IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORT SILL APACHE TRIBE,
20885 Frontage Road,
Deming, New Mexico 88030,

Plaintiff,

v.

NATIONAL INDIAN GAMING COMMISSION,
1441 L Street N.W., Suite 9100
Washington, D.C. 20005
and

JONODEV CHAUDHURI, in his official capacity as Acting Chairman of the National Indian Gaming Commission,
1441 L. Street N.W., Suite 9100
Washington, D.C. 20005,

Defendants.

Civil Action No. 1:14-cv-958

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Fort Sill Apache Tribe, a federally-recognized Indian Tribe (hereinafter the "Tribe"), brings this action against defendants the National Indian Gaming Commission (the "NIGC," "Agency" or "Commission") and NIGC Chairman Jonodev Chaudhuri, and states for its Complaint:

INTRODUCTION

1. The Tribe is the legally determined successor in interest to the Chiricahua and Warm Springs Apache tribes that once occupied Southwest New Mexico. The Tribe was ejected by the United States from its aboriginal homelands in New Mexico in the 1880s and, for more than 27 years, its members were held by the United States as prisoners of war in Florida and

Oklahoma. After being released from the Fort Sill, Oklahoma prison camp, they were neglected and ignored until the United States approved the Tribe's Constitution in 1976. Today, the Tribe and its elected government are of modest size and limited resources.

2. In 1997, with the approval of the United States' Bureau of Indian Affairs ("BIA"), the Tribe acquired land in Lawton, Oklahoma, for the purpose of establishing a land base. The land was located within the former Kiowa, Comanche and Apache ("KCA") Reservation, near the former Fort Sill prison camp. The Comanche Nation objected to the Tribe's efforts to establish a land base within the former KCA Reservation and sued the United States and the Tribe (the "*Comanche* Litigation"). The BIA brokered a tripartite settlement agreement ("*Comanche* Settlement Agreement"), the centerpiece of which was the Tribe's agreement to relinquish fundamental land and gaming rights in the former KCA Reservation in exchange for a commitment from the United States that the Tribe would receive equivalent rights in New Mexico, the Tribe's original homeland. The *Comanche* Settlement Agreement was approved by the United States District Court for the Western District of Oklahoma in March, 2007. The United States' continuing failure to honor the terms of that agreement is at the heart of the present action.

3. In 2001, the United States took land in Akela Flats, Luna County, New Mexico into trust for the use and benefit of the Tribe. Pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*, which authorizes federally-recognized Indian tribes to operate gaming facilities, the Tribe drafted a tribal gaming ordinance, secured approval of that ordinance by the NIGC, and planned to open a gaming facility known as the "Apache Homelands Casino" on the Akela Flats property. Without regard for the Unties States' factual acknowledgments in the *Comanche* Settlement Agreement, the NIGC *sua sponte* issued a "Warning Notice" advising the Tribe that a "preliminary review" showed that the Apache Homelands Casino would violate IGRA's general prohibition against gaming on trust lands acquired after 1988 (the "General Prohibition"). Although no regulatory action or approval was pending before the NIGC, its Acting General Counsel, Penny Coleman, proceeded to issue an

"opinion" concluding that Akela Flats did not qualify for gaming under IGRA (the "2008 Coleman Opinion"). Specifically, the Coleman Opinion concluded that (1) IGRA's general prohibition against gaming on trust lands acquired after 1988 (the "General Prohibition") prohibits gaming on the Akela Flats property and (2) the Akela Flats property does not qualify for any of the exceptions to the General Prohibition.

4. The 2008 Coleman Opinion contained obvious legal and factual errors including, most significantly, the erroneous assumption that federal recognition of the Chiricahua and Warm Springs Apache tribes had never been terminated. That assumption formed the basis for the 2008 Coleman Opinion's erroneous conclusion that the Akela Flats property does not qualify for any of the exceptions to the General Prohibition. The Tribe brought those errors to the attention of the same United States District Court that had adjudicated the *Comanche* litigation. In response, the NIGC formally withdrew the 2008 Coleman Opinion.

5. With the 2008 Coleman Opinion withdrawn, the Tribe renewed its plans to open a gaming facility at Akela Flats and opened the Apache Homelands Casino in April 2009. On July 21, 2009, the NIGC issued Notice of Violation 09-35 (the "NOV"), asserting that the Tribe could not conduct gaming at Akela Flats. The NOV expressly relied on and adopted the withdrawn 2008 Coleman Opinion, as well as a supplement to the 2008 Coleman Opinion (the "2009 Supplement") which had not previously been provided to the Tribe.

6. The arbitrary and capricious nature of the NOV (a copy of which is attached hereto as Exhibit 1) is manifest. Neither the NOV nor the 2008 Coleman Opinion nor the 2009 Supplement acknowledges the binding factual acknowledgments and representations to which the United States committed in the *Comanche* Settlement Agreement. To the contrary, the 2008 Coleman Opinion and 2009 Supplement rely on a variety of assumptions and conclusions that plainly contradict the *Comanche* Settlement Agreement. The United States could not draw such conclusions; it was, and remains, estopped from challenging or contradicting the factual determinations to which it agreed in the *Comanche* Settlement Agreement.

7. In addition, the NOV improperly applied the regulations found at 25 Part 292 (the "Part 292 regulations"). By their own terms, the Part 292 Regulations do not apply to matters (such as the 2008 Coleman Opinion and the opening of the Apache Homelands Casino) pre-dating their promulgation.

8. Furthermore, the NOV improperly reversed the burden of proof applicable to an NIGC enforcement action. The NIGC bears the burden of proof when a notice of violation is issued. But the NOV, and the 2008 Coleman Opinion and 2009 Supplement on which the NOV is based, places the burden of proof on the Tribe.

9. Moreover, the NIGC improperly used the NOV to force the Tribe to close the Apache Homelands Casino. The NOV threatened fines of $25,000 per day unless the Apache Homelands Casino was immediately closed. As the NIGC was well aware, the Tribe could not afford to risk such staggering penalties. And, as the NIGC clearly intended, the Tribe was forced to close the Apache Homelands Casino (which remains closed to this day). NIGC regulations in effect at the time (*i.e.,* 2008 and 2009) did not permit the NIGC to order the closure of a tribal gaming facility absent a "substantial violation" of IGRA. Those same regulations also specified that the violation alleged in the NOV — gaming on lands (allegedly) subject to the General Prohibition — was not "substantial."

10. The NIGC's arbitrary and capricious actions did not end with its issuance of the NOV. The Tribe timely sought administrative review of the NOV. At the NIGC's suggestion, the Tribe agreed to waive its right to an administrative hearing before a "Presiding Official" in exchange for the NIGC's commitment to an expedited resolution of the administrative appeal based on briefing submitted to the full Commission. But the NIGC never expedited the proceeding. On the contrary, the NIGC refused to file the substantive briefing to which the parties agreed (and, eventually, waived the right to submit any briefing at all). Although the administrative record for the Tribe's administrative appeal was completed years ago, and despite repeated requests from the Tribe, *the NIGC continues to refuse to rule upon the appeal*.

11. By issuing an NOV that threatens the Tribe with draconian daily penalties for operating the Apache Homelands Casino and then refusing to rule on the Tribe's administrative appeal of the NOV, the NIGC has accomplished by fiat and without due process what its own regulations forbade: it closed the Apache Homelands Casino without even alleging (much less proving) a "substantial violation" of IGRA. It would be difficult to find a better example of arbitrary and capricious agency action.

12. For nearly half a decade, the NIGC has made and broken promises to issue a decision in the Tribe's administrative appeal of the NOV, all the while disregarding the havoc this uncertainty wreaks on the Tribe's finances, governance and planning. In the absence of a decision, the Tribe's efforts to obtain financing, develop its tribal homeland in New Mexico, plan for its future, and provide for its citizens have been frozen in place.

13. In the *Comanche* Settlement Agreement, the Tribe gave up valuable land and gaming rights in Oklahoma in consideration for the United States' express and binding acknowledgment of and commitments to the Tribe's rights in New Mexico. The United States induced that Settlement Agreement, but one of its administrative agencies now refuses to honor it. The NIGC has arbitrarily and capriciously contradicted the *Comanche* Settlement Agreement, misused the NOV process to close the Apache Homelands Casino, and has refused to act on the Tribe's administrative appeal for nearly half a decade. For these and all the additional and further reasons set forth in this complaint, the Tribe respectfully requests the Court to find that the NIGC has acted arbitrarily and capriciously, to vacate and invalidate the NOV, and to issue a decision that permits the Tribe to proceed with gaming on its Akela Flats reservation.

JURISDICTION AND VENUE

14. Plaintiffs seek judicial review pursuant to Chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and judicial review is proper under the APA.

15. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (original jurisdiction over mandamus action to compel agency to perform its

duties). The Court may grant declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

16. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Defendants include an agency of the United States and an officer of that agency, both of which reside in the District of Columbia.

17. By virtue of Defendants' actions and failures to act, there exists a final agency action and an actual, justiciable controversy between the Parties.

THE PARTIES

18. Plaintiff is a federally-recognized Indian tribe whose aboriginal territory includes those parts of Arizona and New Mexico where the Untied States currently holds land in trust for the benefit of the Tribe. The Tribe is the legally-recognized successor in interest to the Chiricahua and Warm Springs Apache tribes.

19. Defendant National Indian Gaming Commission is an independent federal regulatory agency created pursuant to IGRA.

20. Defendant Jonodev Chaudhuri is sued in his official capacity as Chairman of the National Indian Gaming Commission. His place of business is 1441 L Street N.W., Suite 9100, Washington, D.C. 20005. The Chairman is the chief executive officer of the NIGC, and he has enforcement powers and responsibilities under IGRA including, but not limited to, the power and responsibility issue notices of violation, issue temporary closure orders, and collect civil fines.

APPLICABLE LAW

Administrative Procedure Act

21. The APA mandates that reviewing courts "hold unlawful and set aside agency action, findings, and conclusions" that are "in excess of statutory jurisdiction, authority, or limitations" or "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(C), (D).

22. The APA further requires reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

23. The APA provides for the issuance of a declaratory judgment. 5 U.S.C. § 706(3).

Indian Gaming Regulatory Act

24. Congress explicitly intended IGRA to provide "a statutory basis for . . . gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702.

"Indian Lands" Requirement

25. IGRA generally permits gaming on "Indian lands," defined to include "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

26. IGRA generally prohibits gaming on lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after IGRA's October 17, 1988 enactment. 25 U.S.C. § 2719(a). This prohibition is generally described as the General Prohibition against gaming on after-acquired lands.

27. IGRA also contains several exceptions to the General Prohibition. Collectively, the exceptions to the General Prohibition are designed to allow belatedly recognized and/or acknowledged tribes (such as the Tribe) to secure the benefits of IGRA, thereby placing them on equal footing with tribes that were recognized and had trust lands at on the date of IGRA's enactment. *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. For W.D. Mich.*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999).

28. One exception provides that the General Prohibition does not apply to lands taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process" (the "Initial Reservation Exception"). 25 U.S.C. § 2719(b)(1)(B)(ii). Pursuant to the Initial Reservation Exception, the first land proclaimed to be a reservation for a tribe constitutes that tribe's initial reservation, and the tribe can avoid the General Prohibition for any lands taken into trust before or at the time of the reservation proclamation.

29. A second exception provides that the General Prohibition does not apply to lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition" (the "Restored Lands Exception"). 25 U.S.C. § 2719(b)(1)(B). Lands qualify for the Restored Lands Exception where (1) a tribe's federal recognition (government-to-government relationship) was terminated, (2) federal recognition was subsequently restored, and (3) the land in question was taken into trust as part of the tribe's restoration.

30. In May of 2008, the BIA published regulations purporting to implement the General Prohibition, the Restored Lands Exception, the Initial Reservation Exception, and other provisions of IGRA. 25 U.S.C. § 2719. 73 Fed. Reg. 29354 (May 20, 2008). Those regulations, which appear at 25 C.F.R. part 292, went into effect on August 25, 2008. 73 Fed. Reg. 35579 (Jun. 24, 2008).

31. By their own terms, the Part 292 Regulations do not apply to matters involving NIGC opinions issued prior to August 25, 2008: "these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the [NIGC] issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used or a particular gaming establishment." *See* 25 C.F.R. § 292.26(b).

32. The NIGC has applied this rule even in situations where a decision issued after the effective date of the Part 292 Regulations simply modifies a pre-Part 292 decision. *See* Memorandum from John R. Hay, Senior Attorney, National Indian Gaming Commission, to Tracie Stevens, Chairwoman, National Indian Gaming Commission, at 2 (April 3, 2012) (available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fKaruk4912.pdf&tabid=120&mid=957).

Notices of Violation

33. The Chairman of the NIGC has the authority to issue notices of violation alleging violations of IGRA. Notices of violation are subject to *de novo* review by the full Commission.

25 C.F.R. §§ 573.3(a); 577.15 (2008).[1] The Chairman bears the burden of supporting his notice of violation by a preponderance of the evidence. *See, e.g., In the Matter of JPW Consultants* (NIGC 97-4, 98-8) (Nov. 13, 1998).

34. In the course of review by the full Commission, the recipient of a notice of violation has the right to "present oral testimony or witnesses" in an oral hearing before an independent Presiding Official. 25 C.F.R. §§ 577.3(c) (2008).

35. A third party seeking to intervene in the full Commission's review must file a petition with the Presiding Official and serve that petition on all other parties to the proceeding. 25 C.F.R. § 577.12(c) (2008). A petition for intervention may only be granted if the Presiding Official finds that:

(a) the final decision could directly and adversely affect the intervenor;
(b) the intervenor can contribute materially to the disposition of the proceedings;
(c) the intervenor's interest is not adequately represented by existing parties; and
(d) "intervention would not unfairly prejudice existing parties or delay resolution of the proceeding."

25 C.F.R. § 577.12(a) (2008).

36. Regulations in effect on the date of the Tribe's request for review of the NOV set forth the following timeline for review of a notice of violation by the full Commission:

(a) a hearing on the notice of violation must be commenced within 30 days after the filing of a timely request for Commission review;
(b) recommended decision must be issued within 30 days of the closure of the administrative record;

[1] The NIGC amended many of its regulations in 2012. *See, e.g.,* 77 Fed.Reg. 47518 (Aug. 9, 2012) (amending Part 573); 77 Fed.Reg. 58945 (Sept. 25. 2012) (amending Part 577); 77 Fed.Reg. 58948 (Sept. 25, 2012) (creating 25 C.F.R. Part 853). Unless otherwise stated, references in this Complaint to NIGC regulations are to the regulations in effect at the time the NIGC issued the NOV in 2008.

(c) objections to the recommended decision (if any) must be filed within 10 days of service of that decision; and

(d) the full Commission's must affirm or reverse, in whole or in part, the recommended decision of the presiding official by a majority vote within 30 days after the date of the presiding official's decision.

25 C.F.R. §§ 577.4(a); 577.14(a); 577.7(b); 577.15 (2008).

Administrative Penalties

37. IGRA provides the Chairman of the NIGC with authority to levy civil fines of up to $25,000. 25 U.S.C. § 2713(a)(1); 25 C.F.R. § 575(a).

38. IGRA also provides the Chairman with authority to "issue orders of temporary closure of gaming activities" in situations involving "substantial violations" of IGRA. 25 U.S.C. §§ 2705(a)(1)), 2713(b)(1). The Chairman is not authorized to issue a closure order in the absence of a "substantial violation." *Id*.

39. Regulations in effect at the time the NOV was issued identify "substantial violations" of IGRA that can justify a closure order. 25 C.F.R. § 573.6(a) (2008). Notably, the operation of a gaming facility on tribal trust lands that do not or may not constitute "Indian lands" eligible for gaming under IGRA is not among them.[2]

40. In the event that a closure order is issued, the NIGC is subject to strict deadlines and due process requirements:

> Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian Tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

[2] The NIGC's lack of authority in 2008 or 2009 to issue a closure order to close a gaming facility for purportedly operating on lands not eligible for gaming under IGRA is corroborated by the promulgation of regulations in 2012 (years after the NOV here) authorizing the NIGC to close gaming facilities that operate "on Indian lands not eligible for gaming" under IGRA. 25 C.F.R. § 273.4(a)(13).

25 U.S.C. § 2713(b)(2).

41. IGRA provides that a final approval of the Commission to levy fines and/or to order a permanent closure is a final agency action, appealable in federal court. 25 U.S.C. § 2713(c).

FACTUAL BACKGROUND

Historical Background

42. In the nineteenth century, the United States established a government-to-government relationship with the Chiricahua and Warm Springs Apache Tribes through treaty negotiations. The tribes had aboriginal homelands in New Mexico, including in the area of Akela Flats in Luna County, New Mexico, as recognized by the Indian Claims Commission. *Fort Sill Apache Tribe, et al. v. United States*, 19 Ind. Cl. Comm. 212 (June 28, 1968). Plaintiff Fort Sill Apache Tribe is the legally-recognized successor-in-interest to the Chiricahua and Warm Springs Apache Tribes.

43. During the Civil War and the decades thereafter, the United States engaged in warfare with the Chiricahua and Warm Springs Apache Tribes. In 1886, after tribal leader Geronimo and his last warriors surrendered, the United States imprisoned the entire Chiricahua and Warm Springs Apache population (including women, children, and other non-combatants) and forcibly expatriated them to Florida. Conditions in the Florida prison camps were brutal: four years after Geronimo's surrender, a quarter of the Chiricahua and Warm Springs Apache were dead.

44. In May 1894, Congress authorized the relocation of the Chiricahua and Warm Springs Apache to the Fort Sill Military Reservation in what was then the "Indian Territory" (now Oklahoma). Most of the Chiricahua and Warm Spring Apache remained imprisoned at Fort Sill for another 19 years. In late 1913 and early 1914, the United States released the surviving Chiricahua and Warm Springs Apache prisoners of war from Fort Sill in order to reclaim the property for other purposes. As a result of the United States' actions, each Chiricahua or Warm Springs Apache was effectively required to choose between becoming a

member of the Mescalero Apache Tribe in New Mexico (a different and pre-existing tribe), or being released to live on his own without alliance to any tribal organization. Chiricahua and Warm Springs Apache who chose not to join the Mescalero were settled in Oklahoma on various parcels of land located within the former KCA Reservation.

45. In the 1970s, former Chiricahua and Warm Springs Apache who had been settled in Oklahoma (and their descendants) sought to restore their tribal government by drafting a tribal constitution and bylaws. On or about August 18, 1976, the United States' Commissioner of Indian Affairs formally approved the constitution and bylaws for the Ft. Sill Apache Tribe, thereby acknowledging the Tribe as a federally recognized tribal entity entitled to government-to-government relations with the United States. *Fort Sill Apache Tribe v. Martinez*, Order, No. 34,464 Mem. Op. at 1-2 (N.M. Apr. 14, 2014).

46. On or about October 23, 1998, the Tribe acquired approximately thirty acres of property in fee simple at Akela Flats. The Akela Flats property is within the Tribe's aboriginal homeland, the area where the Chiricahua and Warm Springs Apache lived prior to their dispossession. Shortly thereafter, the Tribe requested that the United States accept title to the Akela Flats property to be held in trust for the Tribe.

47. On or about July 23, 2001, the United States issued a letter approving the Tribe's request for acceptance of the Akela Flats property in trust, wherein the United States expressly acknowledged that the trust acquisition of Akela Flats was to "promot[e] tribal self-determination and land for reestablishment of the Tribe's land base in New Mexico." On or about June 26, 2002, the United States formally accepted trust title to the Akela Flats property for the benefit of the Tribe.

48. The Tribe has a significant modern-day connection to the Akela Flats property. The Tribe presently operates businesses on the Akela Flats property. On April 14, 2014, the New Mexico Supreme Court unanimously ordered the State of New Mexico to recognize the Tribe, to include the Tribe on the list of tribal entities compiled by the New Mexico Indian

Affairs Department, and to include the leaders of the Tribe in the annual state-tribal summit held by the Governor of New Mexico.

49. The Tribe also has approved the movement of a number of tribal agencies and programs to Akela Flats, including the Native American Graves Protection and Repatriation Program, the Cultural Resources Management Program, the Fort Sill Apache Environment Protection Agency, the tribal Higher Education program, and the tribal Per Capita program. Unfortunately, the Tribe's ability to move these agencies and programs to Akela Flats (and to raise capital and develop related infrastructure on and near the property) has been hindered by the NIGC's refusal to issue a decision in the Tribe's administrative appeal of the NOV, and by the State of New Mexico's prior refusal to recognize the Tribe, now reversed by the state's supreme court.

The *Comanche* Lawsuit

50. On March 29, 1996, the United States issued a memorandum opinion concluding that the Tribe had "equal standing" with other tribes within the former KCA Reservation, where individual Chiricahua and Warm Springs Apache prisoners of war had been released in 1913 and 1914. The memorandum opinion concluded that the BIA could transfer land within the former KCA Reservation into trust for the Tribe, and, further, that such transfers did not require consent of other tribes.

51. Consistent with the memorandum opinion, the Tribe proposed that title to a half acre parcel of land held in trust for an individual in Lawton, Oklahoma (the "Lawton Parcel") be transferred into trust for the Tribe. The Tribe planned to use the Lawton Parcel to develop a gaming facility that could generate revenue to fund health, welfare, and employment services, as authorized by IGRA.

52. On or about June 30, 1998, the BIA approved the Tribe’s trust-to-trust acquisition application for the Lawton Parcel for the purpose of gaming.

53. The Comanche Nation opposed the Tribe's trust-to-trust acquisition of the Lawton Parcel. The Comanche Nation contended that the Tribe could not have trust land within the former KCA Reservation and claimed primary jurisdiction over the Lawton Parcel.

54. On March 23, 2005, the Comanche Nation filed the *Comanche* Litigation against the Tribe and the United States (*Comanche Nation v. United States*, W.D. Ok. Case No. 05-cv-328) challenging the Tribe's trust acquisition of the Lawton Parcel.

55. The parties to the *Comanche* Litigation eventually entered settlement negotiations, and, on March 8, 2007, they agreed to the final terms set forth in the *Comanche* Settlement Agreement (attached hereto as Exhibit 2). Pursuant to the *Comanche* Settlement Agreement, the Comanche Nation committed to dismiss the *Comanche* Litigation; the United States committed to withdraw its March 29, 1996 memorandum opinion allowing the Tribe to acquire a land base on the former KCA Reservation in Oklahoma and to provide the Tribe with equivalent rights in New Mexico; the Tribe committed to withdraw its request for trust-to-trust property acquisition and agreed not to take any additional former Comanche allotments into trust without prior approval from the Comanche Nation. The parties to the *Comanche* Settlement Agreement made these commitments in consideration of and express reliance upon the specific findings and representations set forth in Section 7 of the Agreement.

56. The *Comanche* Settlement Agreement resolves fundamental issues regarding the Tribe's ability to conduct gaming on the Akela Flats property.

57. In Section 7 of the *Comanche* Settlement Agreement, the parties acknowledged that the Tribe is the successor in interest to the Chiricahua Apache and Warm Springs Apache groups:

> 7(g) **The Fort Sill Apache Tribe is 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 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); *United States v. Fort Sill Apache Tribe*, 477 F.2d

> 1360, 201 Ct.Cl 630 (1973), *cert. denied*, 416 U.S. 993 (1974).

58. The parties to the *Comanche* Settlement Agreement further acknowledged that the Chiricahua and Warm Springs Apache groups were at one time recognized by, and maintained a government-to-government relationship with, the United States:

> 7(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.

59. The parties to the *Comanche* Settlement Agreement further acknowledged that the United States' government-to-government relationship with the Chiricahua and Warm Springs Apache tribes was terminated:

> 7(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.

60. The parties to the *Comanche* Settlement Agreement further acknowledged that the government-to-government relationship was restored in 1976 with recognition of the Tribe:

> 7(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**, see 70 Fed.Reg. 71194, and has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date.

61. The parties to the *Comanche* Settlement Agreement further acknowledged that the Tribe has no reservation within the State of Oklahoma:

> 7(k) The Fort Sill Apache **Tribe has no reservation within the State of Oklahoma** as defined by the Secretary of Interior pursuant to 25 U.S.C. §467.

62. In the *Comanche* litigation and the settlement negotiations, the parties agreed that, in exchange for the relinquishment of the Tribe's right in Oklahoma, the Tribe would receive equivalent rights in New Mexico — the site of its original homeland — and agreed that Akela Flats would be designated as the Tribe's initial reservation:

> 7(l) The Fort Sill Apache Tribe has land in New Mexico held in federal trust status within the formal aboriginal and/or Indian Title lands of the Chiricahua and/or Warm Springs Apache Tribes as defined by the Indian Claims Commission and 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**.

63. On November 28, 2011, the United States, in compliance with its representation in the *Comanche* Settlement Agreement, issued a "Notice of Reservation Proclamation," which proclaimed the approximately 30 acres of land at Akela Flats "as the Fort Sill Apache Indian Reservation for the Fort Sill Apache Tribe of Indians." The Notice of Reservation Proclamation was published in the Federal Register the same day. 76 Fed.Reg. 72969 (Nov. 28, 2011).

64. The *Comanche* Settlement Agreement remains binding on its signatories, including both the United States and the Tribe, and the Tribe has honored and complied with each of its commitments under the *Comanche* Settlement Agreement.

The Tribe's Lawful Efforts to Establish Gaming at Akela Flats

65. In an effort to promote tribal economic development, fund government programs for its citizens, and provide employment opportunities, the Tribe sought to open and operate a gaming facility at Akela Flats.

66. Pursuant to an NIGC-approved tribal gaming ordinance, on December 16, 2007, the Tribal Gaming Commission issued a license for the operation of a Class II gaming facility at Akela Flats.[3]

67. Although the NIGC had previously reviewed and approved the Tribe's gaming ordinance, on February 27, 2008, the Agency sent the Tribe a "Warning Notice" that a "preliminary review" indicated that operation of a gaming facility at Akela Flats might violate the General Prohibition. The Tribe disagreed with the NIGC's "preliminary review" but, in an abundance of caution, it decided not to commence gaming operations at Akela Flats at that time.

The 2008 Coleman Opinion

68. On May 19, 2008, even though no action or approval was pending before the NIGC, the Agency's General Counsel Penny Coleman *sua sponte* issued a written opinion declaring that the Akela Flats property does not qualify for gaming under IGRA (the "2008 Coleman Opinion").

69. The 2008 Coleman Opinion contradicts the commitments, assertions, and representations of the United States in the *Comanche* Settlement Agreement. Among other things, the Opinion concluded that the Tribe could not meet the Restored Lands Exception to IGRA's General Prohibition because the government-to-government relationship between the United States and the Tribe's ancestors, the Chiricahua and Warm Springs Apache, had never been terminated. That assumption is contrary to the provisions of the *Comanche* Settlement Agreement. It is also contrary to a specific factual finding arising from the *Comanche* Litigation: "the Chiricahua Apache and Warm Springs Apache Tribes have not been recognized by the United States of America, the United States Department of the Interior, or any subordinate

[3] IGRA divides gaming activities into three categories: "class I" gaming includes traditional forms of gaming; "class II" includes, generally, bingo and non-banked card games (and certain electronic facsimiles thereof); and, "class III" includes all other forms of gaming. 25 U.S.C. §§ 2703(6)-(8). IGRA permits only class I and class II gaming in the absence of a tribal-state gaming compact. 25 U.S.C. § 2710(d)(1)(C).

officer or agency thereof." *Comanche Nation v. United States*, W.D. Ok. Case No. CIV-05-328-F, Order, October 7, 2008, at 5 (ECF Doc. 115).[4]

70. The 2008 Coleman Opinion also concluded that the Tribe could not meet the requirements of the Initial Reservation Exception to the General Prohibition because Akela Flats is not a reservation. That determination was inconsistent with the United States' obligation promptly to issue a reservation proclamation for the Tribe pursuant to the *Comanche* Settlement Agreement.

71. The 2008 Coleman Opinion also suggested that the Tribe has inadequate population and governmental presence in New Mexico. The New Mexico Supreme Court has concluded otherwise and has ordered the State of New Mexico to recognize the Tribe. *Fort Sill Apache Tribe v. Martinez*, Order, No. 34,464 Mem. Op. at 1-2 (N.M. Apr. 14, 2014).

72. The Tribe brought the errors and omissions of the 2008 Coleman Opinion to the attention of the *Comanche* court. In response, the NIGC formally withdrew the Opinion.

The NIGC Issues Notice of Violation 09-35

73. With the May 2008 Coleman Opinion withdrawn, the Tribe renewed its plans to open a gaming facility at Akela Flats. On April 9, 2009, the Tribe opened the Apache Homelands Casino on the understanding and belief that the Akela Flats property constituted "Indian lands" eligible for gaming under IGRA.

74. On or about April 30, 2009, Ms. Coleman prepared, *sua sponte* and without notice to or knowledge of the Tribe, a "supplement" to her withdrawn 2008 Opinion (the "2009 Supplement").

[4] This finding was issued in response to the Tribe's motions to enforce the *Comanche* Settlement Agreement. The Tribe filed its first motion to enforce the *Comanche* Settlement Agreement on March 11, 2008, seeking a declaration that the Untied States had failed to uphold its obligation to timely process a reservation proclamation for the Akela Flats property, as required by the *Comanche* Settlement Agreement. *Comanche Nation, Oklahoma v. United States*, W.D. Ok. Case No. CIV-05-328-F, Memorandum of Points And Authorities In Support Of Motion By Fort Sill Apache Tribe Of Oklahoma For Enforcement Of Agreement Of Compromise And Settlement (ECF Doc. 84-1). On July 31, 2008, the Tribe supplemented its motion, in light of the May 2008 Coleman Opinion, on the basis that the United States' findings in the opinion were inconsistent with the concessions in and terms of the *Comanche* Settlement Agreement. (Doc. 102). On July 29, 2008, the Tribe filed its Second Motion for Enforcement of Agreement for Compromise and Settlement. (Doc. 116). The court denied both motions. (Docs. 107, 145).

75. On July 21, 2009, the NIGC Chairman issued the NOV and ordered that "the Tribe must immediately cease all gaming operations at Akela Flats."

76. The NOV, by its own terms, relies on the withdrawn 2008 Coleman Opinion and the 2009 Supplement:

> 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. 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.

Ex. 1, NOV-09-35, at 5 §§ I, J.

77. The NOV, the 2008 Coleman Opinion, and the 2009 Supplement incorrectly concluded that the Akela Flats property is subject to the General Prohibition and does not qualify for any exception to the Prohibition.

The NIGC Requires Closure of the Apache Homelands Casino

78. The NOV stated that "there is no way for the Tribe to cure the alleged violation" and directed the Tribe to "immediately cease all gaming operations at Akela Flats." The NOV also threatened the Tribe with civil fines of up to $25,000 per day if the Apache Homelands Casino remained open. The NOV did not identify any "substantial violation" of IGRA.

79. On September 11, 2009, the NIGC issued a letter to the Tribe, indicating that it would stay the imposition of civil fines assessed pursuant to the NOV only if the Tribe "agrees to cease gaming at Akela Flats pending the resolution of the appeal and any subsequent judicial review."

80. As the NIGC was aware, the Tribe could not afford the substantial fines threatened in the NOV. For that reason, the Tribe closed the Apache Homelands Casino. The Casino has remained closed since.

81. By denying the Tribe an opportunity to cure the alleged violation and threatening fines that the Tribe could not reasonably be expected to pay, the NIGC effectuated closure of the

Apache Homelands Casino without issuing a closure order and without identifying a "substantial violation" of IGRA.

The Tribe's Administrative Appeal

82. The Tribe timely appealed the Chairman's NOV to the full Commission.

83. The Tribe sought to resolve the matter in discussions with the NIGC. During the course of those discussions, the NIGC proposed to the Tribe an "expedited" appeal procedure that would be limited to the Tribe's filing an initial brief, the NIGC's filing of a responsive brief, the Tribe's filing of a reply brief, and the issuance of a decision by the full Commission based solely on the briefing. This expedited procedure required the Tribe to waive its legal right to a hearing before an independent Presiding Officer.

84. On September 4, 2009, the Tribe notified the NIGC that it was "weighing its options" as to whether to waive its "important right" to an administrative hearing and wanted reassurance from the NIGC that "the alternative briefing schedule would mean a continued stay of sanctions pending the outcome of such an expedited route."

85. On September 9, 2009, the Tribe gave notice that it agreed to waive its right to an administrative hearing in exchange for an expedited appeal of the NOV that would follow the procedure proposed by the Agency.

NIGC Allows the State of New Mexico to Intervene

86. The NIGC covertly and immediately reneged on its commitment to expedite the Tribe's appeal. Unbeknownst to the Tribe, on August 31, 2009, the State of New Mexico had petitioned to intervene in the Tribe's administrative appeal. New Mexico did not serve a copy of its intervention petition on the Tribe. The NIGC did not provide the Tribe with a copy of the petition or inform the Tribe that the intervention petition had been filed.

87. Between August 31, 2009 and September 18, 2009, without notifying the Tribe or allowing the Tribe to oppose the intervention petition, the NIGC decided to allow the State of New Mexico to intervene.

88. In a letter dated September 18, 2009, Michael Gross, Associate General Counsel for the NIGC, advised the Tribe that the NIGC had granted intervention to New Mexico, and that the State would enjoy full party status in the Tribe's appeal. The September 18 letter did not state — and the NIGC has never stated — the basis for its decision to grant the New Mexico's intervention petition. Nor has the NIGC made or purported to make any findings about the appropriateness of the State's intervention.

The NIGC Refuses To Participate In Or Act On The Tribe's Appeal

89. The NIGC's September 18, 2009 letter also established a briefing schedule for the Tribe's appeal. The schedule provided that both the NIGC Chairman and the State would submit responsive briefs with supporting exhibits.

90. The NIGC has never filed a "response brief" in accordance with the September 18, 2009 schedule. Instead, on February 22, 2010, the NIGC issued a notice formally declining to provide any substantive information or argument in support of the NOV. At no time in the proceeding has the NIGC presented evidence or argument supporting the NOV or responding to the Tribe's substantive arguments.

91. On or around March 22, 2013, Tribal Chairman Jeff Haozous, together with attorneys Philip E. Thompson and Alan Fedman representing the Tribe, participated in a telephone conference with Eric Shepard, Acting General Counsel of the NIGC, and Melissa Schlichting and Michael Hoeing, senior attorneys in the NIGC's Office of General Counsel. Also participating in this call were Jessica Hernandez and Frank Baca, counsel for the State of New Mexico. During this call Mr. Shepard assured Chairman Haozous, Mr. Thompson and Mr. Fedman that the NIGC was expeditiously working on the Tribe's pending appeal, that a memorandum had been prepared for the Commissioners to review, and that a decision would be forthcoming in the very near future. When Mr. Thompson asked specifically about the timing of the decision, Mr. Shepard indicated it would be "within the next few months."

92. In October of 2013, after six months had passed with no decision from the NIGC, the Tribe requested a "status conference" to discuss the Tribe's "Appeal and the anticipated timeframe for the Commission's issuance of a decision in this matter."

93. On November 4, 2013, Chairman Haozous, Mr. Thompson and Mr. Fedman again participated in a telephone conference with Mr. Shepard, Mr. Hoeing, Ms. Hernandez and Mr. Baca. On this call the Tribal representatives described to the NIGC the hardship to the Tribe resulting from the continued delay, and reminded the NIGC staff of their prior commitment to have a decision issued following the March 22, 2013 call. Mr. Shepard specifically assured the Tribal representatives that a decision regarding the Tribe's pending appeal would be "issued by the end of the year," stating that the pending appeal would be decided even though the Commission at that time had only two commissioners.

94. Notably, a final rule promulgated by the NIGC on September 25, 2012 provides that a standard (*i.e.,* not expedited) review of a notice of violation by the full Commission should take approximately 180 days. 25 C.F.R. §§ 584.6(a); 584.12(a); 584.13; 584.14(a).

95. Although the Tribe's "expedited" administrative appeal of the NOV has been pending for nearly five years, no decision has been issued.

VIOLATIONS OF LAW

Count 1: Agency Action Unlawfully Withheld Or Unreasonably Delayed

(Violation of the APA)

96. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 95 above as if fully restated herein.

97. The APA requires reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

98. In August and September 2009, the NIGC represented to the Tribe that the agency would "expedite" the Tribe's administrative appeal of the Chairman's NOV if the Tribe were to waive its right to a hearing before an independent Presiding Officer. In reliance on that

representation, the Tribe waived its right to a hearing. Thus, the NIGC assumed a discrete, mandatory obligation to provide an expedited resolution of the Tribe's appeal.

99. On November 4, 2013, the NIGC explicitly committed to issuing a decision on the Tribe's administrative appeal by the end of the year. By doing so the NIGC assumed a discrete, mandatory obligation to issue a decision no later than December 31, 2013.

100. The NIGC's own regulations impose specific deadlines for the completion of each step in the administrative appeal process. Among other things, those regulations provide that once a matter is deemed submitted for decision to the full Commission, the Commission must issue a decision within 30 days. The parties' briefing in the appeal was complete as of June 11, 2011.

101. Four years have passed since NIGC proposed and the Tribe agreed to an "expedited" process. Briefing has been complete for three years. Nothing has been filed or docketed by the NIGC for nearly three years. The Commission has yet to issue a decision. The Commission has offered no explanation for its failure to do so. To the contrary, the Commission staff has promised that the Commission would do so and then failed to live up to those promises.

102. The Tribe has been prejudiced by the NIGC's failure to act on the appeal. The uncertainty of the status of the Akela Flats gaming operation has impeded and curtailed the Tribes ability to borrow funds and finance its operations. The Tribe's inability to operate the Apache Homelands Casino has deprived the Tribe of the financial ability to implement its plans to re-establish New Mexico — including the area of and surrounding Akela Flats — as its governmental and population centers.

103. By failing to issue a decision within the time required by its own representations, its own regulations and all reasonable standards of administrative procedure, the NIGC has unreasonably delayed and unlawfully withheld a discrete, mandatory action in violation of the APA.

Count 2: Arbitrary And Capricious Actions By The NIGC

(Violation of IGRA and the APA)

104. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 103 above as if fully restated herein.

105. The APA requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2).

The NIGC's Determination That Akela Flats Is Ineligible For Gaming

106. In issuing the NOV, the NIGC's Chairman purported to determine that the Akela Flats property is ineligible for gaming under IGRA because the property is subject to the General Prohibition and because the property does not qualify for any of the exceptions to the General Prohibition. By failing to act in any fashion for four years on the Tribe's timely-filed administrative appeal, the NIGC affirmed that purported determination.

107. The *Comanche* Settlement Agreement sets forth facts and representations that bear directly upon whether the Akela Flats property qualifies for the Initial Reservation and Restored Lands exceptions to the General Prohibition. The NOV entirely ignores the United States' acknowledgments in, and obligations under, the *Comanche* Settlement Agreement.

Initial Reservation Exception

108. The "Initial Reservation Exception" specifies that the General Prohibition does not apply to "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii). The Akela Flats property qualifies for this exception.

109. As described above, the *Comanche* Settlement Agreement confirms that the Tribe qualifies for the Initial Reservation Exception. Through the *Comanche* Settlement Agreement, the Tribe secured the United States' promise to issue a reservation proclamation for Akela Flats, designating that parcel as the Tribe's initial reservation. On November 28, 2011, pursuant to its

obligations under the *Comanche* Settlement Agreement, the Department of the Interior proclaimed the Akela Flats property to be "the Fort Sill Apache Indian reservation for the Fort Sill Apache Tribe of Indians." 76 Fed. Reg. 72969. The Federal Register contains an official notice confirming that the Akela Flats property is the Tribe's reservation. *Id*. Akela Flats is the Tribe's initial reservation. In the *Comanche* Settlement Agreement the United States expressly conceded that "the United States acknowledged the Fort Sill Apache Tribe" in 1976 and it is now estopped from arguing otherwise.

Restored Lands Exception

110. IGRA's "Restored Lands Exception" specifies that the General Prohibition does not apply to "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). The Akela Flats property qualifies for this exception.

111. As described above, the *Comanche* Settlement Agreement confirms that the Tribe qualifies for the Restored Lands Exception. The *Comanche* Settlement Agreement establishes that the Tribe is the successor in interest to the Chiricahua and Warm Springs Apache tribes (both of which dealt with the United States on a government-to-government basis prior to their incarceration as prisoners of war), and the United States is estopped from contending otherwise. The *Comanche* Settlement Agreement also establishes that this government-to-government relationship was terminated for a time; again, the United States is now estopped from contending otherwise. The *Comanche* Settlement Agreement and the July 23, 2001 letter wherein the United States approved the acquisition of Akela Flats in trust for the Tribe confirm that the property was part of a systematic effort to restore the Tribe's aboriginal landbase. The Tribe has both historic and modern-day connections to that landbase, including Akela Flats, despite the chilling effect of the NIGC's arbitrary and capricious issuance — and refusal to take action on — the NOV. And, in light of these historical and modern-day connections to between the Tribe and Akela Flats, there is a temporal connection between the Tribe's 1976 restoration and its 1999 request for the property to be placed in trust.

Burden of Proof

112. The NIGC bears the burden of proof in all administrative enforcement actions taken pursuant to 25 C.F.R. Part 273 (2008). *See, e.g., In the Matter of JPW Consultants* (NIGC 97-4, 98-8) (Nov. 13, 1998); 25 C.F.R. 580.7.

113. The Chairman issued NOV-09-35 to the Tribe in reliance on 25 C.F.R. Part 273. Therefore, the NIGC bears the burden of proof.

114. The Chairman's determination that the Akela Flats property is ineligible for gaming under IGRA is based on legal analyses from the 2008 Coleman Opinion and the 2009 Supplement. In a February 22, 2010 letter, the NIGC explicitly declined to provide any other analysis or argument.

115. The 2008 Coleman Opinion and the 2009 Supplement improperly allocates to the Tribe, rather than the NIGC, the burden proof.

Application of Part 292 Regulations

116. The Chairman's NOV improperly applies and relies on the Part 292 Regulations. By their own terms, those regulations do not apply to matters (such as this one) in which the NIGC issued an opinion prior to August 25, 2008. As described above, the NOV's treatment of the regulations also represents an arbitrary and capricious departure from NIGC practice. *See* Memorandum from John R. Hay, Senior Attorney, National Indian Gaming Commission, to Tracie Stevens, Chairwoman, National Indian Gaming Commission, at 2 (April 3, 2012) (available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fKaruk4912.pdf&tabid=120&mid=957).

117. Moreover, in relying on the Part 292 Regulations the NIGC inaccurately concluded that the "Federal acknowledgment process" referred to in IGRA can only mean the process set forth in 25 C.F.R. Part 83. Neither the language of the statute nor its legislative history supports this interpretation. Had Congress meant to limit the Initial Reservation exception only those tribes recognized through the Part 83 process — and not tribes that were

otherwise recognized through other federal administrative acknowledgment processes — it was certainly capable of doing so.

118. Even if the Part 292 Regulations applied here — which they do not — Akela Flats would nevertheless qualify for the Initial Reservation Exception and the Restored Lands Exception for the reasons set forth above.

Reliance on Withdrawn 2008 Coleman Opinion

119. The Chairman's NOV improperly applies and relies on the 2008 Coleman Opinion despite the fact that the Opinion had been formally withdrawn. For that reason, as well as the reasons set forth elsewhere in this complaint, the NIGC's reliance on the 2008 Coleman Opinion and the 2009 Supplement to that Opinion was improper, arbitrary and capricious.

120. For each of the reasons set forth above, the NIGC's determination, and subsequent affirmation by inaction, that Akela Flats is ineligible for gaming under IGRA, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedure required by law.

The NIGC's Actions To Force Closure Of The Apache Homelands Casino

121. In issuing the NOV, the NIGC stated that there was "no way for the Tribe to cure" the violations alleged therein. The NIGC also threatened to impose massive fines unless the Apache Homelands Casino was closed. By denying the Tribe an opportunity to cure alleged violations and threatening fines that the Tribe could not reasonably be expected to pay, the Agency effectively ordered the closure of the Apache Homelands Casino.

122. Regulations in effect at the time prohibited the NIGC from issuing a closure order absent a "substantial violation" of IGRA. Those same regulations specified that the violation alleged in the NOV — gaming on lands (allegedly) subject to the General Prohibition — was not a "substantial violation."

123. Even if the NIGC had the authority to close the Akela Flats gaming facility, the NIGC's actions deprived the Tribe of the due process protections afforded in matters involving a

formal closure order, including, most importantly, the right to have an administrative appeal resolved within 90 days.

The NIGC's Decision To Allow Intervention By The State Of New Mexico

124. In a September 18, 2009 letter, the NIGC advised the Tribe that it had granted the State of New Mexico's petition to intervene in the Tribe's administrative appeal of the NOV.

125. Regulations in effect at that time permitted the NIGC to grant intervention petitions only upon a Presiding Official's finding that (a) "the final decision could directly and adversely affect [the intervenor] or the class they represent;" (b) the intervenor "may contribute materially to the disposition of the proceedings;" (c) the intervenor's interest "is not adequately represented by existing parties;" and (d) "intervention would not unfairly prejudice existing parties or delay resolution of the proceeding." 25 C.F.R. § 577.12 (2008). The NIGC did not make any of these findings before granting the State of New Mexico's intervention petition.

126. Regulations in effect at the time also required the State of New Mexico to serve its intervention petition on the Tribe. The State of New Mexico failed to do so and the NIGC was aware of that failure.

127. On information and belief, the NIGC's decision to grant the State of New Mexico's intervention petition is contrary to a prior Agency determination that "[t]he State has no gaming regulatory or enforcement authority over the Fort Sill Apache Tribe."

128. The NIGC's decision to allow the State of New Mexico to intervene in the Tribe's administrative appeal of the NOV was erroneous, arbitrary and capricious, and it has caused actual prejudice and delay to the Tribe. On information and belief, the State's intervention in one factor that has caused the NIGC to refuse to take action on the Tribe's administrative appeal.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Fort Sill Apache Tribe of Oklahoma respectfully requests the Court to grant the following relief:

1. declare that the actions of Defendants the National Indian Gaming Commission and its Acting Chairman Jonodev Chaudhuri, including the issuance of NOV-09-35, were

arbitrary, capricious, not in accordance with law and without observance of procedure required by law;

2. declare the actions of the Defendants to be outside the scope of their statutory and regulatory authority;

3. invalidate NOV-09-35, setting aside all actions taken in its enforcement, and order Defendants to take all necessary corrective action to reinstate the Tribe's legal rights;

4. declare that Akela Flats is not subject to the General Prohibition and, therefore, that the Tribe may lawfully conduct gaming on that parcel;

5. award Plaintiff its costs, including attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ; and

6. grant such other and further relief as the Court deems just and proper.

Dated: June 6, 2014

Respectfully submitted,

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By: /s/ Kenneth J. Pfaehler

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