extinguished . . . ." 18 U.S.C. § 1151. Although this definition applies directly only to federal criminal jurisdiction, the courts have also generally applied this definition to questions of civil jurisdiction. *Venetie*, 522 U.S. at 527.

In its review of 18 U.S.C. § 1151, the *Venetie* court found that the statute contains two of the indicia previously used to determine what lands constitute "Indian Country": (1) lands set aside for Indians and (2) Federal superintendence of those lands. *See Venetie*, 522 U.S. at 527. In *Venetie*, the court observed that Section 1151 reflects the two criteria the Supreme Court previously held necessary for a finding of "Indian Country." 522 U.S. at 527. Further, reservation status is not necessary for a finding of "Indian Country."[4]

The Tenth Circuit found that "[o]fficial designation of reservation status is not necessary for the property to be treated as Indian Country under 18 U.S.C. § 1151," rather, "it is enough that the property has been validly set aside for the use of the Indians, under federal superintendence." *United States v. Roberts*, 185 F.3d 1125, 1133, n.4 (10th Cir. 1999). Further, "reservation status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151." *Roberts*, 185 F.3d at 1130. Thus, as long as the land in question is in trust, the courts make no distinction between the types of trust lands that can be considered "Indian Country." *Roberts*, 185 F.3d at 1131, n.4. Accordingly, lands held in trust, fee simple restricted status, allotments and reservations are all considered "Indian Country."[5] Consistent with the Supreme Court decisions discussed above, Akela Flats qualifies as "Indian country," because the land has been validly set-aside for the Tribe under the superintendence of the Federal government. Because the land is Indian country held in trust for the Tribe, we conclude that the Tribe has jurisdiction over it.

B. Governmental Power on Non-Reservation Trust Land

Next we look to whether the Tribe exercises governmental power over Akela Flats. *See* 25 U.S.C. § 2703(4)(B); *see also Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 703 (1st Cir. 1994).

IGRA is silent as to how NIGC is to decide whether a tribe exercises governmental power over lands at issue. Furthermore, the manifestation of governmental power can differ dramatically depending upon the circumstances. For this reason, the NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *See* National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12382,

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[4] *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) ("No precedent of this Court has ever drawn the distinction between tribal trust land and reservation that Oklahoma urges.")

[5] *See United States v. Sandoval*, 231 U.S. 28 (1913) (fee restricted land as Indian Country); *United States v. Pelican*, 232 U.S. 442 (1914) (allotment as Indian Country); *United States v. McGowan*, 302 U.S. 535 (1938) (trust land as Indian Country).

12388 (1992). Caselaw provides some guidance. The First Circuit in *Narragansett Indian Tribe* found that satisfying this requirement depends "upon the presence of concrete manifestations of [governmental] authority." 19 F.3d at 703. Such examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.*

In *Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F. Supp. 523 (D.S.D. 1993), *aff'd.* 3 F.3d 273 (8th Cir. 1993), the court stated that several factors might be relevant to a determination of whether off-reservation trust lands constitute Indian lands. The factors were:

(1) Whether the areas are developed;

(2) Whether the tribal members reside in those areas;

(3) Whether any governmental services are provided and by whom;

(4) Whether law enforcement on the lands in question is provided by the Tribe; and

(5) Other indicia as to who exercises governmental power over those areas.

Id. at 528.

In this matter, the Tribe has identified several actions that demonstrate its present exercise of governmental power over Akela Flats. Specifically, the following actions are significant:

(1) The Tribe has fenced off the land;

(2) The Tribe has begun construction of a gaming facility on the site;

(3) The Tribe has issued a facility license to the gaming facility; and

(4) The Tribe is in the process of improving the roads on the site.

These actions constitute "concrete manifestations of governmental authority" over Akela Flats. Therefore, the Tribe exercises governmental power over Akela Flats.

Application of 25 U.S.C. § 2719

A determination of whether a tribe is exercising governmental powers over the subject parcel, however, is not necessarily the end of the inquiry. IGRA generally prohibits gaming on lands acquired in trust after October 17, 1998, unless one of the statute's

exceptions apply. 25 U.S.C. § 2719. Accordingly, for lands taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether a tribe can conduct gaming on such lands.

The Tribe alleges that the land at issue qualifies for IGRA's last recognized reservation exception and its restored lands exception. The last recognized reservation exception allows gaming on Indian lands acquired in trust after October 17, 1988, if the Indian tribe has no reservation on the October 17, 1988, and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2)(B). The restored lands exception allows gaming on Indian lands acquired in trust after October 17, 1988, if the lands are taken into trust as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). The Tribe also claims that the land satisfies the "initial reservation" exception which allows gaming on Indian lands taken into trust as part of a tribe's "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii).

I. Last Recognized Reservation

The last recognized reservation exception allows gaming on Indian lands acquired in trust after October 17, 1988, if the Indian tribe had no reservation as of October 17, 1988, and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2)(B). The first two parts of this exception are met: the Tribe had no reservation on October 17, 1988, and the land is in New Mexico, a state other than Oklahoma. We now consider to whether Akela Flats is within the State or States within which the Tribe is presently located and whether Akela Flats is within the Tribe's last recognized reservation.

IGRA does not define "presently located." Whether the Tribe is "presently located" in New Mexico turns on the scope and meaning of the term "presently located." To determine the scope of a statute, we look first to its language. *Reves v. Ernest & Young*, 507 U.S. 170, 177 (1993). To ascertain the plain meaning of a statute we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); (*See also*, *U.S. v. Seminole Nation of Oklahoma*, 321 F.3d 939, 944 (10th Cir. 2002), "In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

The NIGC has defined "presently located" to mean where a tribe physically resides, and "to determine where this is the NIGC looks to the seat of tribal government and population center." *Wyandotte Nation v. National Indian Gaming Commission*, 437 F.Supp.2d 1193, 1205 (Kansas 2006). The *Wyandotte* court, however, accepted a less restrictive definition of "presently located." It concluded that a tribe is presently located where "a tribe has its population center and major governmental presence." *Id.* at 1206. We conclude that under either test, the Tribe is not presently located in the State of New Mexico.

A. Seat of Tribal Government and Population Center

To determine where the Tribe is located, we first consider the location of the Tribe's seat of government and the location of the Tribe's population center. The Tribe meets neither test.

The Tribe argues that it is presently located in New Mexico because the Tribe has:

1. expressed its intent to repatriate back to the State;
2. received correspondence from the Governor in which the Governor expressed his support of the Tribe's effort to return to the State;
3. purchased Akela Flats in 1998 and Akela Flats was taken into trust;
4. submitted an application requesting a Reservation Proclamation be issued;
5. allegedly opened tribal offices at Akela Flats and is administering programs to its tribal members from that location;
6. sought to purchase additional land within the New Mexico;
7. entered into discussions with the Bureau of Land management regarding taking over the conservancy of protected sites in Dona Ana County, New Mexico;
8. received numerous communications from Federal, State, and local agencies seeking the Tribe's participation, comments on, or consultation regarding projects or actions throughout the Tribe's former reservation in New Mexico;
9. asserted that individuals who are now members of the Mescalero Apache Tribe may qualify for membership to the Tribe if they choose to revoke their Mescalero Apache membership;
10. asserted that thirty current members of the Tribe live in New Mexico;

11. provides educational program benefits and per capita payments to all members, including those members that reside in New Mexico; and

12. conducted elections in which any member may participate through mail-in ballot, including those members who reside in New Mexico.

The Tribe's governmental headquarters is located in Apache, Oklahoma. *See* Memorandum of Support of Fort Sill Apache Tribal Gaming Commission Luna County, New Mexico Gaming License, page 10 (Feb. 22, 2008). On March 27, 2008, the Tribe passed resolutions transferring several of its tribal programs to the Tribe's New Mexico Office. The following programs were allegedly transferred:

1) Section 106 Consultation Program;

2) Cultural Resource Management Program;

3) Native American Graves Protection and Repatriation Act Program;

4) Environmental Protection Agency Program; and

5) Higher Education Program.

See Fort Sill Apache Business Committee Resolution Number FSABC-2008-15; FSABC-2008-16; FSABC-2008-17; FSABC-2008-118; FSABC-2008-19. In addition, the Tribe may have also relocated its per capita program to New Mexico. While the Tribe may have authorized the transfer of these programs, the Tribe did not submit any evidence that these programs are presently administered from the site. Moreover, the transfer of several tribal programs does not equate to the establishment of the seat of tribal government in New Mexico. Thus, the seat of the Tribe's government remains in Apache, Oklahoma.

The Tribe has not demonstrated that its population center is located in New Mexico. The Tribe notes that half of the Tribe's members live outside the State of Oklahoma and that this resulted from the Tribe's lack of an adequate land base in Apache, Oklahoma. The Tribe also acknowledges that its tribal rolls do not reflect a large number of members in New Mexico. The Tribe's current tribal membership roll indicates that the Tribe has approximately 635 enrolled members. *See* Letter from Phillip Thompson, Attorney for Fort Sill Apache Tribe, to Esther Dittler, Staff Attorney, NIGC, Enclosure 10 (April 7, 2008). Approximately two hundred ninety seven (297) tribal members, forty-seven percent (47%), live in Oklahoma. *Id.* By contrast, approximately twenty six (26) tribal members, four percent (4%), live in New Mexico. *Id.*

The tribal membership rolls demonstrate that a majority of the Tribe's membership is disbursed over a great many states.

Figure 1: Fort Sill Apache Location of Enrolled Tribal Members by State[6]

State or Other Location	Number of Tribal Members Residing in State or Location	Number of Tribal Members Residing in State as a Percent
Oklahoma	297	47%
Texas	59	9%
California	46	7%
Kansas	40	6%
Arizona	31	5%
New Mexico	26	4%
Illinois	17	3%
Arkansas	14	2%
Montana	13	2%
Colorado	8	1%
Tennessee	8	1%
Washington	8	1%
Kentucky	7	1%
Iowa	6	1%
Maryland	6	1%
Nevada	4	1%
Utah	4	1%
Virginia	4	1%
Florida	3	< 1%
Georgia	3	< 1%
Louisiana	3	< 1%
Massachusetts	3	< 1%
Mississippi	3	< 1%
South Carolina	3	< 1%
Indiana	2	< 1%
North Carolina	2	< 1%
Connecticut	1	< 1%
Montana	1	< 1%
Nebraska	1	< 1%
New York	1	< 1%
Ohio	1	< 1%
Oregon	1	< 1%
Pennsylvania	1	< 1%
Wisconsin	1	< 1%
Puerto Rico	4	1%
England	1	< 1%

[6] Data Source: Letter from Phillip Thompson, Attorney for Fort Sill Apache Tribe, to Esther Dittler, Staff Attorney, NIGC, Present Tribal Membership Roll - Enclosure 10 (April 7, 2008).

Military	2	< 1%
Total	628	

The Tribe notes that there are an undetermined number of individuals who are now members of the Mescalero Apache Tribe, some of whom may qualify for membership in the Tribe if they chose to renounce their Mescalero Apache membership. Potential tribal members, by definition, are not members of the Tribe; therefore, such individuals are not properly considered in this analysis. The approximately twenty six (26) tribal members who reside in New Mexico do not represent the Tribe's population center. *Wyandotte Nation v. National Indian Gaming Commission*, 437 F.Supp.2d 1193,1207 (Kansas 2006) (rejecting the assertion that approximately 100 members residing in the county constitutes a population center).

Consequently, the Tribe's population center is clearly located in Oklahoma. Furthermore, the Tribe's seat of government is in Apache, Oklahoma.

B. Major Governmental Presence and Population Center

Some tribes have reservations that span more than one state. (*e.g.* the Navajo Nation's reservation spans the borders of Arizona, New Mexico, and Utah). In such a case, a tribe may be "presently located" in more than one state, that is, the Tribe may be presently located in "states." 25 U.S.C. § 2719(a)(2)(B). Although it is possible for a tribe to have more than one seat of government (e.g., the Seneca Nation's seat of government rotates between two reservations), generally a Tribe has only one seat of government. If the NIGC applied the seat of tribal government test in circumstances where a tribe's former reservation spanned more than one state, any tribe with one seat of government would be precluded from gaming on at least part of its last recognized reservation, and we would have failed to give effect to the term "states" within the meaning of 25 U.S.C. § 2719(a)(2)(B).

However, while a tribe that may be located in more than one state and may have one seat of government, generally, the tribe will maintain a major governmental presence in the states through the provision of services to tribal members. Therefore, in circumstances where a tribe's last recognized reservation spans more than one state, and in order to give effect to the term "states," the NIGC looks to a tribe's population center and for a "major governmental presence." Where statutory language is ambiguous, a court will defer to the NIGC's reasonable interpretation of the language. *U.S. v. Seminole Nation of Oklahoma*, 321 F.3d 939, 944 (10th Cir. 2002). In *Wyandotte Nation*, the District Court for the District of Kansas found that a review based upon population center and major governmental presence was a "reasonable interpretation in light of the plain meaning of the phrase presently located, and adopt[ed] the same." *Wyandotte Nation v. NIGC*, 437 F.Supp.2d 1193, 1206 (2006).

The Tribe has not demonstrated that it has a "major governmental presence" in New Mexico. An expression of intent to repatriate back to the State, correspondence from the Governor expressing his support of the Tribe's effort to return to the State, purchase of the land at issue and subsequent trust acquisition, the submission of an application requesting a Reservation Proclamation, and the Tribe's effort to purchase additional land within the New Mexico simply do not demonstrate a major governmental presence in New Mexico.

The Tribe also asserts that it has opened tribal offices on the land at issue and is administering programs to its tribal members from that location. Based on observations made by NIGC field staff, there are no tribal offices on the site and no programs being administered on the site. As mentioned above, the Tribe recently authorized the transfer of several tribal programs to New Mexico. While the Tribe may have authorized the transfer of these programs, we have no evidence that any programs are presently being administered from the site.

The Tribe further asserts that it has a governmental presence in New Mexico through the provision of certain services to members who live in the state. The Tribe's government is located in Apache, Oklahoma, and it permits tribal members to participate in various tribal programs through the mail. Specifically, the Tribe permits its members to participate in its education programs, distributes per capita payments, and conducts elections through the mail. These activities instead of establishing a governmental presence in New Mexico, establish that the Tribe is exercising its governmental power from the State of Oklahoma.

Further, the Tribe has indicated that it has entered into discussions with the Bureau of Land management regarding taking over the conservancy of protected sites in Dona Ana County, New Mexico, and suggests that this contributes to the Tribe's presence in the State. The Tribe has not asserted that it is currently acting as the conservator for these sites; therefore, these discussions do not support the claim of a major governmental presence within the State.

In addition, the Tribe notes that it received numerous communications from Federal, State, and local agencies seeking the Tribe's participation, comment, or consultation regarding projects or actions in New Mexico, including one letter from the Department of the Interior, Bureau of Indian Affairs, providing the Tribe with notice and an opportunity to comment on a two-part determination for the Pueblo of Jemez pursuant to the exception contained in 25 U.S.C. § 2719(b)(1)(a).[7] The Tribe suggests that these communications represent the acknowledgement of the various governmental agencies of the Tribe's physical presence in New Mexico. At most, these communications acknowledge the Tribe's potential interest in the proposed action. In particular, Section

[7] We note that this correspondence was sent to the Tribe's governmental headquarters in Oklahoma.

20 of IGRA requires the Secretary of the Interior to consult with any "nearby Indian tribe" while considering a two-part determination. The Secretary has not yet adopted a definition for "nearby Indian tribe." However, the Secretary has published a proposed definition for "nearby Indian tribe." Under the proposed definition:

> Nearby Indian tribe means an Indian tribe with tribal Indian lands, as defined in 25 U.S.C. 2703(4) of IGRA, located within a 25-mile radius of the location of the proposed gaming establishment, or if the tribe is landless, within a 25-mile radius of its governmental headquarters.

Gaming on Trust Lands Acquired After October 17, 1988, 71 Fed. Reg. 58769 (Oct. 5, 2006) (to be codified at 25 C.F.R. pt. 292). Similar to the other requests for comment or consultation, the Secretary's notice and request for comment acknowledge that the Tribe holds Indian lands in New Mexico and is not an acknowledgement that the Tribe is "presently located" in New Mexico as contemplated by 25 U.S.C. § 2719(a)(2)(B) or is eligible to game on such lands under § 2719.

Taken together, the actions taken by the Tribe establish that it is exercising its governmental power from the State of Oklahoma and that, at best, its governmental presence in New Mexico is limited. Therefore, the Tribe has not established that it has a "major governmental presence" in New Mexico, or, as noted above, that its population center is located in New Mexico.

C. The Tribe failed to show that the parcel is located within its last recognized reservation.

The Tribe has failed to demonstrate that the land it intends to game on is "within the Indian tribe's last recognized reservation . . . ." 25 U.S.C. § 2719(a)(2)(B). The Tribe failed to show that any land was designated a reservation for its benefit in New Mexico, let alone that Akela Flats was part of it. Letter from Phillip Thompson, Attorney for Fort Sill Apache Tribe, to Esther Dittler, Staff Attorney, NIGC, 6 (April 7, 2008). The Tribe states:

> In New Mexico, the only reservation which may have been designated for the Chiricahua or Warm Springs Apaches was the Hot Springs Reservation. . . The Executive Order establishing the Hot Springs Reservations mentions the Southern Apaches. The Souther [sic] Apaches [however] is not a designation used to describe the Tribe in the ICC opinions.

Id. at 6.

The Fort Sill Apache was found to be the successor-of-interest of the Chiricahua and Warm Springs Apache Bands. *Fort Sill Apache Tribe v. United States*, 19 Ind. Cl. Comm.

212, 215 (June 28, 1968). As the Tribe indicated, the ICC opinion did not specifically find that Southern Apache was a designation used to describe the Tribe. Therefore, it has no claim to the Warm Springs reservation.

Alternatively, the Tribe claims that its last recognized reservation is the land described in Finding of Fact 13(a) of the case *Fort Sill Apache Tribe v. United States,* 19 Ind. Cl. Comm. 212, at 241-242. The land defined in that case encompasses Akela Flats because it encompasses half of Arizona, half of New Mexico, and part of Mexico. The Tribe wants to claim that this entire area constitutes a reservation, and thus Akela Flats is part of the last recognized reservation. However, Finding of Fact 13(a) designates the lands to which the Tribe held aboriginal title as of September 4, 1886 and does not connote a reservation. *Id.* at 241.

Many definitions exist for what constitutes a reservation. Reservation originally meant any land reserved from a Tribe's cession of aboriginal territory. *See* F. Cohen, *Handbook on Federal Indian Law*, note 3 at 34 (1982 ed.). Over the years a number of definitions have arisen in Indian law including the following:

> Reservation includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

25 U.S.C. § 1452(d). Another definition of reservation is that:

> Reservation means, for purposes of this part, that area of land which has been set aside or which has been acknowledged as having been set aside by the United States for the use of the tribe, the exterior boundaries of which are more particularly defined in a final treaty, Federal agreement, Executive or secretarial order, Executive or secretarial proclamation, United States patent, Federal statute, or final judicial or administrative determination.

25 C.F.R. § 151.2. However, the Tribe's claim as to the land described in Finding of Fact 13(a) cannot meet any of the definitions of reservation because the Tribe does not provide evidence that it ceded its lands and reserved a part or that the federal government set aside any tracts for its use as a reservation. Because the Tribe failed to present evidence of a last recognized reservation, it cannot claim that Akela Flats is located within that area. Thus, the Tribe cannot claim that exception under IGRA.

II. Restored Lands for a Restored Tribe

The Fort Sill Apache Tribe also claims that Akela Flats meets the restored lands exception of IGRA. However, because the land was not placed into trust for the Tribe as part of a restoration, it does not qualify for the exception.

For trust lands to qualify for the restored lands exception, the tribe must present evidence that meets both of the following requirements: 1) the tribe has been restored to its federal recognition and, 2) the land at issue was placed in trust as part of a "restoration of lands" for the tribe. If the evidence presented fails to meet either of these requirements, then the land at issue cannot qualify for the restored lands exception.

After an examination of the evidence, we conclude that the Fort Sill Apache Tribe is not a restored tribe, and Akela Flats does not qualify for the restored lands exception under 25 U.S.C. § 2719(b)(1)(B)(iii).

A. The Ft. Sill Apache Tribe's evidence is insufficient to prove that it constitutes a restored tribe.

To be considered restored, a tribe must present evidence of: 1) federal government recognition; 2) termination 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).

1. The federal government recognized the Fort Sill Apache's ancestors, the Chiricahua and Warm Springs Apache.

To claim federal recognition, a tribe must present evidence that shows that the federal government views it as an entity with:

> 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.[8]

The Fort Sill Apache descend from the Chiricahua and Warm Springs Apache Bands and claims its ancestors' federal recognition for its own. The Fort Sill Apache take their language, history, and culture from the Tribes that lived as one community. *Fort Sill Apache Tribe v. United States*, 19 Ind. Cl. Comm. 212, 221-223 (June 28, 1968). The Tribe considers the Chiricahua and Warm Springs Apache's territory to be its own ancestral homeland, and the courts agree. *Fort Sill Apache*, 19 Ind. Cl. Comm. at 224. Further, the court has declared the Fort Sill Apache Tribe to be the successor-in-interest

[8] *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)(*citing* 70 Fed. Reg. 71194 at 1 (Nov. 25, 2005)).

to the Chiricahua and Warm Springs Apache. *Id.* at 215. Thus, the Fort Sill Apache Tribe is the same tribe and can claim the political history of its ancestors as its own. *Id.* at 220 (*citing Nooksack Tribe v. United States*, 3 Ind. Cl. Comm. 479; *Snake or Piute Indians v. United States*, 4 Ind. Cl. Comm. 576, 612).

With this in mind, the history of federal recognition of the Tribe is evidenced by the Treaty of July 1, 1852, and other contacts with the federal government.

a. The Treaty of July 1, 1852.

In 1852, Colonel Sumner represented the federal government in treaty negotiations with the southwestern Apache tribes. *Id.* at 227. On July 11, 1852, Mangas Coloradas, chief of the Chiricahua Apaches signed the Treaty of July 1, 1852. *Id.* at 228. In this treaty, the Apache agreed to remain peaceful and not make war on each other or the United States. *See* Treaty with the Apache, July 1, 1852, Art. 2. The tribes agreed to designate formal boundaries and wield their sovereign powers to pass laws within their territory. *See* Treaty of July 1, 1852, Art. 9. Congress ratified the treaty on March 23, 1853. 10 Stat. 979.

This agreement is evidence of the federal government's recognition of the Chiricahuas Apache's sovereign status and the government-to-government relationship. *Fort Sill Apache*, 19 Ind. Cl. Comm. at 239. Because the Fort Sill Apache Tribe is a successor-in-interest to the Chiricahua and Warm Springs Apache, the Fort Sill Apache Tribe may also claim this previous recognition. *Comanche Nation*, CIV-05-328-F at 7(g).

b. Other contacts with the federal government.

The Act of February 27, 1851[9] allowed the United States to extend the Indian Trade and Intercourse Act of June 30, 1834[10] to tribes in New Mexico. This included all Apache tribes. The Act extended the right of occupancy to all tribes in that area and made it illegal to dispossess tribes and individual members of that right.

This Act further evidenced the government-to-government relationship between the Chiricahua and Warm Springs Apache and the federal government. Thus, the descendents of the Chiricahua, its successor in interest known as the Fort Sill Apache Tribe, enjoyed that relationship and federal recognition.

2. The Tribe's evidence is insufficient to support the claim of termination of the Chiricahua and Warm Springs Apaches.

Resisting removal to the San Carlos Reservation, bands of Chiricahua and Warm Springs Apache engaged in hostilities with federal forces. *Fort Sill Apache*, 19 Ind. Cl. Comm. at

[9] 9 Stat. 574, 587.
[10] 4 Stat. 729.

244. On September 4, 1886, the Chiricahua under Geronimo surrendered, and the Apaches were taken to Florida as prisoners of war. *Id.* at 245. On this date, the federal government took away the Chiricahua Apache's aboriginal title to its lands in Arizona, New Mexico, and Mexico. *Id.*

This action, however, did not necessarily constitute the federal government's termination of the Tribe and a cessation of the government-to-government relationship. In fact, the United States military forces' decision to take the Chiricahuas as prisoners of war indicates that the Tribe was still considered a hostile but separate and sovereign entity. The Fort Sill Apache Tribe failed to provide any further evidence to connote termination of federal recognition. Thus, the Tribe's presented evidence fails to definitively establish termination.

3. The federal government accepted the Fort Sill Apache Tribal Constitution and agreed that the Fort Sill Apache acts as the successor in interest for its ancestors Tribe, the Chiricahua and Warm Springs Apache.

One way that the federal government may recognize an Indian tribe is through the Indian Reorganization Act (IRA) of 1934. 25 U.S.C. § 476(a). Under the IRA, a tribe may adopt a constitution by majority vote that is then sent to the Secretary of the Interior for approval. 25 U.S.C. § 476(a). On August 16, 1976, the Bureau of Indian Affairs approved the Fort Sill Apache Tribe's Constitution. *Comanche Nation*, CIV-05-328-F at 7(j) (*citing* 70 Fed. Reg. 71194). This approval reflects the government-to-government relations between the Tribe and the Federal government.

Further, the Tribe's status became a stipulated point in a 2007 trust land case involving the Comanche Nation and a Fort Sill Apache casino. *Id.* In that case, the Department of the Interior had transferred into trust a parcel of land that had once belonged to a member of the Comanche Nation but did this on behalf of the Fort Sill Apache Tribe. *Id.* at 1. The department's failure to notify the Comanche Nation led to a lawsuit that the parties settled under a set of stipulations. *Id.* The relevant stipulations are as follows:

> 7(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.
>
> (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 the Interior Board of Indian Appeals.
>
> (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.
>
> (l). The Fort Sill Apache Tribe has land in New Mexico held in federal trust status within the former aboriginal and/or Indian Title lands of the Chiricahua and/or Warm Springs Apache Tribes as defined by the Indian Claims Commission and the United States Court of Claims. The United States agrees to accept and timely process a Fort Sill Apache Tribe application for a reservation proclamation on land currently held in trust for the Fort Sill Apache Tribe which is located in Luna County, New Mexico.

Thus, the court and the United States agreed to the Fort Sill Apache's sovereignty and federal recognition. Further, these stipulations support the view that the Tribe was once recognized as the Chiricahua and that the Chiricahua Tribe was subsequently recognized as the Fort Sill Apache. The evidence presented, however, fails to show that the government-to-government relationship with the Chiricahua, and thus the Fort Sill Apache, suffered termination. Thus, the Fort Sill Apache Tribe has not presented sufficient evidence to establish that it is a restored tribe.

Because the Tribe has not established that it is a restored Tribe, we need not determine whether Akela Flats is part of a restoration of lands. However, the NIGC is concerned with the evidence presented and details its concerns below.

B. Akela Flats is not conclusively part of a "restoration of lands."

IGRA does not define *restore* and *restoration*, but absent express indication from Congress to the contrary, we must give the words their plain meaning. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 198 F.Supp. 2d 920, 928 (W. D. Mich. 2002). IGRA does not require that a "restoration of lands" be accomplished through congressional action or in the very same transaction that restored the tribe to Federal recognition. Lands may be restored to a tribe through the administrative fee-to-trust process under 25 C.F.R. Part 151.[11]

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[11] Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), aff'd, 369 F.3d 960 (6th Cir. 2004) (Grand Traverse II); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); Grand

Limits exist, however, as to what constitutes restored lands. The exception is not meant to extend to "any lands that the tribe conceivably once occupied throughout its history." *NIGC Grand Traverse Opinion* at 15 (August 31, 2001). The United States District Court for the Western District of Michigan noted these limitations, stating that they exist to avoid a result that "any and all property acquired by restored tribes would be eligible for gaming."[12] The court continued:

> The term "restoration" may be read in numerous ways to place belatedly restored tribes in comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion.

Grand Traverse I, 198 F.Supp. 2d at 935. Thus, courts now apply a three-factor test to determine whether land meets the restored lands exception under IGRA: (1) the factual circumstances of the acquisition, (2) the location of the acquisition, or (3) the temporal relationship of the acquisition to the tribal restoration. *Id.* These factors are a balancing test and not all factors must weigh in the Tribe's favor to meet the exception. *Id.* at 936. These factors together, however, must indicate overall that the Tribe acquired Akela Flats as part of its initial attempt to rebuild its land base.

On balance, we remain concerned that the factual circumstances and the location of the acquisition are not strong enough to fully support the Tribe's claim to restored lands.

1. The Tribe's evidence regarding the temporal relationship and the factual circumstances of the acquisition is insufficient to fully support the restored land claim.

a. Temporal relationship

One factor to be considered is whether there is a reasonable temporal connection between the restoration and the trust land acquisition. *Grand Traverse Band II* at 936 (finding that the land may be considered part of a restoration of lands on the basis of timing alone). The NIGC understands that once recognition occurs, a tribe still needs time to organize and create a constitution before taking land into trust. With that in mind, the NIGC analyzes a restored land claim to see if the land in question constitutes "part of a systematic effort to restore tribal lands." *Id.* at 936. Thus, the NIGC looks at two factors: 1) the time span between when the tribe was restored and when the land was acquired in trust, and 2) how many other parcels the tribe acquired in that time.

The Tribe's evidence of a temporal relationship between the acquisition and restoration is insufficient. The Tribe was recognized in 1976, but it admits that it waited to purchase

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Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999) (Grand Traverse I).

[12] *Grand Traverse Band I*, 46 F.Supp. 2d at 700; *Grand Traverse Band II*, 198 F.Supp 2d at 935.