribal self-determination and land for reestablishment of the Tribe's land base in New Mexico. The Tribe stated the purposes for which this land will be used are for a land base to reestablish its presence in its aboriginal and former reservation territories in New Mexico. No development is proposed at this time. By letter dated April 21, 1999, the Tribal Planner transmitted a copy of Tribal Council Resolution No. FSABC-99-14 dated April 20, 1999, and advised that through this Resolution the Tribe was removing gaming as a purpose for this acquisition. Based upon these statements, I also make a finding that this acquisition is not for gaming purposes. Therefore, I am signing this **letter of intent** to take the Akela property into trust status for the Fort Sill Apache Tribe of Oklahoma.

See Letter from Ethel Abeita, Acting Regional Director of BIA to Ruey Darrow, Chairwoman of the Fort Sill Apache Tribe of Oklahoma (July 23, 2001) (emphasis in original).

Applicable Law

For tribes to conduct gaming under IGRA, such gaming must be conducted on "Indian lands," defined as:

> (A) all lands within the limits of any Indian reservation; and

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[2] *See* Warranty Deed between the Schoeppner Family Trust and the Fort Sill Apache Tribe (October 23, 1998).

[3] *See* Letter from Gary Johnson, Governor, State of New Mexico, to Robert Baracker, Area Director, Bureau of Indian Affairs (April 1, 1999).

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United State against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). *See also* 25 C.F.R. § 502.12 (NIGC's implementing regulation further defining Indian lands).

The land at issue here is not within a present day reservation. Thus, for trust or lands subject to a restriction to qualify as Indian lands, a Tribe must present evidence that it exercises governmental power over the land at issue. Prior to answering that question, however, we must consider the Tribe's jurisdiction over the land, as a tribe must possess theoretical and actual jurisdiction to enable it to exercise governmental power over a parcel of land.

Jurisdiction and the Exercise of Governmental Power

A. Jurisdiction

As stated before, tribal jurisdiction is a threshold requirement to the exercise of governmental power. *See e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) ("In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]"); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (*Miami II*) (a tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (*Miami I*) ("the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land"); *State ex. rel. Graves v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd and remanded sub nom., Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)); *see also Narragansett Indian Tribe*, 19 F.3d at 701-703. As a threshold matter, we must therefore analyze whether the Tribe possesses jurisdiction over the trust parcel.

Generally speaking, an Indian tribe possess jurisdiction over land that the tribe inhabits if the land qualifies as "Indian country." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Congress defined the term "Indian country" as: "(a) all land within the limits of any Indian reservation . . . , (b) all dependent Indian communities . . . , and (c) all Indian allotments, the Indian titles to which have not been