UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

NOTICE OF CROSS-MOTION TO DISMISS

14-cv-1317 (DNH/ATB)

PLEASE TAKE NOTICE, that upon the annexed Declarations of Cornelius D. Murray and Edward Trufant, both dated November 30, 2014 and submitted herewith, and upon the accompanying Memorandum of Law in support of the Defendants' Cross-Motion to Dismiss, and upon all pleadings and prior papers by and between the parties in this action and the action previously dismissed, the Defendants, through their attorneys, O'Connell & Aronowitz, will cross-move this Court at the Alexander Pirnie U.S. Courthouse, 10 Broad Street, Utica, New York, on December 17, 2014, at 2:00 p.m., before the Hon. David N. Hurd, United States District Court Judge, for an Order denying the Plaintiffs' motion for a preliminary injunction and dismissing the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), based on the doctrine of *res judicata*.

DATED: Albany, New York
December 1, 2014

O'CONNELL AND ARONOWITZ
By:

s/ Cornelius D. Murray

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

Civil Action No. 5:14-cv-01317 (DNH-ATB)

DECLARATION OF CORNELIUS D. MURRAY

Cornelius D. Murray declares under penalties of perjury as follows:

1. I am the attorney for the Defendants in this matter, and as such I am fully familiar with the facts hereinafter set forth.

2. This Declaration is respectfully submitted in support of the Defendants' Cross-Motion to Dismiss and in opposition to the Plaintiffs' Motion for a Preliminary Injunction.

3. Attached hereto as Exhibit "A" is a copy of a decision rendered by the Interior Board of Indian Appeals on January 16, 2014 in a case entitled *Cayuga Indian Nation of New York, Clint Halftown, Tim Twoguns, and Gary Wheeler v. Eastern Regional Director, Bureau of Indian Affairs*, Docket No. IBIA 12-005.

4. Attached hereto as Exhibit "B" is a copy of an Indian lands opinion letter issued by the National Indian Gaming Commission Office of General Counsel to the

Pyramid Lake Paiute Tribe, dated August 27, 2005, regarding Gaming on fee land at Pyramid Lake Paiute Indian Reservation.

5. Attached hereto as Exhibit "C" is a copy of an Indian lands memorandum from Lawrence S. Roberts, General Counsel of the National Indian Gaming Commission, to Tracie Stevens, Chairwomen of the National Indian Gaming Commission, dated July 18, 2011, regarding the United Keetoowah Bank of Cherokee Indians.

DATED: November 30, 2014
Albany, New York

s/ Cornelius D. Murray
Cornelius D. Murray, Esq.
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Exhibit A

INTERIOR BOARD OF INDIAN APPEALS

Cayuga Indian Nation of New York, Clint Halftown, Tim Twoguns, and Gary Wheeler v. Eastern Regional Director, Bureau of Indian Affairs

58 IBIA 171 (01/16/2014)

Related Board cases:
49 IBIA 164

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CAYUGA INDIAN NATION OF NEW YORK, CLINT HALFTOWN, TIM TWOGUNS, AND GARY WHEELER, Appellants,	)	Order Vacating Decision
v.	)	Docket No. IBIA 12-005
EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	January 16, 2014

The Cayuga Indian Nation of New York (Nation), Clint Halftown, Tim Twoguns, and Gary Wheeler (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from an August 19, 2011, decision (Decision) of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), concerning the composition of the Nation's Council of chiefs and seatwarmers and the identity of the Nation's representatives for government-to-government relations.[1] The Regional Director decided that the Nation, through its clan mothers, had removed and replaced Halftown, Twoguns, and Wheeler from the Nation's Council, and that the newly constituted Council had appointed new representatives of the Nation for government-to-government purposes.

[1] This appeal involves a dispute concerning the leadership of the Nation. The Board's reference to the Nation and the Nation's Council, in whose name certain pleadings have been filed, shall not be construed as expressing any view on the merits of the dispute or on the authority of any attorney to file pleadings on behalf of either the Nation or the Nation's Council. For purposes of this decision, the Board uses the terms "Council" or "Nation's Council" to refer to the council consisting of chiefs and/or seatwarmers, who are also sometimes characterized as the "representatives" of their respective clans to the Council.

The parties also use the term "representatives" to refer to the two individuals designated by the Council as the Nation's representatives to BIA for government-to-government purposes. It is undisputed in this appeal that the Council currently consists of a total of six individuals—two each from three clans—but three members of the Council are disputed, as are the identities of the Nation's two representatives for government-to-government purposes.

After briefing on the merits of the appeal was completed, the Board denied a motion by the Regional Director and Interested Parties to place the Decision into immediate effect and ordered supplemental briefing by the parties on a threshold issue not previously addressed in the appeal: Was it even appropriate, at the time the Decision was issued, for BIA to issue a decision on the composition of the Council or the identity of the Nation's representatives? *See* Order Denying Motion to Place Decision into Effect, Aug. 28, 2012 (Order Denying Motion).[2]

After considering the supplemental briefs and the record, we conclude that the Regional Director impermissibly intruded into tribal affairs by issuing the Decision. At the time he did so, there was no separate matter pending before BIA that independently required or warranted BIA action which, in turn, made it necessary for BIA to address the internal dispute. We therefore vacate the Decision without expressing any view on the merits of the underlying dispute, the current leadership of the Nation, or the identity or scope of authority of any individual to represent or take action on behalf of the Nation.

Background

I. History of the Tribal Dispute Preceding the Decision

The Nation is governed by oral law and traditions. *See George v. Eastern Regional Director*, 49 IBIA 164, 167 (2009). Cayuga law and traditions "mirror" the law and traditions of the Haudenosaunee (Iroquois) Confederation, of which the Nation is a member. Letter from Keith M. Harper and Daniel J. French to Patrice Kunesh, Oct. 17, 2011 (Administrative Record (AR) Tab 25); *see George*, 49 IBIA at 167.

The Nation has been involved in a governance dispute since 2004, when the Council split into factions. The dispute, as it stood in 2006, was the subject of an earlier appeal in which the Board affirmed a decision by the Regional Director declining a request from one faction to "withdraw" BIA's recognition of Appellant Halftown as the Nation's designated representative for government-to-government purposes as relevant to an Indian Self-Determination and Education Assistance Act (ISDA) contract between the Nation and BIA. *George*, 49 IBIA at 180. BIA's previous identification of Halftown as the Nation's

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[2] The Interested Parties who collectively intervened in this appeal identify themselves as the Cayuga Nation Council and Chiefs William Jacobs and Samuel George; Clan Mothers Bernadette Hill, Inez Jimerson, and Brenda Bennett; Faithkeepers Karl Hill, Alan George, Tammy VanAernam, and Pamela Isaac; and Clan Representatives Chester Isaac, Daniel C. Hill, Justin Bennett, and Samuel Campbell. *See* Motion of Cayuga Council to Have Decision Made Effective Immediately, Sept. 29, 2011, at 1.

representative was based on action by the Council in 2003.[3] In the *George* appeal to the Board, no party challenged the composition of the Council as it stood in 2005, or at least as it was identified by the Regional Director at that time: Appellants Halftown, Twoguns, and Wheeler ("Halftown faction"); and Interested Parties William Jacobs, Samuel George, and Chester Isaac ("Jacobs faction"). *Id.* at 175. In *George*, the Jacobs faction contended that a 5-member "consensus" of the Council (all except Halftown) had acted to remove Halftown as the Nation's representative.[4] Twoguns and Wheeler, who subsequently realigned with Halftown, purported to revoke their consent to remove Halftown. The Regional Director concluded that there was insufficient evidence for him to "withdraw" BIA's recognition of Halftown, whom BIA had previously recognized as the Nation's representative for government-to-government purposes. *Id.* at 180. The Board affirmed that decision.

Even while the *George* appeal was pending, and separate from the issue of whether Halftown was still designated as the Nation's representative, the factions continued to disagree on whether or to what extent actions that had been taken by Halftown had been authorized by a consensus of the Council. Thus, they continued to disagree about whether Halftown, even in the role of representative, was exceeding his authority. Neither the Regional Director nor the Board addressed the scope of authority vested in Halftown as the Nation's representative, with respect to ISDA contracts or any other matters. *Id.* at 165, 187.

In 2008, the Jacobs faction wrote to the Regional Director and asked that a moratorium be placed on fee-to-trust applications that it contended had been submitted by Halftown without having been approved by a consensus of the Council. Letter from Jacobs, George, and Isaac to Regional Director, Jan. 9, 2008 (AR Tab 14F). After *George* was decided, the Jacobs faction continued to take the position that Halftown had not been authorized to submit land-into-trust applications on behalf of the Nation, although in correspondence to the Regional Director and the Assistant Secretary – Indian Affairs (Assistant Secretary) in 2010, the Jacobs faction stopped short of repeating its request for a

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[3] In 2003, following Chief Vernon Isaac's death, the Council consisted of Halftown, Jacobs, Twoguns, and Wheeler. That 4-member Council recognized Halftown as the Nation's representative and Twoguns as an alternate representative. *George*, 49 IBIA at 169. The scope of the representatives' authority is defined by the Council.

[4] The parties agreed in *George* that the Council must act by consensus. In *George*, the Halftown faction argued that consensus "is achieved only when *all* of the members of the Nation's Council are 'of one mind.'" *George*, 49 IBIA at 165; *see also id.* at 188 (Halftown testified that consensus meant unanimity and that disputes were tabled until agreement occurs).

moratorium, but insisted that any lands restored to the Nation must be held by the Nation in the same manner as they had been before they were illegally taken. *See* Letter from Jacobs, George, and Isaac to Assistant Secretary, Nov. 19, 2010 (AR Tab 14G); Letter from Jacobs, George, and Isaac to Regional Director, Nov. 19, 2010 (AR Tab 14G). In May 2011, without addressing the tribal dispute, the Regional Director transmitted the Nation's fee-to-trust application to the Assistant Secretary, recommending approval of a 129.14-acre transaction. *See* Appellants' Consolidated Response, June 6, 2012, Ex. A (Declaration of Halftown) & Ex. [A]12 (Memorandum from Regional Director to Assistant Secretary, May 4, 2011).

In another matter, in 2009, after the Board decided *George*, BIA apparently accepted a proposal submitted by Sharon LeRoy, as the Executive Administrator of the Nation, for a Community Services Program ISDA contract for the years 2009-2012. *See* Appellee's Supplemental Brief, Sept. 24, 2012, at 12 & Ex. B. The Regional Director submitted to the Board a partial copy of the proposal for the contract, but no documentation associated with the Regional Director's consideration and approval of the proposal. No party has disputed the existence of the 2009-2012 contract, but the contract itself is not part of the Regional Director's administrative record for the Decision, nor has any party provided the Board with a copy. Thus, we cannot determine who the actual signatories are to the contract, who is authorized to request drawdowns, and the schedule for drawdowns to fund the contract.

Between 2009, when the Board decided *George*, and 2011, when the most recent developments within the Nation occurred, the dispute between the Halftown faction and the Jacobs faction continued to fester, focusing on what, if any, present-day continuing substantive authority had been vested in Halftown by the Council, and whether the Halftown faction could operate as the Council—i.e., with less than a full 6-member consensus.[5]

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[5] Notwithstanding its prior representations, *see supra* note 4, the Halftown faction apparently sometimes takes the position that the Council can take affirmative action (and not simply table a matter) based on the unanimity of only three members of the Council—or at least the three-member Halftown faction if the Jacobs faction is not present. The Jacobs faction accuses the Halftown faction of excluding them from Council meetings, which the Halftown faction denies, and the Halftown faction in turn accuses the Jacobs faction of refusing to participate in Council meetings. Each faction accuses the other of imposing unreasonable pre-conditions for a meeting of the full Council.

II. The Request for BIA to Recognize New Representatives and the Regional Director's Decision

On June 1, 2011, the Nation's Turtle Clan Mother, Brenda Bennett (Bennett), wrote to the Regional Director "in reference to the serious and critical issues facing the Cayuga Nation community," complaining about the Halftown administration's allegedly hostile treatment of Nation citizens who expressed disagreement with the Halftown faction, and advising the Regional Director that Twoguns and Wheeler had been "released" as the Turtle Clan representatives (to the Council), and had been replaced with Justin Bennett and Samuel Campbell. Letter from Brenda Bennett to Regional Director, June 1, 2011 (AR Tab 5). Bennett asked that the two newly-selected individuals "be officially recognized by [BIA]." *Id.* at 2 (unnumbered). She enclosed a summary of "Concerns/Issues" regarding the Halftown-controlled government, and also enclosed "Cayuga Nation Resolution 11-001," titled "Cayuga Nation Composition of Federal Recognition." AR Tab 5.

Resolution 11-001 recites that the Council, in addition to Jacobs, George, and Isaac (whose positions on the Council are undisputed), now includes representatives Justin Bennett and Samuel Campbell (for the Turtle Clan) and seatwarmer Dan Hill (for the Heron Clan), replacing Twoguns and Wheeler (Turtle Clan), and Halftown (Heron Clan), who are no longer recognized by their clan mothers as representatives to the Council.[6] The Resolution also states that Halftown and Twoguns are no longer recognized as the Nation's representatives to BIA, and have been replaced by Jacobs and George. *Id.*

Bennett's letter was followed by another letter from an attorney for Interested Parties, referring to the "newly unified" Council and the "historic unity" among the Council, "the three Cayuga Clan Mothers and the Nation's Faithkeepers." Letter from Joseph J. Heath to Regional Director, June 9, 2011 (AR Tab 8). Heath urged the Regional Director "to promptly recognize the newly constituted Cayuga Nation government and representatives, as affirmed in Resolution # 11-001." *Id.* at 1. Heath outlined the events leading up to the changes, including a litany of complaints against the Halftown faction. The letter explained how Twoguns and Wheeler had been removed by Clan Mother Bennett. It did not articulate the circumstances of Halftown's removal from the Council, but asserted that even if Halftown argued that he had not properly been

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[6] Although Resolution 11-001 identifies Dan Hill as a seatwarmer for the Heron Clan, it also recites that Clan Mother Bernadette Hill appointed "Karl Hill, currently serving as a Faithkeeper, as the duly recognized Heron Clan Representative," and the Resolution itself is signed by "Karl Hill – Faithkeeper, Heron Clan Representative," but not by Dan Hill. As noted earlier, *supra* note 2, Interested Parties identify Dan Hill as a clan representative and Karl Hill as a faithkeeper.

removed, his refusal to attend or participate by telephone in the Council meeting allowed the five Council participants to act by consensus to remove him as the Nation's representative to BIA. *Id.* at 6-7.

The Halftown faction responded and asked the Regional Director to reject, on the merits, or as in part barred by the preclusive effect of the *George* decision, the Jacobs faction's request that he find that Halftown and Twoguns are no longer the Nation's designated representatives for government-to-government purposes. *See* Letter from Daniel J. French to Regional Director, June 24, 2011 (AR Tab 13). Additional correspondence from attorneys for both factions followed, with each side arguing the merits of the tribal issues and urging for or against BIA recognition of a new composition of the Council and newly designated representatives. *See* AR Tabs 15, 16, 18.

On August 19, 2011, the Regional Director issued the Decision. The Decision begins by stating that BIA had been informed in early June by members of the Nation that some clan representatives had been removed and new representatives appointed. Although no faction had suggested that the purported developments within the Nation would affect the administration of the Nation's Community Services ISDA contract (and if so, how), nor did Resolution 11-001 refer to any changes in the administration of the Nation's existing ISDA contract, the Regional Director stated that "[f]or the limited purpose of determining to whom BIA funds are appropriately directed in carrying out the government-to-government relationship, the BIA, in its capacity as a steward of federal funds and programs . . . can only recognize or not recognize the actions of a nation in choosing its leaders. That is the limited scope of this determination." Decision at 2. The remainder of the Decision addressed the merits of the tribal dispute, concluding that "for purposes of the government-to-government relationship between the United States and the Cayuga Nation, I recognize the Nation Council as set out in Cayuga Nation Resolution 11-001," and "recognize . . . Jacobs and . . . George as the federal representatives designated by the new Nation Council." *Id.* at 4.

III. Appeal Proceedings and Briefing on Whether the Regional Director Was Justified in Addressing the Tribal Dispute

The Halftown faction appealed to the Board. Interested Parties quickly responded by filing a motion to have the Decision placed into immediate effect, pursuant to 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314(a), or in the alternative, for expedited consideration of the appeal. Subsequently, the Regional Director also filed a motion to make the Decision effective immediately. The Board allowed briefing on the motions to place the Decision into effect, and subsequently took the motions under advisement and ordered briefing on the merits.

On August 28, 2012, the Board denied the motions to place the Decision into effect, finding that the Regional Director and Interested Parties had not demonstrated that compelling circumstances existed that warranted such action by the Board. Critically, in denying the motion, we found that we were "unable to determine, as a threshold matter, what specific request for action or decision was pending before the Regional Director at the time of the Decision that required BIA to address the tribal dispute and to make any determination on the composition of the Nation's Council or its representative(s)." Order Denying Motion at 2.

The Board ordered supplemental briefing from the parties to address several Board decisions issued since *George*—none of which had been mentioned by the parties—that reemphasized, reiterated, and applied, as relevant to tribal disputes, the principles of tribal self-determination and sovereignty, and the corresponding principle of BIA noninterference in those disputes unless required. *See, e.g., Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220 (2012) (affirming BIA decision not to address a tribal dispute on the ground that there was no Federal action required, but vacating—on that same ground—the portion of the decision that purported to "continue" to recognize the council with which BIA had a past relationship). The Board ordered the parties to identify what separate request or matter was pending at the time the Decision was issued (1) that required BIA action; and (2) which, in order to take that action, required BIA to decide the composition of the Nation's Council or the identity of the Nation's representative(s) for the matter at issue. Order Denying Motion at 3-4.

In response, Interested Parties and the Regional Director argue, first, that BIA has an independent, stand-alone obligation to intervene and decide a tribal government dispute when BIA's failure to do so would leave the tribe without an operative government. Second, they argue that even if no such stand-alone obligation exists, there were three separate matters that required BIA action at the time the Decision was issued, which in turn required the Regional Director to address the tribal dispute on the merits: (1) a pending agreement between the U.S. Department of Homeland Security (DHS) and the Nation; (2) a request by Interested Parties that the Department of the Interior (Department) stay further consideration of the fee-to-trust application submitted by Halftown; and (3) BIA's need to know to whom to direct funding for an existing ISDA contract with the Nation.

Appellants argue that the Decision should be vacated because BIA does not have authority to intervene in a tribal dispute unless a separate matter requires BIA action and, in turn, implicates the government-to-government relationship and necessitates a BIA decision addressing the merits of a tribal dispute. Appellants contend that none of the three matters posited by Interested Parties and the Regional Director triggered a need for BIA action which, in turn, required the Regional Director's issuance of a decision addressing the tribal dispute.

Discussion

We agree with Appellants that the Regional Director committed procedural error in issuing the Decision, and therefore we vacate the Decision. We address in turn each of the arguments raised by Interested Parties and the Regional Director.

I. Does BIA have an Independent Obligation to Intervene and Decide a Tribal Government Dispute Whenever a Tribe Appears Incapable of Resolving the Dispute by Itself?

Interested Parties and the Regional Director argue that when there is a dispute within a tribe over the leadership of the tribe, BIA has an independent obligation to decide whom to recognize when internal tribal processes for resolving the dispute have been exhausted and there is a danger that the tribe may be incapable of sorting out the dispute by itself, thus leading to tribal governmental paralysis. Interested Parties' Supplemental Brief, Sept. 24, 2012, at 1, 4. The Regional Director contends that issuance of the Decision was necessary and justified because BIA has an obligation to ensure "that the Nation is not left with an inoperative government." Appellee's Supplemental Brief, Sept. 24, 2012, at 2; *see id.* at 3 ("BIA cannot refrain from recognizing a tribal leader when the effect is to leave a tribe without a functional government."). The Regional Director contends that the Decision was predicated on his understanding that the Nation was "at an impasse, with no ability to achieve effective government." *Id.* at 17.

The Regional Director cites our decision in *George*, involving an earlier iteration of the same tribal dispute, as establishing "an important exception" to the general rule that BIA may not render a tribal leadership recognition decision in a vacuum, because in *George* the parties did not dispute the need for a BIA recognition decision, yet no discrete and separate matter requiring BIA action was identified. Appellee's Supplemental Brief, Sept. 24, 2012, at 3. The Regional Director suggests that it would be a change in Board precedent if the Board were to hold that BIA was not permitted to intervene in the dispute in order to ensure that the Nation has a functional government. *Id.*

In our view, the Regional Director and Interested Parties read judicial and Board precedent too broadly, but to the extent Board precedent may be unclear or even arguably inconsistent, we clarify and confirm our conviction that more recent Board precedent more accurately and correctly reflects the principles of tribal sovereignty and self-determination that serve to constrain BIA's intrusion into internal tribal disputes, unless it is truly necessary as an incident to satisfying some separate Federal obligation.

At least since 1996, the Board has recognized that BIA has the authority to make a determination on tribal leadership "when the situation [has] deteriorated to the point that recognition of some government was *essential for Federal purposes*." *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130, 145 (1996) (emphasis added). A corollary is that BIA has "both the authority and responsibility to interpret tribal law *when necessary to carry out the government-to-government relationship* with the tribe." *United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75, 80 (1992) (emphasis added); *see also Ransom v. Babbitt*, 69 F. Supp. 2d 141, 151-52 (D.D.C. 1999) (Department has authority to review tribal procedures "when it is forced to recognize" tribal leadership). And it is well-established that in executing responsibilities for carrying on government relations with a tribe and providing necessary day-to-day services, *BIA* may not effectively *create* a hiatus in tribal government by simultaneously recognizing two tribal governments or declining to recognize any tribal government. *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983).

But disfunctionality or even paralysis within a tribal government, standing alone, does not necessarily, or even ordinarily, mean that *BIA* has created a hiatus in the tribal government, nor does it trigger some free-standing obligation for BIA to end the stalemate to ensure that the tribal government remains functional, even when the government-to-government relationship is not, at the time, implicated in any concrete way. As Appellants argue, and as the Board has held, no statute or regulation imposes on BIA a free-standing obligation to intervene in a tribal dispute solely for the *tribe's* sake—i.e., to save a tribe from its own disfunctionality, even when the tribal dispute has not yet in fact affected BIA's ability to carry out its responsibilities. *See* Appellants' Supplemental Brief Reply Brief, Oct. 15, 2012, at 7 (citing *Alturas Indian Rancheria v. Pacific Regional Director,* 54 IBIA 138, 143 (2011)); *see also Wasson v. Western Regional Director*, 42 IBIA 141, 153 (2006) (the appellants' request for recognition was "fatally flawed because it does not seek recognition for the purpose of the conduct of any specified BIA function or program").

The Regional Director relies in part on our decision in *LaRocque v. Aberdeen Area Director*, 29 IBIA 201 (1996), arguing that in *LaRocque* we affirmed a BIA area director's recognition decision when his interpretation of tribal law was not only reasonable "but also avoid[ed] the absurd result of rendering the tribal government totally inoperative." Appellee's Supplemental Brief, Sept. 24, 2012, at 15 (quoting *LaRocque*, 29 IBIA at 204). But that case does not stand for the proposition that BIA may intervene in tribal affairs whenever necessary to prevent a tribal dispute from rendering a tribal government totally inoperative. The Board's language must be read in context: The Board was justifying the reasonableness of BIA's interpretation of tribal law, not addressing whether BIA's intervention itself was justified. That issue—whether there was a matter pending that permitted BIA to issue a decision that interpreted tribal law—had been addressed earlier in the decision. *See LaRocque*, 29 IBIA at 202 ("the Area Director notified the Tribe that

matters were pending which required the recognition of a tribal government for the purposes of carrying out the Federal government-to-government relationship").

Nor does the Federal court decision in *Winnemucca Indian Colony v. United States*, 837 F. Supp. 2d 1184 (D. Nev. 2011), which is also relied on by both the Regional Director and Interested Parties, support their position. In *Winnemucca*, the Colony sued the United States for interfering with its own activities on tribal trust lands. *See id.* at 1187-88. The suit was prompted when BIA law enforcement officers threatened to arrest individuals for trespass on tribal trust land. The individuals had been authorized to be there by Thomas Wasson, as Chairman of the Winnemucca Indian Colony. BIA's actions regarding possible trespass on lands owned by the United States in trust for the tribe—whether or not otherwise misguided in that case—implicated Wasson's authority and status. *See also Wasson v. Western Regional Director*, 52 IBIA 353, 358-60 (2010) (ordering BIA to address an earlier trespass allegation by the Wasson faction, and recognizing that BIA's decision may need to address the tribal government dispute).

We recognize that while the principle that BIA has the authority to intervene in tribal disputes "when necessary to carry out the government-to-government relationship with [a] tribe," *United Keetoowah*, 22 IBIA at 80, has been often stated, the predicate—that such intervention be based, in fact, on necessity—has not always been raised by parties to appeals, nor has it necessarily been raised or expressly addressed *sua sponte* by the Board. For example, in *George*, the parties did not dispute the premise that BIA recognition of a tribal representative was necessary for conducting government-to-government business, as relevant to an ISDA contract. *See George*, 49 IBIA at 164, 187. It may well be that the premise should have been questioned or more closely examined. What is more important, in our view, is that in *George*, the Board plainly reaffirmed the principle that "[r]ecognition is not required in the abstract," and that BIA is not required to make *any* recognition decision if it is not needed for government-to-government purposes. *Id.* at 186. Thus, we reject the Regional Director's argument that *George* should be read as creating an exception to the rule that BIA is precluded from intervening in tribal disputes unless essential for Federal purposes.

Instead, we reaffirm the Board's case law that principles of tribal sovereignty and self-determination must prevail, and must act as constraints on BIA intervention, when there is no separate matter that requires or separately triggers a need for BIA action that implicates the government-to-government relationship, and which in turn necessitates a BIA decision on the tribal dispute. *See Cloverdale*, 55 IBIA 220 (BIA may not address a tribal dispute when there is no separate Federal action required); *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320 (2012) (vacating BIA decisions addressing a tribal dispute when BIA had not identified any required BIA action that prompted BIA's intervention); *Pueblo de San Ildefonso v. Acting Southwest Regional Director*,

54 IBIA 253 (2012) (vacating BIA recognition decision because there was no evident need for Federal action); *Phillip Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317 (2010) (same).[7]

II. Were There Separate Pending Matters That Required or Warranted BIA Action Which, in Turn, Required a Determination on the Tribal Dispute?

A. Pending Memorandum of Understanding with DHS

The Regional Director and Interested Parties contend that even if BIA has no stand-alone obligation to ensure that the tribal dispute does not render the Nation unable to function, there were three separate matters that required BIA action at the time the Decision was issued, which in turn required the Regional Director to address the tribal dispute on the merits. The first such matter relied upon is a pending Memorandum of Understanding (MOU) that apparently had been negotiated by Halftown, purportedly on behalf of and as authorized by the Nation, and DHS, relating to the Western Hemisphere Travel Initiative concerning entry into and departure from the United States. In a letter to the Jacobs faction in 2008, DHS indicated that it would rely on BIA to determine points of contact for Federally recognized tribes, and that DHS follows guidelines set by BIA when addressing Federally recognized tribal entities. *See* Interested Parties Supplemental Brief, Sept. 24, 2012, Ex. F. According to Interested Parties and the Regional Director, because DHS was relying on BIA to determine whether Halftown was authorized to represent the Nation, the Regional Director was justified in issuing the Decision.

We initially note that the DHS correspondence was not addressed to the Regional Director, nor was it in the form of a request to BIA. It is not part of the Regional Director's administrative record for the Decision, meaning that it was not utilized by the

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[7] The Regional Director suggests that as long as the Decision is stayed by this appeal, "BIA is required to continue to recognize a Cayuga council composed of [the Halftown faction and Jacobs faction]." Appellee's Supplemental Brief, Sept. 24, 2012, at 16. That is not the case. If there is no separate need for Federal action during the Nation's tribal government dispute, BIA is not required to recognize anyone as the Nation's representative or any composition of the Council, nor would it be appropriate for BIA to do so. *See Cloverdale*, 55 IBIA at 225-26 (vacating the portion of a BIA decision that otherwise (correctly) declined to intervene in a tribal dispute but then stated that BIA "continues" to recognize the council it had previously recognized). And if there *is* a separate need for Federal action, which in turn requires a recognition decision, it would be BIA's responsibility to make a decision about whom to recognize, setting forth its reasoning and justification, and providing appeal rights to interested parties.

Regional Director in issuing the Decision. *See* 43 C.F.R. § 4.335 (BIA's record certification).[8] But even if DHS's correspondence to the Jacobs faction had been considered by the Regional Director, it could not have served as the necessary justification for issuing the Decision.

In the correspondence to the Regional Director leading up to the Decision, the Halftown faction expressly informed the Regional Director that due to the tribal governance dispute, the Nation—i.e., Halftown, with whom DHS apparently had been negotiating—had decided to *postpone* signing an MOU. The Regional Director relies on this "indefinite[] postpone[ment]" of the MOU signing as "signaling that the Appellants viewed [BIA's] decision as bearing upon" which party to this appeal DHS would work with. Appellee's Supplemental Brief, Sept. 24, 2012, at 13. That may well be the case. But whether intended or not by Appellants, their willingness to effectively table further proceedings with DHS while the dispute remained unresolved served, if anything, to *remove* this as a possible justification for BIA intervention and issuance of a decision.[9]

Moreover, as we held in *Alturas*, BIA does not have some independent duty to serve as the arbiter for tribal disputes for the convenience of other agencies or third parties. 54 IBIA at 143-44. Thus, while the emergence of the present dispute possibly could have served as a reason for the Regional Director to advise DHS of the existence of the dispute, the pendency of a proposed MOU—by then tabled by Halftown—could hardly serve as a separate matter requiring BIA action and necessitating BIA's intervention in the dispute.

B. Land-Into-Trust Application and Interested Parties' Stay Request

The Regional Director and Interested Parties also contend that the Regional Director and the Assistant Secretary had pending before them, at the time the Decision issued, a request from Interested Parties to stay consideration of the land-into-trust application submitted by Halftown. They argue that resolution of the stay request—an

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[8] Nor did the Regional Director refer to the pending MOU with DHS in his affidavit to support making the Decision effective immediately. *See* Motion of Appellee to Make Decision Effective Immediately, Oct. 26, 2011, Ex. A (Affidavit of Franklin Keel).

[9] To the extent Interested Parties and the Regional Director contend that a requirement for BIA action was triggered by DHS's need to determine whether Halftown was authorized to speak for the Cayuga Nation, it is unclear why the Regional Director would have waited until 2011 to act, when the Jacobs faction had been contending for some time that under the Council as recognized for purposes of the Regional Director's 2006 decision, Halftown lacked such authority in the absence of a consensus decision by the entire 6-member Council.

apparent reference to the correspondence in 2008 and 2010 from the Jacobs faction to the Regional Director, *see supra* at 173-74—required the Regional Director to determine if the trust application had been submitted by the legitimate representatives of the Nation.[10]

But the land-into-trust application was not pending before the Regional Director when he issued the Decision. *See supra* at 174 (Regional Director transmitted the land-into-trust application to the Assistant Secretary on May 4, 2011). Thus a request for the Department to stay consideration of the application could not serve as the separate matter that required action *by the Regional Director*. The Regional Director argues that because the matter was briefed to him, and has now been briefed to the Board, administrative efficiency would be well served by a decision on the merits. That misses the point. Neither the Regional Director nor the Board serve as general arbiters of disputes that may be implicated in matters that are pending before other Departmental officials. When the Regional Director transmitted the land-into-trust application to the Assistant Secretary for consideration, any request to stay consideration was for the Assistant Secretary, not the Regional Director, to decide.

C. ISDA Contract Administration and Funding

The final argument made by the Regional Director and Interested Parties is that the administration and funding of an existing ISDA contract between BIA and the Nation required BIA to issue a decision on the composition of the Council and the designation of the Nation's representatives. In some cases, an ISDA contract may have action-triggering events that do indeed require BIA to address an internal tribal dispute and to make a tribal leadership determination in order to take some ISDA action. But in other cases, even a tribal governance dispute involving a purported change in tribal leadership does not necessarily directly and immediately affect the administration of an ISDA contract, nor require BIA to address the dispute. As the Board recognized in *Coyote Valley*, not all interaction between BIA and a tribe regarding the administration of an ISDA contract requires a determination of the tribe's political leadership. 54 IBIA at 326 n.12. In that case, we recognized that "ISDA may require BIA to act on a request for approval of an ISDA document from a tribe," but we found that the regional director in that case "did not produce or identify any such request as the foundation to justify issuance of the decisions." *Id.* at 327.

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[10] Interested Parties suggest that they reiterated the stay request in a June 16, 2011, meeting, but it appears that their request at that time was directed to the Halftown faction in the context of exploring mediation. No reiteration of the request appears to have been directed to the Regional Director.

Similarly, in the present case, the Regional Director has not produced or identified any ISDA document that had been presented to him, either by Halftown or LeRoy, or by Jacobs or George as the newly-designated representatives, that required BIA action. Instead, Interested Parties (and the Regional Director) would have us simply assume that the administration and funding of the Nation's contract required a Federal recognition decision because in the absence of a decision, Federal funds would improperly be "disbursed to an individual who is no longer the Nation['s] representative," and contract money would continue to be used to pay the salary of LeRoy, who is "nominally employed" by the Nation but who allegedly has refused to follow direction from the Interested Parties and the newly constituted Council. Interested Parties' Response to Appellants' Supplemental Brief, Oct. 15, 2012, at 6; Interested Parties' Supplemental Brief, Sept. 24, 2012, at 12-13. But as Appellants point out, Interested Parties concede that LeRoy remains employed by the Tribe. Resolution 11-001 does not purport to relieve LeRoy of her position, or instruct BIA to no longer accept her as having any authority or role in relation to obtaining the Nation's funding under the contract. Nor is there any documentation in the record to show what Halftown's role is in the ongoing administration of the contract, or that a request was submitted to BIA to amend the contract in a way that would change any role he may have.

ISDA contracts are predicated on a government-to-government relationship, and on BIA's statutory obligation to contract certain programs and functions to tribes, if requested to do so. But once an ISDA contract is executed, the rights and obligations of the parties are governed by the contract, and changes to the contractual relationship are not to be taken lightly or informally. Funds are directed according to the terms of the contract. If a change in the designated tribal representative on an existing contract is to be made, it is for the tribe, not BIA to initiate the request for change. No such request is incorporated in Resolution 11-001. And unless the change in the designated tribal representative has some actual practical effect on administration of the contract, e.g., to change the authority for requesting drawdowns or to change where such drawdowns are to be directed, it still may not require BIA to intrude in the internal affairs of the tribe by addressing a tribal dispute.

Of course, a tribal request to renew a contract requires tribal authorization, which in turn may require BIA to determine the composition of the Council and whether the individual submitting the proposal was authorized to do so by the Council. But no such proposed contract request was pending when the Regional Director issued the Decision.

Instead of waiting for an ISDA matter to arise that required BIA action, and which may (or may not) have required a determination on the tribal governance dispute, the Regional Director acted in anticipation that ISDA funding might *become* an issue. But in so doing, the Regional Director intruded into the tribal dispute and undermined the right and

responsibility of the tribe to have the maximum opportunity to resolve the dispute by itself. *See Cloverdale*, 55 IBIA at 225.[11]

We note that over a year after the Decision was issued, and while this appeal was pending, LeRoy apparently submitted a new proposal to BIA for a 3-year Community Services Program ISDA contract, which purportedly was authorized by a duly enacted resolution of the Council. *See* Interested Parties' Supplemental Brief, Sept. 24, 2012, Ex A. As Appellants correctly argue, that post-decisional submission could not serve as the justification for the Regional Director to have issued the Decision. *See Cloverdale*, 55 IBIA at 224 ("Appellants' *post-decisional* request cannot serve as the predicate to either require or justify an *earlier* decision by BIA on the internal tribal dispute."); *San Ildefonso*, 54 IBIA at 259 ("The cornerstone of any decision by BIA to recognize a tribal government should be a present Federal need to do so, not an anticipated need at a future date."). Instead, it could at best serve as justification for a future decision.[12]

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[11] In reaching this conclusion, we are only recognizing that when the Decision was issued, there was a continuing dispute between the factions. We express no opinion, of course, on Interested Parties' argument that as a matter of Cayuga law and tradition, the clan mothers' action to remove a seatwarmer from the Council is final and thus the dispute has been resolved as a matter of tribal law. That argument, of course, goes to the underlying merits of the dispute as presented to BIA for a decision.

[12] No party has informed the Board what happened to LeRoy's submission. Appellants assert that a decision by BIA to approve or deny the application submitted by LeRoy would not necessitate a decision regarding the Nation's leadership, but it is not at all clear why that would be the case for an ISDA proposal based on purported authorization and action by the Council. At a minimum, in light of the tribal dispute, action on the proposal presumably would require a decision that included appeal rights, with proper notice to all interested parties.

And even if, as the Halftown faction contends, the Council composition did not change in 2011, it would not follow that the Regional Director could accept the submission without possibly needing to address the tribal dispute, in light of the governance structure of the Nation. *See George*, 49 IBIA at 187 (Regional Director has discretion to decide whether and what form of verification may be appropriate to show Council approval of Halftown's action); *see also Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144, 151 (1996) ("BIA has the right to require proof of the validity of Council enactments relevant to the government-to-government relationship whenever there is a question as to the validity of those enactments."). Absent proper grounds for declination, Indian tribes have a statutory right to enter into ISDA contracts, but they are not required to choose to do so. Nothing in *Goodface* prohibits a tribe from letting its own authorization for a contract lapse, even if

(continued...)

Conclusion

We conclude that by issuing the Decision when there was no separate matter that was pending that required or warranted BIA action, and which in turn would have necessitated a determination on the tribal dispute, the Regional Director impermissibly infringed on the sovereign rights of the Nation by intruding into tribal affairs. In vacating the Decision, we make no assumptions about the willingness or the ability of the tribal parties to resolve the dispute among themselves, although the pendency and disposition of this appeal has provided and will provide them additional time to do so without Federal interference. And if it becomes necessary for the Regional Director to issue a new decision, when a separate matter presents itself for BIA action that would implicate the tribal dispute, the Regional Director will have the benefit of, and may respond as necessary to, the parties' arguments on the merits as set forth in briefs in this appeal and in any supplemental submissions to the Regional Director.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

(...continued)
to do so results in a contractual hiatus. BIA cannot supply the necessary authorization from a tribe if such authorization does not exist as a matter of tribal law.

Exhibit B

Chairwoman Bonnie Akaka-Smith
Pyramid Lake Paiute Tribe
PO Box 256
Nixon, NV 89424

Attorney General Brian Sandoval
State of Nevada
Office of the Attorney General
Gaming Division
3476 Executive Pointe Way, Suite 13
Carson City, NV 89706

Re: Gaming on fee land at Pyramid Lake Paiute Indian Reservation

Dear Chairwoman Akaka-Smith and Attorney General Sandoval:

The NIGC Office of General Counsel (OGC) has received requests from both of you for an opinion on whether gaming conducted on fee lands within the exterior boundaries of the Tribe's reservation is Indian gaming under the IGRA. It is our understanding that a family by the name of Crosby owns fee land[1] within the reservation and operates a small gambling operation, the Crosby Lodge, with approximately 15 slot machines. The Tribe licenses the gaming and collects fees both quarterly and annually. The Tribe and the State of Nevada have a Class III Gaming Compact set to expire on January 6, 2006. The Crosby Lodge is the only gaming activity on the Tribe's reservation.

We have evaluated the history of the Tribe's reservation and statutory language of IGRA, and we conclude that the land owned by the Crosby family is Indian lands and that the gaming is Indian gaming under IGRA.

Background

The existence of fee lands within the Tribe's Reservation is the result of the land's history. The Tribe first had official contact with non-Indian settlers in January of 1844. Historical journal entries and reports indicate non-Indian contact as early as 1827 in the Humboldt River Basin. The U.S. General Land Office (Utah Territory) set aside land for the benefit of the Tribe on December 8, 1859. This land was withdrawn from the public domain for the preservation of the livelihood of the Tribe. From 1861 through 1885, a number of non-Indian white settlers encroached and settled on these lands. Some of the best lands were inhabited by squatters who believed it was their right to settle on the Tribe's lands.

In 1868, the Central Pacific Railroad was completed, a portion of which ran through

the Tribe's reservation. The railroad company established a rail station at the Big Bend of the Truckee River and later founded the present-day town of Wadsworth. The railroad company acquired rights-of-way for its rail course across fee lands in the southern part of the Tribe's reservation.

Since the early 1860s the Indian Agent of the Utah Territory had tried unsuccessfully to evict the non-Indians who were trespassing on the land reserved for the Tribe. In 1874, President Ulysses Grant issued an Executive Order confirming the establishment of the Tribe's reservation. The Order confirms the date of the reservation's establishment as December 8, 1859.

In 1916, lawsuits were filed against the non-Indian settlers who were considered to be trespassing on the Tribe's reservation. The 68th U.S. Congress enacted, "A bill for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada." The Act provided for the sale of any land that had been settled upon or occupied for at least twenty-one (21) years. Settlers would pay $1.25 per acre and in return be granted certain lands in fee simple status.

By 1935, many settlers had become delinquent on their land payments to the U.S. government. In a pair of related decisions, the Ninth Circuit Court of Appeals upheld the United States' efforts to eject these non-Indians from the reservation and awarded possession of the land back to the Tribe. See *U.S. v. Garaventa Land & Livestock*, Co., 129 F.2d 216 (9th Cir. 1942); *U.S. v. Depoali*, 139 F.2d 225 (9th Cir. 1943). The Supreme Court denied certiorari in 1944. *Depoali v. U.S.*, 321 U.S. 796 (1944). In 1951, the non-Indian white residents began vacating the lands. By 1956, the lands were assigned to the Tribe's members. Today, less than one percent (1%) of the Tribe's reservation lands remains in fee status.

Applicable Law

IGRA explicitly defines "Indian lands" as follows:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benef tribe or individual subject to restriction by the United States against alienation power.

25 U.S.C. § 2703(4).

NIGC regulations further clarify the Indian lands definition, providing that:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either --
>
> (1) Held in trust by the United States for the benefit of any Indian trib individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Further, IGRA gives tribes the exclusive right to regulate gaming on Indian lands, specifically providing that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lan prohibited by Federal law and is conducted within a State which does not, as such gaming activity.

25 U.S.C. § 2701 (5). IGRA further clarifies the jurisdiction of Tribes as to the different class of gaming stating that:

> (1) Class I gaming on Indian lands is within the exclusive jurisdiction of the In the provisions of this chapter.
> (2) Any class II gaming on Indian lands shall continue to be within the jurisdic subject to the provisions of this chapter.

25 U.S.C. § 2710(a)(1)(2). The requirements for Class III gaming likewise state:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activ
> (A) authorized by an ordinance or resolution that
> (i) is adopted by the governing body of the Indian tribe having juri
> (C) conducted in conformance with a Tribal-State compact entered int paragraph
> (3) that is in effect.

25 U.S.C. § 2710(d)(1)(A)(C).

Analysis

OGC recently revised its analytic approach to Indian lands within reservation boundaries. (See Indian lands opinion letter to Judith Kammins Albeitz, Esq. from Penny J. Coleman, Acting General Counsel, Dated June 30, 2005).[2] The analysis used through the past few years included a two-part determination whenever an Indian lands questions was raised – OGC looked first to determine whether the lands constituted Indian lands; OGC then looked to whether the tribe exercised jurisdiction over those lands. This two-part analysis was driven by the outcome in *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213 (10th Cir. 2001)(*Miami III*). That Court held the NIGC's failure to focus on the threshold question of whether the tribe possessed jurisdiction over a tract of land rendered the ultimate conclusion arbitrary and capricious. *Id.* Despite this holding, the NIGC has concluded that, in some instances IGRA's preemptive effect negates the need for a complete jurisdictional analysis. IGRA specifically defines Indian lands as any "[l]ands within the

limits of an Indian Reservation." This finding is a prerequisite for a tribe to lawfully conduct gaming under IGRA. IGRA gives tribes the exclusive right to regulate gaming on Indian lands if the Indian lands in question are within "such tribe's jurisdiction." A tribe is presumed to have jurisdiction over its own reservation. Therefore, if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists. (See Letter to Judith Kammins Albeitz, Esq. at page 6).

The particular question at issue here is whether the non-Indian owned fee land, which is within the exterior boundaries of the Pyramid Lake reservation, falls within the "limits" of the reservation and meets the definition of Indian lands under IGRA, 25 U.S.C. § 2703(4)(A), and NIGC's regulations, 25 C.F.R. §502.12(a). Case law supports the view that "all land within the limits of any Indian reservation" as used in the Indian country statute, 18 U.S.C. § 1151(a) means all lands – including fee lands – within the boundaries of a reservation. "Indian country" as defined at 18 U.S.C. § 1151 (a), means "*all land within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (Emphasis added); *see also City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) ("[T]he general definition of Indian country in § 1151 .... includes all fee lands within reservations.") The IGRA definition of "Indian lands" in 25 U.S.C.

§ 2703(4)(A) is identical to the highlighted language in 18 U.S.C. § 1151(a). Because the pertinent language in both statutes is identical, these cases support the notion that "all land within the limits of any Indian reservation" as used in IGRA means lands within the boundaries of a reservation. We therefore conclude that the land at issue falls within the "limits" of the Tribe's reservation and meets the definition of Indian lands under IGRA and NIGC regulations.

This conclusion is consistent with our recent opinion regarding gaming on fee land at the White Earth Reservation in Minnesota (see Memorandum to NIGC Acting General Counsel Re: Tribal jurisdiction over gaming on fee land at White Earth Reservation, dated March 14, 2005) and with our Buena Vista opinion regarding gaming on fee land. In our White Earth opinion, we determined that the State of Minnesota lacked jurisdiction over gaming on the White Earth Reservation because the gaming took place within the exterior boundaries of the reservation; the gaming was therefore Indian gaming under IGRA, which pre-empts state jurisdiction. As the White Earth Band was undisputedly the only tribe exercising jurisdiction over the land at White Earth, that Tribe met IGRA's requirement that it be the tribe with jurisdiction over the Indian lands at issue. In our Buena Vista opinion, we similarly held that the fee land within the exterior boundaries of the Buena Vista Rancheria fell within the "limits" of the reservation and met the definition of Indian lands under the IGRA, 25 U.S.C. § 2703(4)(A), and NIGC's regulations, 25 C.F.R. §502.12(a).

We note that IGRA's jurisdiction is not limited to gaming conducted by tribal entities or members. Rather, IGRA's jurisdiction runs with the land and allows gaming, even by non-tribal entities, that is conducted on Indian lands. 25 U.S.C. § 2710(b)(4)(A) ("A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described [below]...and are at least as restrictive as those established by State law...."). Gaming by non-tribal entities must meet certain requirements,

however, for example, that 60 percent of the proceeds go to the tribe. *See* 25 U.S.C. § 2710(b)(4)(B). These same requirements apply to class III gaming. *See* 25 U.S.C. §2710(d)(1)(A)(ii).

Because IGRA's applicability is determined by the character of the land on which gaming is conducted rather than by who is conducting the gaming, we note that the situation at hand is not governed by the line of cases analyzing whether tribes have jurisdiction over non-members on non-Indian owned fee land within the reservation. The primary case in this line of cases is *Montana v. United States,* 450 U.S. 544 (1981). *Montana* and its progeny stand for the proposition that "...the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Montana*, 450 U.S. at 565. *See also Brendale v. Confederate Tribe and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Strate v. A-1 Contractors,* 520 U.S. 438, 445 (1997) (reaffirming *Montana*analysis in questions of tribal adjudicatory authority).[3] Because Congress has made IGRA's application dependent upon whether the gaming is conducted on Indian lands, not upon whether the gaming is conducted by Indian or non-Indian people, we need not engage in a jurisdiction analysis under *Montana.*

We do, however, need to evaluate jurisdiction in the sense that we need to determine whether the Pyramid Lake Tribe is the tribe that exercises jurisdiction over the land at Pyramid Lake. IGRA states that a tribe may engage in Class II gaming "on Indian lands within such tribe's jurisdiction" if, among other things, the tribe has an ordinance approved by NIGC's Chairman. 25 U.S.C. §2710(b)(1). The requirements for conducting Class III gaming likewise state: "Class III gaming activities shall be lawful on Indian lands only if such activities are (A) authorized by an ordinance or resolution that (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands...." 25 U.S.C. §2710(d)(1).

The context of IGRA's prescriptions as to jurisdiction—that land be within "such tribe's jurisdiction" and ordinances adopted by "the Indian tribe having jurisdiction over such lands"—indicates that Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land. *See, e.g., Williams v. Clark*742 F.2d 549 (9th Cir. 1984), *cert. denied sub nom. Elvrum v. Williams,* 471 U.S. 1015 (1985)(Both Quileute and Quinault tribes exercise jurisdiction over the Reservation, and either may be considered the "tribe in which lands are located" for purposes of Indian Reorganization Act § 4). Since the Pyramid Lake Tribe is undisputedly the only tribe exercising jurisdiction over the land at Pyramid Lake, the Tribe meets IGRA's requirements for jurisdiction over the Indian lands at issue.

The gaming at Pyramid is conducted within the limits of the reservation and is thus on Indian land.

Sincerely,

Penny J. Coleman
Acting General Counsel

cc: Brian Gunn and Kevin Wadzinski
Gardner Carton & Douglas

1301 K. Street, NW
Suite 900 East
Washington, DC 20005-3317

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[1] The legal description of the land is as follows: FRAC N1/2 of SE ¼ of NE ¼ of Section 15, Township 24N, Range 21E. The address is 30605 Sutcliffe Drive, Reno, Nevada, 89510.

[2] This Indian lands opinion addressed the question whether fee land within the exterior boundaries of the Buena Vista Rancheria qualifies as reservation land and therefore as Indian land upon which the Rancheria may game. We concluded that it does.

[3] The *Montana* court acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" *(Montana* at 565), it established two important exceptions to its general rule that jurisdiction does not extend to nonmembers. The first exception is for nonmembers who have certain agreements with a tribe; the second is for activities by nonmembers that threaten a tribe's well-being:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers *who enter consensual relationships with the tribe or members,* through commercial dealing, contracts, leases, or other arrangements [cites omitted]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe* [emphases added].

450 U.S. at 565-566; *cited with approval Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 651 (2001).

Were a *Montana* analysis necessary, we would find that the Tribe has jurisdiction. The gaming conducted on fee land within the Pyramid Lake reservation meets this exception by virtue of the agreement between the Tribe and the Cosby family for gaming fees and slot machine taxes the tribe collects from the gaming operated by the Crosby family. (These fees and taxes represents the specific kind of consensual economic agreement between non-members and a Tribe that the *Montana* Court upheld: a "tribe may regulate, through *taxation,* licensing, or other means, the activities of nonmembers...through *commercial dealing,* contracts, leases, or other arrangements."

450 U.S. at 565.

1441 L. Street NW Suite 9100, Washington DC 20005 Tel.: (202) 632-7003 Fax: (202) 632-7066
E-mail with Questions, Comments, or Suggestions Privacy Statement

Exhibit C

MEMORANDUM

TO: Tracie Stevens, Chairwoman

FROM: Lawrence S. Roberts, General Counsel
Jo-Ann M. Shyloski, Associate General Counsel—Litigation & Enforcement
Dawn Sturdevant Baum, Staff Attorney

DATE: July 18, 2011

RE: United Keetoowah Band of Cherokee Indians;
Gaming site in Tahlequah, Oklahoma

This memorandum concludes a legal review of whether a gaming facility owned and operated by the United Keetoowah Band of Cherokee Indians in Oklahoma ("United Keetoowah Band" or "UKB") is on Indian lands as defined by the Indian Gaming Regulatory Act ("IGRA") and National Indian Gaming Commission ("NIGC") regulations. This matter was remanded to the NIGC for review by the federal district court in *United Keetoowah Band of Cherokee Indians in Okla. v. Oklahoma*, No. 04-340, 2006 U.S. Dist. LEXIS 97268 (E.D. Okla. Jan. 26, 2006).

The gaming facility once was called Keetoowah Bingo but is now called the Keetoowah Cherokee Casino. *See* http://www.keetoowahgaming.com/. The gaming facility is located at 2450 South Muskogee Avenue in Tahlequah, Oklahoma ("the Gaming Site").

As explained below, it is our opinion that the Gaming Site does not qualify as Indian lands under IGRA. Therefore, the NIGC does not have jurisdiction to regulate the gaming activities that take place there. The Department of the Interior ("DOI"), Office of the Solicitor, concurs with this opinion.

I. Procedural Background

In September 2000, the General Counsel of the NIGC wrote an Indian lands opinion concerning the Gaming Site. Letter from Kevin K. Washburn, NIGC General Counsel, to Jim Henson, UKB Chief (Sept. 29, 2000) ("the September 2000 Letter"). Mr. Washburn concluded that the UKB's gaming activity is not subject to IGRA because the UKB lacked the requisite legal jurisdiction over the Gaming Site for it to qualify as Indian lands. *Id.* at 4-6. The UKB challenged the September 2000 Letter in federal district court.[1] The district court found that because the NIGC "took definite action" to stop regulating the UKB's gaming operation in accordance with the conclusion in the September 2000 Letter, the September 2000 Letter constituted a reviewable final agency action. *United Keetoowah Band*, No. 04-340 at 7 n.4, 10.

The district court set aside the September 2000 Letter as arbitrary and capricious under the Administrative Procedures Act because the NIGC failed to consider important aspects in reaching its conclusion. *Id.* at 10-14. For example, the court determined that when the NIGC has exercised some sort of regulation over a site for some time, the Indian lands determination must go beyond the basic analysis to include consideration of the facts surrounding the past regulation. *Id.* at 12. The court concluded that the administrative record supporting the September 2000 Letter lacked information relating to the early regulation of the gaming site by the NIGC. Further, the September 2000 Letter failed to give any explanation as to the past regulation of the UKB's gaming activities, "including whether the NIGC had, in fact, prior to 2000, ever made any determination that the [Gaming Site] Land was 'Indian land' and if it had not, why the NIGC made the decision to regulate Plaintiff's gaming on the land." *Id.*

In setting aside the September 2000 Letter and remanding the matter to the NIGC, the court ordered the NIGC to "investigate, compile a complete record and consider all relevant factors before making its final determination of whether the [Gaming Site] Land is 'Indian land' as that term is defined by 'IGRA.'" *Id.* at 14.[2] According to the court's order, a complete administrative record in this case should contain, but not be limited to, the following:

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[1] The NIGC's position in that lawsuit was—and continues to be—that stand-alone legal opinions from the NIGC's Office of General Counsel are not agency actions at all, much less final agency actions subject to judicial review under IGRA, 25 U.S.C. § 2714, or the Administrative Procedures Act ("APA"), 5 U.S.C. § 704. *See Miami Tribe of Okla. v. United States*, 198 F. App'x 686, 689-91 (10th Cir. 2006); *County of Amador v. United States Dept. of the Interior*, No. 07-527, 2007 U.S. Dist. LEXIS 95715, at *10-18 (E.D. Cal. Dec. 13, 2007); *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 327-28 (W.D.N.Y. 2007); *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1201 (D. Kan. 2006); *Cheyenne-Arapaho Gaming Comm'n v. United States*, No. 04-1184, slip op. at 5-9 (W.D. Okla. Dec. 4, 2006); *Cheyenne-Arapaho Gaming Comm'n v. NIGC*, 214 F. Supp. 2d 1155, 1167-72 (N.D. Okla. 2002).

[2] The United States and the State of Oklahoma appealed the district court's order. The United States did not pursue its appeal after a court-ordered mediation process failed to produce a settlement, but the State of Oklahoma did. The Tenth Circuit dismissed the State's appeal for lack of jurisdiction, finding that the remand order was not a final order subject to appeal. *United Keetoowah Band of Cherokee Indians in Okla. v. United States*, No. 06-7033 (10th Cir. Sept. 6, 2007).

- Evidence indicating the status of the UKB's trust application, *id.* at 11;
- Documents and analysis regarding whether the gaming site is within the boundaries of the "original Cherokee territory" in Oklahoma, and if so, evidence as to whether the Cherokee Nation has been "consulted" regarding the UKB's trust application and the results of that consultation, *id.*;
- Evidence regarding whether the UKB has exercised governmental power over the gaming site, *id.*;
- Evidence showing the exact nature and extent of federal regulation over the UKB's gaming activities that took place during the entire period of such regulation, *id.* at 13;
- Documentation of the UKB's tax payments to the State if they were made, and if not, documentation showing why they were not paid, including any collection notices, *id.* at 12; and
- Documents showing whether the Gaming Site is the same property as the land at issue in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993), *id.*

Upon commencing its review on remand, the NIGC provided notice to five entities: the United Keetoowah Band; the Cherokee Nation; the State of Oklahoma; Cherokee County, Oklahoma; and the City of Tahlequah, Oklahoma. Letter from Penny Coleman, NIGC Acting General Counsel, to potentially interested parties (Nov. 28, 2007). Specifically, the NIGC established a briefing schedule to allow the submittal and exchange of opening memoranda, responses, and replies, all with supporting documentation. *Id.* That briefing schedule was twice extended, first at the request of the UKB and then the State of Oklahoma. Letters from Jeffrey Nelson, NIGC Senior Attorney, to interested parties (Jan. 29, 2008; May 29, 2008). The NIGC received opening, response, and reply briefs, all with supporting materials, from the United Keetoowah Band, the Cherokee Nation, and the State of Oklahoma. Later, the NIGC requested supplemental briefing on whether the Gaming Site was "subject to restriction by the United States against alienation" as that phrase is used within IGRA's definition of *Indian lands*. Letter from Penny Coleman, NIGC Acting General Counsel, to interested parties (July 31, 2009). The NIGC received supplemental briefs addressing this issue from the UKB, the Cherokee Nation, and the State of Oklahoma.

In addition, the NIGC reviewed its own files at both its headquarters and Tulsa region offices, compiling all documents in its possession concerning the UKB's Gaming Site. Finally, the NIGC contacted the Bureau of Indian Affairs and obtained a copy of the administrative record concerning the UKB's trust application.

II. Facts

We have compiled and reviewed a thorough administrative record, including all documents submitted during the briefing schedule and all other information in the NIGC's possession regarding the UKB's Gaming Site.

A. Location of the Gaming Site

The Gaming Site is located at 2450 South Muskogee Avenue (U.S. Highway 62) in the City of Tahlequah, Cherokee County, Oklahoma. The legal land description is:

> A tract of land lying in and being a part of the S½ NE¼ SE¼ SW¼ and a part of the N½ SE¼ SE¼ SW¼ of Section 4, Twp. 16 N, Rge. 22 E, Cherokee County, Oklahoma, more particularly described as follows, to-wit: Beginning at a point 175.0 feet South of the North boundary and 131.0 feet East of the West boundary of said S½ NE¼ SE¼ SW¼; thence S 2° - 56' W, 159.8 feet; thence N 89° - 12' W, 24.8 feet; thence S 3° - 30' W, 171.4 feet to a point 175.0 feet South of the North boundary of said N½ SE¼ SE¼ SW¼; thence S 89° - 49' E, 384.32 feet to a point on the West boundary of U.S. Highway No. 62; thence N 5° - 25' W, along the West boundary of U.S. Highway No. 62, 332.0 feet; thence N 89° - 49' W, 309.55 feet to the Point of Beginning. Containing 2.63 acres.

Warranty Deed (Jan. 2, 1991); Memorandum from Tim Harper, NIGC Region Director, to Rick Schiff, NIGC Deputy Chief of Staff, re United Keetoowah Land Issue (May 1, 2000); UKB Opening Mem. at 36.

In addition to operating a gaming facility on the Gaming Site, the United Keetoowah Band uses the parcel and contiguous tracts[3] as a tribal complex, which includes the tribal government headquarters, administrative offices, tribal tag office, tribal court system, legal assistance office, tribal realty department, tribal law enforcement office, tribal newspaper, public information office, and the tribal community garden. UKB Opening Mem. at 11, ex. 8 (Affidavit of Charles Locust ("Locust Aff.")).

[3] The State has produced two additional deeds that conveyed three small tracts to the UKB. State Opening Mem. at 11, ex. 2, 3. Using satellite image and mapping software, we have determined that these three small tracts are contiguous to the Gaming Site. See Figure 1, below. Nothing in the administrative record or from the collective knowledge of the NIGC's field staff suggests that the UKB is conducting gaming operations on the three contiguous tracts. Moreover, it appears that the United Keetoowah Band conveyed the western contiguous tract to Wal-Mart about 15 years ago. Warranty Deed from United Keetoowah Enterprises Inc. for and in behalf of United Keetoowah Band of Cherokees in Oklahoma, to Wal-Mart Stores Inc. (Nov. 7, 1995). Therefore, the analysis and conclusions in this memorandum are limited to the 2.63-acre Gaming Site.

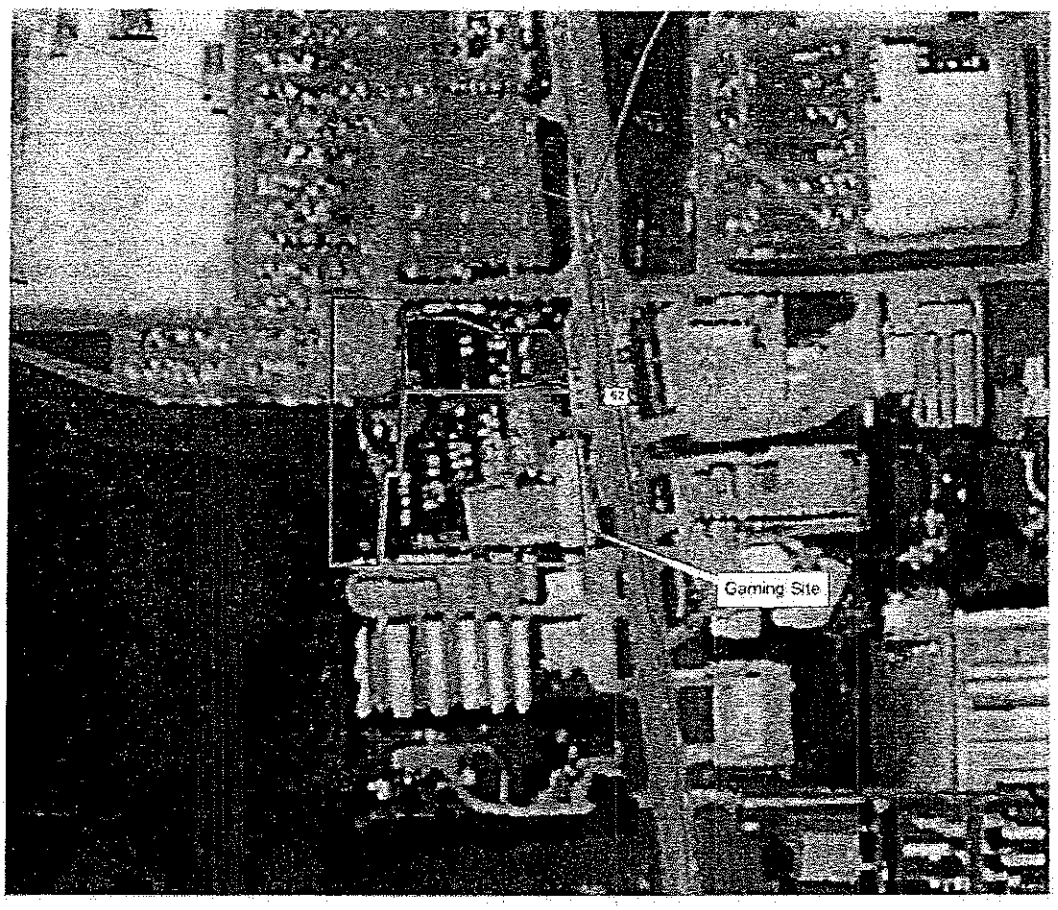

Figure 1: Satellite image of the UKB's tribal complex and vicinity in Tahlequah, Oklahoma. ESRI ArcGIS online service.

There is no dispute that the Gaming Site is located within the exterior boundaries of the former Cherokee Reservation or "original Cherokee territory" in Oklahoma. UKB Opening Mem. at 11, ex. 11 (maps, Historical Atlas of Okla.); *see also* Cherokee Nation's Opening Mem. at 9-10. There is also no dispute that the Gaming Site was *not* among the properties that were at issue in *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993). *See* UKB Opening Mem. at 12, ex. 12 (Okla. Tax Comm'n Response to Plaintiff's Supplemental Brief, attaching property deeds at issue in *Buzzard*).

B. History of the Gaming Site

All of Cherokee County, including the Gaming Site, is within the exterior boundaries of the former Cherokee Nation Reservation, created by the United States' Treaty with the Western Cherokee, 7 Stat. 311 (May 6, 1828), and confirmed in the Treaty of New Echota, 7 Stat. 478 (Dec. 29, 1835), which lands were granted to the Tribe in fee simple. *See generally*, Memorandum from M. Sharon Blackwell, DOI Field Solicitor, to DOI Associate Solicitor, re Cherokee Nation of Oklahoma – Trust Acquisition of 15.99 acres, City of Catoosa, Oklahoma, for Gaming Purposes (Sept. 21, 1993) (discussing Cherokee Nation Reservation with reference to attached maps).

In 1902, Congress provided for the allotment of these lands, with each Cherokee citizen to receive an allotment in fee from the Cherokee Nation. 32 Stat. 716 (July 1, 1902). Each allotment was to include a smaller homestead parcel that was identified by a separate homestead certificate and was to be nontaxable and inalienable during the lifetime of the allottee, but not exceeding 21 years from the date of the certificate of allotment. *Id.* § 13. Consequently, Department of Interior decisions and federal court opinions refer to this territory as a "former reservation." See *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs,* Decision of the Assistant Secretary – Indian Affairs (June 24, 2009); *Buzzard v. Oklahoma Tax Comm'n.*, 992 F.2d 1073, 1076-77 (10th Cir.1993).

In 1905, a Cherokee citizen named Albert Payne received a homestead certificate for 30 acres of land that included the future Gaming Site. Homestead Certificate to Albert Payne (approved May 24, 1905). In 1908, Congress enacted a statute that removed certain restrictions on the allotments and homesteads held by Cherokee citizens. 35 Stat. 312 (May 27, 1908). Pertinent to this analysis, the statute provided: "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions." *Id.* Albert Payne was recorded in the Dawes Rolls as a Cherokee citizen (#14,315) of ⅛ Indian blood. Index to the Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, Prepared by the Commission and Commissioner to the Five Civilized Tribes and Approved by the Secretary of the Interior at 326 (March 4, 1907). Therefore, the 1908 statute removed all restrictions on the Payne homestead allotment. Three months later, Payne conveyed his 30-acre allotment in fee simple to a woman named Emma Rinks of Tahlequah. A general warranty deed was recorded by the Cherokee County Register of Deeds. General Warranty Deed between Albert Payne and Emma Rinks (Aug. 24, 1908).

From 1908 to 1985, there were many conveyances of the future Gaming Site. *See* Memorandum summarizing chain of title from Linda Anderson, Cherokee Nation Paralegal, to Annette Jenkins, Cherokee Nation Director of Real Estate Services (Sept. 20, 2000). By 1986, the property was owned by Lakeway Building Supply, an Oklahoma corporation. On June 20, 1986, the UKB signed a contract for purchase of the property. The contract gave the UKB immediate possession and use of the property with monthly installments to be paid toward the ultimate purchase price. Contract for Deed between Lakeway Building Supply Inc. and the United Keetoowah Band of Cherokee Indians of Oklahoma (June 20, 1986). By warranty deed signed on November 30, 1990, and recorded by the Cherokee County Clerk on January 2, 1991, the UKB obtained fee simple title to the site. Warranty Deed (Jan. 2, 1991). Since then, the UKB has owned the Gaming Site in fee simple.

The UKB pays annual real property taxes for the Gaming Site to Cherokee County. *See* Real Property Tax Invoices and Receipts between UKB and Cherokee County (2003-2004); Affidavit of Erlene Luper, Cherokee County Assessor (Oct. 7, 2005); UKB's Response at 7 ("The Kectoowah Cherokees admits that it has paid *ad*

valorem property taxes on the gaming property."). Although it admits to paying real property taxes, the UKB raises the fact that it has never paid a tax to the State of Oklahoma on the proceeds of its gaming operations. UKB Opening Mem. at 11-12, ex. 8 (Locust Aff.). The State counters that the Oklahoma Tax Code does not impose either a sales tax or a use tax on the proceeds of casino operations. State's Response at 4-5, ex. 24.

According to the UKB, it began to offer public bingo at the Gaming Site in 1986. UKB Opening Mem. at 2, 11, ex. 8 (Locust Aff.).[4] The first evidence of any contact between the NIGC and the UKB comes from late 1991. The NIGC's enabling legislation was enacted in 1988, but the three-member Commission was not fully seated until 1991. In August of that year, the NIGC's first promulgated regulation required all Class II gaming operations "within the jurisdiction of the Commission [to] begin self-administering the provisions of these regulations and [to] begin reporting and paying any fees that are due to the Commission at the end of the third quarter of 1991 (Sept. 30)." 56 Fed. Reg. 40,702 (Aug. 15, 1991). Accordingly, the record contains references to an annual fee payment remitted by the UKB to the NIGC by check dated December 2, 1991. *See* Worksheet for Computing and Reporting Annual Fees Payable by Class II Gaming Operations ("Revised 1990"); *see also* Letter from Anthony J. Hope, NIGC Chairman, to United Keetoowah Bingo (June 22, 1992) (referencing prior UKB fee payment). This was followed by regular quarterly fee worksheets and payments made by the UKB to the NIGC for a number of years.

Thus it is evident that the NIGC became aware of, and began to regulate, the UKB's gaming operation by virtue of the UKB's own action in remitting its first fee payment to the NIGC. No regulatory action on the part of the federal government identified which gaming operations were "within the jurisdiction of the Commission." Rather, each operation was to self-identify and send its own fee worksheets and payments to the NIGC. That is exactly what happened with the UKB, and it was a reasonable approach on the part of the new agency that each facility identifying itself as being "within the jurisdiction of the Commission" by complying with the NIGC's fee regulation was in fact within the NIGC's jurisdiction, unless or until determined otherwise.

In 1993, Tim Harper, now the director of NIGC's regional office in Tulsa, became the first NIGC field representative in Oklahoma. Deposition of Tim Harper at 7-11, 140 (June 2, 2005). One of Mr. Harper's first assignments was to visit all of the Indian gaming operations in his geographical area in order to obtain some basic information about the tribes and their gaming operations. *Id.* at 10-12, 23. For this purpose, NIGC headquarters compiled a list of tribes that Mr. Harper was to visit, and it included the UKB. *Id.* at 11. Around that same time, Mr. Harper informed headquarters staff that he had heard or read about an issue concerning how the UKB Gaming Site might not be on Indian lands or within Indian country. *Id.* at 12-14, 19-23. Nevertheless, Mr. Harper was told by someone in the headquarters office to go ahead and work with the UKB. *Id.* at 28-31. Therefore, he conducted his initial visit to the UKB Gaming Site and met there with

[4] We note that 1986 was about five years before the NIGC became operational.

tribal officials. *Id.* at 23. He visited the UKB at least a couple more times from 1993 to 1999, either at the UKB's request or to check on compliance issues. *Id.* at 40-41. *See also* Affidavit of Tim Harper (Oct. 28, 2005) (Cherokee Nation Response ex. 22). We have found no evidence that anyone at the NIGC made any specific determination during 1992 or 1993 that the Gaming Site was on Indian lands. Rather, consistent with the explanation provided above, it appears that Mr. Harper was directed to treat the UKB's gaming operation as being on Indian lands because the UKB had identified its gaming facility as within the NIGC's jurisdiction.

In November 1994, the UKB submitted a request to the NIGC to review and approve a tribal gaming ordinance. Harold Monteau, then Chairman of the NIGC, subsequently approved the UKB's tribal gaming ordinance. Letter from Harold A. Monteau, NIGC Chairman, to John Ross, UKB Chief (March 22, 1995). The gaming ordinance contained no information about any specific site, and the NIGC Chairman was careful to make clear that the ordinance approval was not tantamount to approval of gaming activities on any particular site. As to the issue of Indian lands, the NIGC Chairman wrote in the approval letter:

> It is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in the IGRA. At the current time, it is the understanding of the NIGC that the Band does not have any lands that meet that definition. Therefore, until such time as it is determined that the Band holds lands that meet the definition in the IGRA, the Band is not authorized to conduct class II or class III gaming.
>
> Thank you for submitting the ordinance of the Band for review and approval. The NIGC staff and I look forward to working with you and the Band in implementing the IGRA once the Band acquires Indian lands.

Id.

This approval is the most definitive finding made by the NIGC about the Indian lands status of the Gaming Site and the UKB's authority to conduct gaming there. The approval was an explicit finding by the NIGC Chairman in an agency action authorized and made reviewable by statute, 25 U.S.C. §§ 2705(a)(3), 2714, and it set forth the agency's view that the UKB had no Indian lands. Until that changed, the UKB was not authorized to conduct Class II or Class III gaming. 25 U.S.C. §§ 2710(b)(1)(B), 2710(d)(1)(A)(iii). The Chairman's finding was not appealed to the full Commission or to a federal district court.

However, it also was not followed—not by the UKB or the NIGC. The record shows that the UKB continued to conduct gaming activities on the Gaming Site and continued to send fee payments to the NIGC. *See, e.g.*, Quarterly Statement from United Keetoowah Bingo (March 31, 1995); Quarterly Statement from United Keetoowah Bingo (June 30, 1995); Quarterly Statement from United Keetoowah Bingo (Sept. 30, 1995). The NIGC continued to accept the UKB's fee payments and wrote to the UKB about

them, even warning the UKB when a payment was late that the failure to pay could result in a civil fine or be grounds for closure. *See* Letter from Philip N. Hogen, NIGC Vice Chairman, to John Ross, UKB Chief (May 19, 1998); *see also* Letter from Cindy Altimus, NIGC Administrative Officer, to Cliff Turk, United Keetoowah Bingo Manager (May 17, 1995); Letter from Cindy Altimus, NIGC Compliance Coordinator, to Barbara Turk, United Keetoowah Bingo (Jan. 13, 1997). Additionally, there is evidence indicating that the UKB submitted annual independent audit reports to the NIGC as required by NIGC regulations. Records of receipt for independent auditor reports for fiscal years 1995-1998 (transmitted by e-mail dated Sept. 30, 2004). The NIGC tracked the UKB's compliance with the various IGRA requirements and included the UKB in the NIGC's then-quarterly compliance report to the Secretary of Interior under Public Law No. 104-134 (1996). *See, e.g.*, Excerpt of NIGC Compliance Report (Sept. 30, 1996); Excerpt of NIGC Compliance Report (Dec. 31, 1996); Excerpt of NIGC Compliance Report (March 31, 1997).

NIGC field representatives continued to have contact with UKB officials concerning IGRA and NIGC requirements, including, among other things, submittal of annual independent audit reports to the NIGC; obtaining fingerprints and completing criminal history checks of key employees and primary management officials; and conducting and submitting background investigations for key employees and primary management officials.[5]

In early 2000, the issue of the Gaming Site's status arose again. NIGC Field Investigator Marci Pate received an anonymous telephone call alleging that the UKB's gaming operation was being managed without an approved management contract and that the Gaming Site was not held in trust. *See* Memorandum from Marci Pate, NIGC Field Investigator, to Tim Harper, NIGC Region Director, re Request for Status Determination for United Keetoowah Band of Cherokees (Feb. 22, 2000). Ms. Pate then called the local BIA office and confirmed that the Gaming Site was not in trust. *Id.* Her memorandum concluded by requesting a formal determination concerning the status of lands on which the UKB was conducting gaming. *Id.* In turn, Mr. Harper wrote a memorandum to the NIGC's Washington headquarters office requesting a formal determination of the status of the land prior to investigating the alleged violation of IGRA in order to "be clear that our office has jurisdiction over gaming on this tract of land." Memorandum from Tim Harper, NIGC Region Director, to Alan Fedman, NIGC Director of Enforcement, re Determination of Indian Land – Oklahoma (March 14, 2000).

In April 2000, Mr. Harper was instructed to obtain whatever information the local BIA office had regarding the Gaming Site. E-mail from Richard Schiff to Tim Harper re

[5] *See* Report from NIGC Field Representative Tim Harper re Compliance Meeting (Sept. 24, 1998); Report from NIGC Field Investigator Marci Pate re Liaison / Introduce new FI Marci Pate (July 16, 1999); Memorandum from Marci Pate, NIGC Field Investigator, to Alan Fedman, NIGC Director of Enforcement re United Keetoowah Band of Cherokees of Oklahoma Voluntary Compliance – Evergreen (Nov. 29, 1999); NIGC Field Investigator's Site Visit Summary Report from Marci Pate, NIGC Field Investigator, re Compliance – Investigative Reports (Dec. 2, 1999); NIGC Field Investigator's Site Visit Summary Report from Marci Pate, NIGC Field Investigator, re Meeting Requested by Tribe (Dec. 30, 1999); *see also* NIGC Record of Employee Fingerprint Processing for UKB (May 11, 2000, through Dec. 11, 2000).

United Keetoowah (April 4, 2000). The e-mail indicated that the NIGC would write to the UKB and seek its analysis on the issue and the NIGC's Office of General Counsel then would be asked to write a lands opinion. The e-mail reiterated that "Our approval [of UKB's Gaming Ordinance] noted that they did not have Indian land and reminded them that they had to have such land to engage in gaming." *Id.*

NIGC's General Counsel wrote to the UKB and asked whether the Gaming Site was on Indian lands under IGRA and the NIGC's regulations. Letter from Kevin Washburn, NIGC General Counsel, to Jim Henson, UKB Chief, re Indian lands inquiry (May 25, 2000). The UKB replied with a letter providing the NIGC with a copy of the license issued by the UKB to the Keetoowah Bingo facility and a list of NIGC-approved gaming ordinances obtained from the NIGC's website, which included the UKB. Letter from Jim Henson, UKB Chief, to Kevin Washburn, NIGC General Counsel, re NIGC Letter, 25 May 2000 (June 14, 2000). On August 19, 2000, the UKB submitted to the NIGC a copy of an application to the DOI to have the Gaming Site placed into trust. Letter from G. William Rice, UKB Assistant Chief, to Kevin Gover, DOI Assistant Secretary – Indian Affairs, re Land Use Plan / Trust Request (Aug. 19, 2000).

Subsequently, the NIGC's General Counsel issued the September 2000 Letter concluding that the Gaming Site was not Indian lands under IGRA because the UKB did not have the requisite jurisdiction over the site and therefore that the NIGC also lacked jurisdiction. On February 15, 2001, the UKB sent the NIGC a letter that made several statements and legal arguments in support of the position that the Gaming Site qualifies as a "dependent Indian community" under 18 U.S.C. § 1151. Letter from Jimmie Lou Whitekiller, UKB Tribal Secretary, to Kevin K. Washburn, NIGC General Counsel (Feb. 15, 2001). The letter requested reconsideration of the September 2000 Letter. *Id; see also* Notice to Whom It May Concern from Henry Dreadfulwater, UKB Gaming Commission Chairman (Feb. 16, 2001). In February 2002, the UKB sent a letter to the NIGC Chairman requesting that he direct NIGC staff to resume performance of their statutory duties with regard to the UKB's gaming facility. Letter from Dallas Proctor, UKB Chief, to Montie Deer, NIGC Chairman (Feb. 25, 2002). This letter contained a legal analysis supporting the UKB's position that the Gaming Site is Indian lands by virtue of being restricted fee land within the UKB's jurisdiction and over which the UKB exercised governmental power. *Id.*

The NIGC did not grant the UKB's requests to reconsider, nor did it change its conclusion about its lack of jurisdiction. *See* Declaration of Penny J. Coleman, NIGC Acting General Counsel (July 8, 2004). Since September 2000 through the present, the NIGC's contacts with the UKB have been very limited and have not dealt with the regulation of the UKB's ongoing gaming activities. For example, in April 2001, an NIGC field investigator visited the Gaming Site simply to confirm that the gaming facility had reopened. NIGC Field Investigator's Site Visit Report re Confirm Gaming Activities (April 20, 2001). In November 2001, the same investigator met with UKB tribal officials in order to discuss an overpayment of prior fees and a potential refund. NIGC Field Investigator's Site Visit Report (Nov. 19, 2001). During this meeting, the investigator "emphasized that because it is the NIGC's opinion the Tribe was not within the NIGC's

jurisdiction, [she] was unable to comment on the Tribe's gaming issues." *Id.* There is evidence in the record that until 2002, the NIGC continued to assist the UKB obtain FBI criminal history checks on its key employees and primary management officials by forwarding fingerprint cards from the UKB to the FBI and in turn sending the FBI criminal history reports to the UKB—a service that the NIGC offers to all gaming tribes. *See* E-mail chain between Tim Harper, NIGC Region Director; Cindy Altimus, NIGC Field Investigator; Marci Pate, NIGC Field Investigator; and Sharon Stivers, NIGC Administrative Assistant (July 30, 2002). But this activity was in the nature of administrative technical assistance rather than regulation; and in any case, it ceased around July 2002.

On April 12, 2006, the UKB submitted a new application to the BIA to have the Gaming Site taken into trust. The United Keetoowah Band of Cherokee Indians in Oklahoma, Land Into Trust Application on 2.03 Acre Parcel Located in Tahlequah, Cherokee County, State of Oklahoma, For the Purpose of Gaming Under 25 U.S.C. § 2719, Section 20 (April 12, 2006). On May 1, 2007, the BIA Regional Office wrote to the Cherokee Nation, the State of Oklahoma, Cherokee County, and other branches of state and local government in order to invite comment on the proposed acquisition. Letter from Jeanette Hanna, BIA Regional Director, to the Honorable Chadwick Smith, Cherokee Nation Principal Chief (May 1, 2007); Letter from Jeanette Hanna, BIA Regional Director, to the Honorable Brad Henry, Governor of Oklahoma (May 1, 2007); Letter from Jeanette Hanna, BIA Regional Director, to the Board of County Commissioners, Cherokee County (May 1, 2007). The Cherokee Nation submitted a response with exhibits. Letter from Chad Smith, Cherokee Nation Principal Chief, and Diane Hammons, Cherokee Nation Acting General Counsel, to Jeanette Hanna, BIA Regional Director (received June 18, 2007). The UKB's April 2006 Gaming Site trust application remains pending with the Director of the BIA and the Assistant-Secretary of Indian Affairs' (AS-IA) Office of Indian Gaming.[6]

[6] In the context of a UKB trust application for a different parcel in Cherokee County (the 76-acre "Community Services Parcel"), the AS-IA disavowed the position that the Cherokee Nation has exclusive jurisdiction over trust and restricted lands within the former Cherokee reservation. *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs,* Decision of the Assistant Secretary – Indian Affairs (June 24, 2009). Subsequently, the AS-IA issued another decision in that matter withdrawing portions of the June 24, 2009 decision relating to the UKB as a successor in interest to the historic Cherokee Nation. *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs,* Decision of the Assistant Secretary – Indian Affairs (Sept. 10, 2010). But AS-IA's recent decision specifically reaffirmed that part of the June 2009 decision regarding whether a trust acquisition for the UKB would create conflicting jurisdiction. *Id.* The June 2009 decision held that "[t]he UKB would have exclusive jurisdiction over land that the United States holds in trust for the Band." *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs,* Decision of the Assistant Secretary – Indian Affairs (June 24, 2009). On May 24, 2011, the Bureau of Indian Affairs, Acting Regional Director issued a decision to acquire 76 acres of land into trust for the United Keetoowah Band. That 76 acre parcel is not at issue here.

III. Legal Analysis

IGRA created the NIGC and vested it with certain powers of regulatory oversight and enforcement. *See, e.g.*, 25 U.S.C. §§ 2706(b)(1) (monitor Class II gaming on Indian lands); 2706(b)(2) (inspect and examine all premises located on Indian lands on which Class II gaming is conducted); 2713 (levy civil fines and closure orders); 2717 (collect NIGC fees from Class II or Class III activities regulated by IGRA). Not surprisingly, IGRA limits the NIGC's authority to regulate gaming activities to those that take place on Indian lands.[7] Consequently, the NIGC lacks jurisdiction over any such activities that take place on lands that do not constitute "Indian lands." IGRA defines *Indian lands* as:

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

25 U.S.C. § 2703(4). The NIGC's regulations clarify that definition, stating:

> *Indian lands* means:
>
> > (a) Land within the limits of an Indian reservation; or
> >
> > (b) Land over which an Indian tribe exercises governmental power and that is either—
> >
> > > (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> > >
> > > (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

A. Indian Reservation

The UKB does not argue that it has a current reservation and the DOI has confirmed that it does not. *See* Letter from Martin Steinmetz, Acting Field Solicitor, to Kevin Washburn, NIGC General Counsel (Aug. 10, 2000). Rather, the UKB argues that the Gaming Site qualifies as Indian lands because it is within the boundaries of the former Cherokee Reservation. UKB Opening Mem. at 23-24 ("It is undisputed that the Keetoowah Cherokee gaming facility occupies fee land within the boundaries of the former Cherokee Reservation."); UKB Response Mem. at 30-32. The UKB argues that

[7] Specifically, under IGRA, an Indian tribe may engage in Class II gaming only "on Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). Similarly, IGRA states that "Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands . . . . 25 U.S.C. § 2710(d)(1)(A)(i).

the NIGC has interpreted the term *Indian reservation* in IGRA to include former reservations. To support this argument, the UKB relies on a NIGC memorandum concerning the White Earth Reservation, characterizing that memorandum as an analysis of gaming on fee land within the boundaries of the "former" White Earth Reservation. *Id.* at 23. That memorandum, however, does not interpret *Indian reservation* to include former reservations. *See* Memorandum from Cindy Shaw, NIGC Staff Attorney, to NIGC Acting General Counsel (March 14, 2005) ("White Earth Memorandum"). Rather, the White Earth Memorandum concerns an existing reservation. It states that although the White Earth Reservation was diminished and subjected to allotment by an act of Congress, the Reservation was not disestablished. *Id.* at 3 ("The Nelson Act . . . diminished the White Earth Reservation. . . . [But the] Minnesota Supreme Court held that the remaining 32 of the original 36 townships on the reservation were not disestablished."). The term *former reservation* is nowhere used in the memorandum.

To the contrary, *Indian reservation* in 25 U.S.C. § 2703(4) refers only to existing federal Indian reservations. *Cf. Citizens Exposing Truth About Casino v. Kempthorne*, 492 F. 3d 460, 470-71 (D.C. Cir. 2007) (IGRA refers only to federal, not state, reservations). Interpreting the term to include former reservations would significantly expand lands eligible for gaming. That Congress did not intend this interpretation is supported by the language of IGRA itself, which specifically distinguishes between reservations existing on the date of IGRA's enactment and former reservations in Oklahoma. *Compare* 25 U.S.C. § 2719(b)(1) *with id.* § 2719(b)(2)(A)(i).

Furthermore, the DOI recently issued regulations defining the term *reservation* in IGRA as:

> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
>
> (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;
>
> (3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or
>
> (4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

25 C.F.R. § 292.2.

The regulations contain a separate definition of *former reservation*, which is defined to mean "lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." *Id.* These terms have distinct meanings in the context of both tribal lands in Oklahoma and gaming on those lands under IGRA. In the present matter, the

UKB's lands encompassing the Gaming Site are not within the limits of an Indian reservation within the meaning of IGRA.

B. Restricted Fee Land

If a site is not within an existing Indian reservation, it may still qualify as Indian lands if it is trust or restricted fee land over which an Indian tribe exercises governmental power. *See* 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). There is no dispute that the Gaming Site is not held in trust. Instead, the UKB argues that the Gaming Site is restricted fee land—that it is "held by an Indian tribe . . . subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). There are three necessary elements for a parcel to qualify as Indian lands under this provision: (1) it must be held by an Indian tribe; (2) it must be subject to restriction by the United States against alienation; and (3) the Indian tribe must exercise governmental power over it. The third element consists of two requirements: (a) the Indian tribe must have legal jurisdiction over the land; and (b) the Indian tribe must actually exercise governmental power over it.

1. Indian Tribe

There is no dispute that the UKB is a federally recognized Indian tribe. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,556 (Apr. 4, 2008). Furthermore, the deeds for the Gaming Site demonstrate that the lands are owned in fee by the UKB. Therefore, the Gaming Site is held by an Indian tribe.

2. Subject to Restriction by the United States Against Alienation

Under the second element, the lands must be "subject to restriction by the United States against alienation . . . ." 25 U.S.C. § 2703(4)(B). The warranty deed for the Gaming Site does not contain an express restriction against alienation. On its face, the deed conveyed the land in fee simple from the prior owner, a building supply company, to the UKB. *See* Warranty Deed (Jan. 2, 1991). The UKB argues that the land is subject to restriction through operation of two separate sources—the Nonintercourse Act, 25 U.S.C. § 177, and the UKB's federal charter. *See* UKB Supplemental Brief (Sept. 28, 2009); Letter from Dallas Proctor, UKB Chief, to Montie Deer, NIGC Chairman (Feb. 25, 2002); Letter from William Rice, UKB Assistant Chief, for Jim Henson, UKB Chief, to Bruce Babbitt, Secretary of Interior (undated; faxed to Montie Deer, NIGC Chairman, on Sept. 8, 2000).

In the September 2000 Letter, the NIGC's General Counsel stated that *Buzzard* "unequivocally indicated" that lands purchased in fee by UKB are subject to a restraint against alienation pursuant to 25 U.S.C. § 177 and by operation of the terms of the UKB's Secretarially approved corporate charter. The General Counsel also noted that whether the Nonintercourse Act or the UKB's charter create a restriction against alienation "by the United States" sufficient to create "Indian lands" "is an exceedingly

difficult question," but concluded that "we need not reach this difficult question." September 2000 Letter at 4. We agree with the former General Counsel's approach because, for the reasons set forth below, UKB lacks legal jurisdiction to exercise governmental power over the Gaming Site.

3. The Indian Tribe Must Have Jurisdiction and Exercise Governmental Power Over the Land.

A site may qualify as Indian lands if it is trust or restricted fee lands over which an Indian tribe exercises governmental power. *See* 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). Tribal jurisdiction is a threshold requirement to the exercise of governmental power as required by IGRA's definition of Indian lands. *See e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) ("In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]"); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (*Miami II*) (a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (*Miami I*) ("the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land"); *State ex. rel. Graves v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd and remanded sub nom., Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). Importantly, the Tenth Circuit requires that "before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)); *see also Narragansett Indian Tribe*, 19 F.3d at 701-703. Therefore, whether the UKB possesses jurisdiction over the Gaming Site is a threshold question.

Generally speaking, an Indian tribe possesses jurisdiction over land that the tribe inhabits if the land qualifies as "Indian country." *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, No. 08-7025, slip op. at 11 n.5 (10th Cir. June 5, 2009) ("[A]s a general matter, Indian tribes exercise court jurisdiction over Indian country—reservations, dependent Indian communities, and Indian allotments."). Congress defined the term *Indian country* as: "(a) all land within the limits of any Indian reservation . . ., (b) all dependent Indian communities . . ., and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ." 18 U.S.C. § 1151. This definition, found in the criminal code, "generally applies to questions of civil jurisdiction[.]" *Venetie*, 522 U.S. at 527.

Relying on *Venetie*, the UKB asserts that the Gaming Site constitutes Indian country if it is subject to federal set-aside and superintendence. *Venetie* interpreted the

term *dependent Indian community* to refer "to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.* at 527. For the reasons set forth above in Section III. A., the Gaming Site does not constitute Indian country under 25 U.S.C. § 1151(a). Further, the UKB does not assert that the land constitutes Indian country pursuant to 25 U.S.C. § 1151(c). *Cf.* UKB Response Mem. at 6 ("The Keetoowah Cherokees has not argued that the property at issue here fits nicely within a pre-conceived notion of Indian Country under § 1151."). According to the UKB, it only has jurisdiction if the Gaming Site is subject to a federal set-aside and federal superintendence, *i.e.*, if the Gaming Site is a dependent Indian community. *Venetie*, 522 U.S. at 530-31 (1998); UKB Opening Mem. at 16-20; UKB Response Mem. at 5-13; UKB Supplemental Mem. at 3-7. In our opinion, the Gaming Site is not subject to a federal set-aside. Accordingly, we need not reach the issue of whether the Gaming Site is subject to federal superintendence.

Federal set-aside requires a federal action "indicating that it set aside the land for the use by the UKB." *Buzzard*, 922 F.2d at 1076. It is *federal* action, not tribal government action, that is required. "[B]ecause Congress has plenary power over Indian affairs, *see* U.S. CONST.. *art.* I, § 8, cl. 3, some explicit action by Congress (or the executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Venetie*, 522 U.S. 531 at n.6.

The UKB argues that the federal action to set aside the Gaming Site here comes in the form of the Non-intercourse Act and the UKB's charter. That argument has been considered and rejected by the Tenth Circuit. *Buzzard*, 922 F.2d at 1076 ("No action has been taken by the federal government indicating that it set aside the land for use by the UKB."). Like the lands at issue in *Buzzard*, the restriction against alienation imposed by the Non-intercourse Act and by operation of the of UKB's corporate charter,

> may show a desire to protect the UKB from unfair disposition of its land, but does not of itself indicate that the federal government intended the land to be set aside for the UKB's use. . . . If the restriction against alienation were sufficient to make any land purchased by the UKB Indian country, the UKB could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in …the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.

Buzzard, 922 F.2d at 1076-77; *see also Kansas v. United States*, 249 F.3d 1213, 1218-19 (10th Cir. 2001) (tribe's unilateral actions adopting property owners into the tribe and then leasing and developing their land did not restore the parcel to tribe's jurisdiction). Further, we disagree with the UKB's contention that NIGC's past regulatory actions or BIA's loan guarantee serve to satisfy the federal set-aside requirement. UKB Opening Mem. at 16-20. Congress has authorized the Secretary of the Department of the Interior, not NIGC, to set-aside lands for Indian tribes, and the Secretary has not yet exercised that

power for the benefit of the UKB. Thus, the requirement of federal set-aside has not been met.

Further, we note that NIGC's regulatory activities described in Section II(B) cannot independently create Indian country. While Congress has granted the Department of the Interior and other federal agencies broad authority regarding tribal lands, the NIGC's regulatory authority is limited to "Indian lands" as defined by IGRA. 25 U.S.C. § 2703(4). IGRA, by its terms, applies only to gaming on Indian lands. *See, e.g.*, 25 U.S.C. § 2710(a)(2) ("any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter"); 25 U.S.C. § 2710(b)(1) (requiring approved tribal gaming ordinance for the conduct of Class II gaming on Indian lands); *id.* (requiring tribal licensure of each gaming facility on Indian lands); 25 U.S.C. § 2710(b)(4)(A) (permitting licensure of individually owned gaming on Indian lands); 25 U.S.C. § 2710(d)(1) (requiring approved tribal gaming ordinance for the conduct of Class III gaming on Indian lands); 25 U.S.C. § 2710(d)(3)(A) (requiring a tribal-state compact for Class III gaming on Indian lands); Sen. Rep. 100-446 at p. A-1. (IGRA "is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands").

Likewise, the powers IGRA grants the Commission and the Chairwoman extend only as far as Indian lands extend. *See, e.g.*, 25 U.S.C. § 2705(a)(3) (power to approve tribal gaming ordinances for gaming on Indian land); 25 U.S.C. § 2705(a)(4) (power to approve management contracts for gaming on Indian lands); 25 U.S.C. § 2713 (enforcement power for violations of IGRA, NIGC regulations, or tribal gaming ordinances); 25 U.S.C. § 2706(b)(1), (2), (4) (powers to monitor gaming, inspect premises, and demand access to records for Class II gaming on Indian lands); 25 U.S.C. § 2702(3)("The purpose of this Act is … to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming…"). In short, in the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman any jurisdiction to exercise regulatory authority over the Gaming Site. The NIGC only has authority to regulate existing Indian lands; it does not have authority to decide to regulate lands not otherwise eligible for gaming under IGRA. Accordingly, the NIGC's past actions cannot and do not create Indian lands or Indian country.

Because the Gaming Site was not set aside by the federal government, it is not Indian country. Accordingly, the Gaming Site does not constitute "Indian lands" under IGRA because the UKB currently lacks jurisdiction over the Gaming Site.[8]

[8] The Assistant Secretary—Indian Affairs has explained that if he takes such a parcel into trust, it will come within the UKB's exclusive jurisdiction. *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs*, Decision of the Assistant Secretary – Indian Affairs (June 24, 2009)("The UKB would have exclusive jurisdiction over land that the United States holds in trust for the Band."); *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of*

IV. Conclusion

On remand, it is our opinion that the UKB's Gaming Site is not on Indian lands as that term is defined by IGRA and the NIGC's regulations. The federal government has taken no action to set-aside these lands for the use of the UKB. In addition, the NIGC's past regulatory activities on the Gaming Site cannot create Indian Country. This analysis must be reevaluated if the DOI accepts the Gaming Site into trust for the benefit of the United Keetoowah Band.

The DOI, Office of the Solicitor, concurs with this opinion. Letter from Patrice H. Kunesh, Deputy Solicitor—Division of Indian Affairs, to Lawrence S. Roberts, General Counsel, NIGC (Jun. 16, 2011).

Indian Affairs, Decision of the Assistant Secretary – Indian Affairs (September 10, 2010)(reaffirming June 2009 decision regarding jurisdiction). Federal courts agree that when the Secretary of the Interior takes land into trust for an Indian tribe, it meets the federal set aside and superintendence requirements to become Indian Country. *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999). Therefore, if the Gaming Site is taken into trust by the United States, the UKB will have exclusive jurisdiction, and this opinion shall be revisited.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

Civil Action No. 5:14-cv-01317 (DNH-ATB)

DECLARATION OF EDWARD TRUFANT

Edward Trufant declares under penalties of perjury as follows:

1. I am the Mayor of the Village of Union Springs, New York (the "Village"), one of the Defendants named in this action.

2. This Declaration is respectfully submitted in support of the Defendants' Cross-Motion to Dismiss and in opposition to the Plaintiffs' Motion for a Preliminary Injunction.

3. The information contained herein is based on my personal knowledge, Village records, newspaper reports and information supplied to me by my colleagues and other personnel working under my supervision.

4. My current term as Mayor began on June 1, 2013. I was also holding the office of Mayor when, in 2005, a bingo hall operated by a group of Cayuga Indians in the Village of Union Springs was shut down as a result of litigation in this Court. *See*

Cayuga Indian Nation of New York v. Village of Union Springs, 390 F.Supp.2d 203 (N.D.N.Y. 2005).

5. The Village of Union Springs is a small village. It has a population of approximately 1,200 people living within 1.75 square miles or about 1,125 acres. It is located within the County of Cayuga and the State of New York. It has no police force.

6. In July 2013, after eight years of inactivity, a group of Cayuga Indians decided to reopen the bingo hall without notice to or authorization from the Village. The operation of this gaming facility violates our 1958 Bingo Ordinance and our Zoning Law. The Village Code Enforcement Officer has notified the operators of the bingo hall that they are in violation of the Village's laws and ordinances. *See* Dkt. 1 at ¶¶ 36, 44, 51. Those notices have been ignored.

7. A group of Cayuga Indians owns a large historic home in the vicinity of the bingo hall. They have converted a single-family home into a boardinghouse or hotel for their hired security forces, a use which is illegal in a Residential District under the Zoning Law.

8. Various groups of Cayuga Indians have purchased, in nine different, scattered, checkerboarded parcels, about 150 acres within the Village's approximate 1,125 acres. Additional parcels have been purchased in the Township beyond the Village, but those parcels are not at issue here. Individual Cayuga Indians have expressed to me their intention to purchase many more parcels.

9. A group of Cayuga Indians is seeking to place about 3.5 acres into trust (which would officially recognize the aforementioned parcels as Indian Lands exempt from local governance) through the Bureau of Indian Affairs within the U.S. Department

of the Interior. The operators of the bingo hall and a nearby convenience store are paying taxes on those parcels.

10. The Cayuga Indians who own the properties are not paying taxes on the remaining approximately 146.5 acres. In total, Cayuga Indians owe about $11,000,000.00 to local governments in back taxes.

11. Cayuga Indian facilities in Union Springs and Seneca Falls have been the scenes of repeated violence and continue with threats of violence among warring factions of the Cayugas that are in dispute over who are the proper governing officials of the tribe.

12. On or about April 28, 2014, one group of Cayuga Indians tried to take over the convenience store in Union Springs from another group of Cayugas; violence ensued which required responses by state and local police forces. As a result, the facility was shut down for a short period of time. At the same time, State Route 90 was shut down at the direction of the Cayuga County Sheriff's Office and the New York State Police for the safety of passersby. Both agencies had to supply patrol officers to oversee the facility for the safety of the area residents.

13. On or about May 12, 2014, a vehicle containing one or more Cayuga Indians rammed a fence and a police car at a Seneca Falls cigarette manufacturing facility. Five participants were arrested for various offenses. Both Seneca Falls Township Police and Seneca County Sheriff's Deputies had to intervene.

14. On or about September 17, 2014, one group of Cayuga Indians seized the Union Springs convenience store, again amidst violence, and property damage, and State Route 90 had to be shut down again, with both State Police and County Sheriff having to respond in large strength for an extended period of time. This facility was closed for

approximately two months with one group of Cayuga Indians occupying the building, and another group of Cayuga Indians or their hired security people occupying the perimeter of the property. During that time, large semi-trailers were parked along the state Route 90 right-of-way to prevent customers from getting into the facility, which was occupied by an opposing group. During this extended standoff, the threat of open violence in the community was palpable. Since the facility is near Union Springs Central School, local residents were very fearful of violence affecting their children.

15. Once again, amidst violence, one group of Cayuga Indians, on or about November 17, 2014, seized the convenience store from the group which had been occupying it with one side apparently suffering injuries requiring hospitalization. Once again Route 90 was shut down with both the State Police and the County Sheriff responding.

16. The Cayuga County Sheriff has told me that he is reluctant to take any action with respect to the operation of the Union Springs bingo hall without a court order directing him to do so.

17. The residents of this Village are fearful that violence may erupt at any time and involve people other than the Cayuga Indians.

18. I am both concerned and frustrated by the foregoing state of lawlessness and violence that has descended upon this Village. Concerned because I fear for the health and safety of my constituents – both Cayuga and non-Cayuga. Frustrated because I am apparently helpless to do anything because of the reluctance of law enforcement authorities to take action because of the legal confusion that surrounds the question of Indian sovereignty and the status of land in our Village and who has governing authority

over it. This is compounded by the fact that no one seems to know who the proper representative of the Cayuga Indian Nation is.

19. While those legal questions may take months or even years to sort out, that cannot be an excuse for continued violence that immediately threatens the health and safety of the citizens of this Village. If the current governance vacuum is allowed to continue, I fear serious physical injury or even death is likely to occur.

20. I therefore respectfully request that this Court dismiss the Complaint in its entirety, deny the Plaintiffs' Motion for a Preliminary Injunction and allow the local elected officials and law enforcement authorities of the Village of Union Springs and Cayuga County to perform their duties in accordance with the decision by the U.S. Supreme Court in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), which unequivocally stands for the proposition that the mere acquisition by an Indian tribe of fee title to its reservation land does not restore its sovereignty.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 30, 2014, in the Village of Union Springs, New York.

Edward Trufant
Mayor of the Village of Union Springs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION and JOHN DOES 1–20,

Plaintiffs,

-against-

Civil Action No.
5:14-cv-01317
(DNH-ATB)

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Of Counsel

Dated: December 1, 2014

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PRELIMINARY STATEMENT

Approximately nine years ago, following the United States Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), this Court vacated a permanent injunction granted to the Cayuga Indian Nation enjoining the Village of Union Springs from applying or enforcing their "zoning and land use laws" and "any other laws" purporting to "regulate, control or otherwise interfere with" the Nation's activities on the property. *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005). In vacating the injunction and dismissing the Complaint, this Court stated that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations." *Id*. at 206. This case is virtually identical to the dismissed case, except that contrary to what the caption implies, it was filed not by the Cayuga Indian Nation but by individuals who do not have standing or capacity to bring the action on behalf of the Nation, although they claim to. Because the Nation has been embroiled in a governance dispute since 2004, and federal courts do not have subject matter jurisdiction to resolve such disputes, the present action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). However, even if the Plaintiffs did have authority to represent the Nation, the present action would nevertheless be barred by the doctrine of *res judicata* because the claims set forth in the Complaint were either raised, or could have been raised, in the prior action. Thus, this Court should reject the Plaintiffs' attempt to relitigate the dismissed claims. In addition, to the extent dismissal is not proper at this time, the Plaintiffs' motion for a preliminary injunction should be denied because the Plaintiffs cannot establish the necessary requirements to obtain preliminary injunctive relief.

BACKGROUND

On April 28, 2003, the Cayuga Indian Nation (the "Nation") purchased property on the open market within the Village and within the boundaries of the Nation's historic reservation (the "Property"). On November 12, 2003, the Nation adopted a Class II gaming ordinance pursuant to the Indian Gaming Regulatory Act ("IGRA"), and submitted it for approval to the National Indian Gaming Commission ("NIGC"). *See* Dkt. 1 at ¶ 24. Less than a week later, on November 18, 2003, the NIGC issued a conditional approval of the ordinance and advised the Nation that, "the Ordinance is only approved for gaming on Indian lands, as defined in the IGRA and the NIGC's regulations, *over which the Nation has jurisdiction*." (emphasis added). *See* Dkt. 5-8 at ¶ 4 & Ex. B. In conditionally approving the ordinance, the NIGC made no determination that the Property was gaming-eligible Indian land. In 2004, the Nation began to conduct Class II gaming at a facility called Lakeside Entertainment, located at 271 Cayuga Street, Union Springs, N.Y. *See* Dkt. 5-8 at ¶ 5.

On October 20, 2003, the Nation commenced an action in this Court against the Village of Union Springs, seeking a declaration that the Property is Indian county within the meaning 18 U.S.C. § 1151(a) and that the Nation has jurisdiction and the right to self-government over the Property. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F.Supp.2d 128, 133 (N.D.N.Y. 2004). The Nation also sought an order permanently enjoining the Defendants from interfering with the Nation's ownership and possession of the Property. *Id*. By order dated April 23, 2004, this Court granted summary judgment on the Nation's Complaint, declaring that the Property was Indian County pursuant to 18 U.S.C. § 1151(a), and that the Defendants were "without authority or jurisdiction, and were preempted from, applying or enforcing their zoning and land use laws or

any other laws, ordinances, rules, regulations, or other requirements which seek or purport to regulate, control, or otherwise interfere with activities by or on behalf of the plaintiff Cayuga Indian Nation of New York occurring on the Property." *Cayuga Indian Nation*, 317 F.Supp.2d at 151-52. This Court further enjoined and restrained the Defendants from applying or enforcing any of their laws purporting to "regulate, control or otherwise interfere with" the Nation's activities on the Property, and from commencing any actions to apply or enforce such laws against the Nation. *Id*. The Defendants subsequently filed an appeal.

On March 29, 2005, while the Defendants' appeal was pending, the Supreme Court decided *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) – a case that "dramatically altered the legal landscape" of Indian land claims. *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005). In *Sherrill*, the Supreme Court rejected the Oneida Indian Nation's claim to sovereign authority to real property that was part of the Oneida's reservation, but that had been sold, and then repurchased by the Oneidas on the open market. The Supreme Court held that the equitable considerations of laches, acquiescence, and impossibility barred the tribe's claim that its open-market purchases of the parcels unified the fee and aboriginal title such that the tribe could assert sovereign dominion over the parcels and avoid payment of city property taxes. In rejecting the unification theory, the Supreme Court stated that the "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling the embers of sovereignty that long ago grew cold," *id*. at 214, and that the "Oneidas long ago relinquished the reins of government and cannot regain them through open market purchases from current titleholders," *id*. at 203.

On May 23, 2005, in light of the Supreme Court's decision in *City of Sherrill*, the Second

Circuit issued a mandate directing this Court to reconsider the April 23, 2004 injunction and declaratory judgment. Defendants subsequently moved to vacate the injunction pursuant to Fed. R. Civ. P. 60(b) and further moved for summary judgment pursuant to Fed. R. Civ. P. 56. Both motions were vigorously opposed by the Nation. This Court granted the Defendants' motions in their entirety, vacated the injunction, dismissed the Complaint, and held that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local government bars the Nation from asserting immunity from state and local zoning laws and regulations." *Cayuga Indian Nation*, 390 F.Supp.2d at 206. Shortly thereafter, the Nation closed the gambling facility. *See* Dkt. 1 at ¶ 21.

No gaming occurred at the Property for the next eight years. Then, on July 3, 2013, in direct defiance of this Court's prior ruling, certain members of the Nation unilaterally elected to re-open the gaming facility without approval from the Village of Union Springs or the Nation's leadership. *See* Dkt. 1 at ¶ 21; Dkt. 28-2 at ¶ 5. On July 9, 2013, the Nation was served with an "Order to Remedy Violations," signed by the Village Code Enforcement Officer, stating that the Nation was in violation of the Games of Chance Ordinance dated May 19, 1958 (the "Gaming Ordinance") because it was operating bingo without a license issued by the Village of Union Springs. *See* Dkt. 1 at ¶ 36 & Ex. C. The Order directed and ordered the Nation to comply with the Gaming Ordinance, and stated that the Village "may seek injunctive relief in the New York Supreme Court." *See id*. The Nation ignored the Order to Remedy Violations, and continued to operate the casino in violation of the Village's laws and ordinances.

On December 20, 2013, the Village Code Enforcement Officer issued two additional Orders to Remedy Violations based on the Nation's continuing violation of the Gaming Ordinance and

failure to obtain a certificate of occupancy in violation of the Village's zoning law ("Zoning Law"). *See* Dkt. 1 at ¶ 44 & Ex. F. The Orders stated that the Nation was "directed and ordered to comply with the law" no later than December 28, 2013, and that a failure to do so "may constitute a fine or imprisonment or both" and that the Village "may seek injunctive relief" in state court. *See id*. On March 24, 2014, the Village's Code Enforcement Officer sent a letter to the Nation reiterating the Village's position that the Nation was operating the gaming facility in violation of the Zoning Law and Gaming Ordinance. *See* Dkt. 1 at ¶ 51 & Ex. G.

On October 28, 2014, the Nation, or rather individuals purporting to act on behalf of the Nation, filed the present action. As with the prior action, the Plaintiffs seek a declaration that "state and local laws prohibiting gambling are preempted by federal law as applied to the Nation's Class II gaming activities at Lakeside Entertainment." *See* Dkt. 1 at 17-18. They also seek an injunction to prevent the Defendants from interfering with the Nation's use and ownership of the Property, and from commencing any actions to apply or enforce the Village's laws and ordinances against the Nation. *See id.*

The reopening of the bingo hall has escalated a governance dispute that has divided the Nation for nearly a decade, eventually culminating in several episodes of physical violence on property owned by the Nation, most recently on November 17, 2014. *See* Declaration of Edward Trufant ("Trufant Decl.") at ¶¶ 11- 17. This Court should reject the Plaintiffs' attempt to preserve a status quo that threatens the safety and welfare of the community, and restore them to the same position they were in when this Court dismissed the Nation's Complaint over nine years ago.

ARGUMENT

POINT I

DEFENDANTS' CROSS-MOTION TO DISMISS THE COMPLAINT SHOULD BE GRANTED

"Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when a defendant raises claim preclusion … as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Intern.*, 231 F.3d 82 (2d Cir. 2000); *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992)(stating that *res judicata* may be raised on a Rule 12(b)(6) motion to dismiss without requiring an answer); *Cowen v. Ernest Codelia, P.C.*, 2001 WL 856606, at *1 (S.D.N.Y. July 30, 2001)("[I]t is proper to consider public documents on a motion to dismiss to determine whether claims are barred by prior litigation."); *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768 (2d Cir. 2002)(stating that courts may look to public records, including complaints filed in state court, in deciding a motion to dismiss); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 769 (2d Cir. 1991)(affirming Rule 12(b)(6) dismissal of securities fraud case where the district court considered documents filed with the Securities and Exchange Commission).

A. The Doctrine of *Res Judicata* Bars the Present Action

The present action should be dismissed on the ground of *res judicata* because the Plaintiffs' claims were either raised, or could have been raised, in the prior action. *Res judicata*, or claim preclusion, applies when (1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Monahan v. New York City*

Dept. of Corrections, 214 F.3d 275, 285 (2d Cir. 2000). Claim preclusion "prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided." *Clarke v. Frank*, 960 F.2d 1146 (2d Cir. 1992).[1]

In the dismissed action, as here, the Plaintiffs sought broad declaratory and injunctive relief against the Village of Union Springs with respect to the Nation's activities on the Property. In particular, the Plaintiffs sought a declaration that: (1) the Property is Indian Country within the meaning of 18 U.S.C. § 1151(a); (2) the Nation has jurisdiction and the right to self-government over the Property; and (3) the Defendants are without authority or jurisdiction, and are preempted from, applying or enforcing their "zoning and land use laws, or any other laws, ordinances, rules, regulations or other requirements which seek or purport to regulate, control or otherwise interfere with activities by or on behalf of the Nation occurring on the Property." *Cayuga Indian Nation*, Dkt. 1 at 8. Plaintiffs also sought an injunction enjoining and restraining the Defendants from applying or enforcing the Village's "zoning and land use laws" or "any other laws" regulating or otherwise interfering with the Nation's activities on the Property, and from commencing any actions to apply or enforce such laws against the Nation. *Id*. Although this Court initially granted the relief requested by the Plaintiffs, it subsequently vacated the injunction and dismissed the Complaint in its entirety based on the Supreme Court's holding in *City of Sherrill*.

This is déjà vu all over again. As with the prior action, the Plaintiffs' Complaint seeks a declaration that the Gaming Ordinance and "all other state and local laws prohibiting gambling are preempted by federal law as applied to the Nation's Class II gaming activities at Lakeside

[1] There can be no dispute that the previous action involved the same parties, or those in privity

Entertainment." *See* Dkt. 1 at 17-18. It also seeks an injunction to prevent the Defendants from interfering with the Nation's use and ownership of the Property, and from commencing any actions to apply or enforce the Village's laws and ordinances against the Nation. *Id*. at 18. These claims were already litigated and decided in the Defendants' favor in the prior action, *Cayuga Indian Nation*, 390 F.Supp.2d at 206, and therefore, this Court should reject the Plaintiff's attempt to relitigate them now.

Moreover, the Plaintiffs cannot avoid the preclusive effect of *res judicata* by conjuring up new legal theories, namely that this Court did not previously address the legality of the Village's attempt to enforce the Gaming Ordinance. As a preliminary matter, the injunctive relief previously requested, and initially granted, extended to all of the Village's laws and ordinances, and clearly included the application and enforcement of the Gaming Ordinance and Zoning Law. *Cayuga Indian Nation*, Dkt. 1 at ¶ 31 ("Defendants application and purported enforcement of local laws, regulations and ordinances against the Nation and the Property is unlawful."); *Cayuga Indian Nation*, 317 F.Supp.2d at 151-52 ("[Defendants] are without authority or jurisdiction, and are preempted from, applying or enforcing defendants' zoning and land use lands and any other laws…."). However, even assuming it did not, the Plaintiffs would still be barred by the doctrine of *res judicata* because such claims could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior action. *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (stating that *res judicata* or claim preclusion "prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided") (citation omitted). Although the Plaintiffs' contention that the federal

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with them, and constituted an adjudication on the merits.

government has exclusive jurisdiction to prosecute violations of the Gaming Ordinance is directly contradicted by the very precedent they cite (as discussed in Point II (a)(ii)), it was certainly available to the Plaintiffs at the time of the prior action and should have been raised then. Both cases involve the same set of factual and legal circumstances – whether federal law allows the Nation to use the Property free from state and local regulation. And, as the only law directly prohibiting the contemplated use of the Property, the Gaming Ordinance should logically have been at the forefront of the Nation's prior challenge. Thus, even if this theory was not subsumed within the prior action, the Plaintiffs' attempt to assert it now must fail. *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985) ("New legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata."). Accordingly, the Plaintiffs' Complaint should be dismissed in its entirety based on the doctrine of *res judicata*.

B. The Complaint Should Be Dismissed for Lack of Subject Matter Jurisdiction Because This Court Has No Authority to Decide Whether Plaintiffs Have Standing to Sue on Behalf of the Nation

The Plaintiffs' Complaint should be dismissed on the additional ground that this Court lacks subject matter jurisdiction over the action, because the Plaintiffs have not, and cannot, meet their burden of demonstrating that they have standing or capacity to bring an action on behalf of the Nation. *See Whitmore v. Arkansas,* 495 U.S. 149 (1990)("It is well established … that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."). Since 2004, the Nation has been involved in a governance dispute concerning the composition of its Council of chiefs and seatwarmers and the identity of its representative for government-to-government relations. In a decision dated January 16, 2014, the Interior Board of Indian Appeals acknowledged the Nation's internal dispute and

concluded that "BIA is not required to recognize anyone as the Nation's representative or any composition of the Council, nor would it be appropriate to do so." *See* 58 IBIA 171, 181 (2014), annexed as Exhibit A to the Declaration of Cornelius D. Murray, Esq. ("Murray Decl."). Federal courts have consistently held that they do not have jurisdiction to resolve internal governance disputes such as this. *Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003); *Crowe E. Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233 (4th Cir. 1974)(citations omitted); *Motah v. U.S.*, 402 F.2d 1, 1 (10th Cir. 1968)(citations omitted)("The action stems from an internal controversy among Indians over tribal government, a subject not within the jurisdiction of the court as a federal question."); *Barnes v. White*, 494 F. Supp. 194, 200 (N.D.N.Y. 1980)("[P]laintiffs' complaint stems from an intratribal dispute which federal policy dictates should be handled within the Tribe and not by this Court."). Without determining whether the Plaintiffs are authorized to file the present action on behalf of the Nation (which this Court cannot do), no justiciable issue is capable of being addressed by this Court. Thus, the Complaint should be dismissed for lack of subject matter jurisdiction.

POINT II

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

To prevail on a motion for a preliminary injunction, a party "must establish that it will suffer irreparable harm in the absence of an injunction and demonstrate either (1) 'a likelihood of success on the merits' or (2) 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly' in the movant's favor." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996). However, when a party, such as the Plaintiffs, challenges "government action taken in the public interest pursuant to a statutory or regulatory scheme," it must establish irreparable harm and a likelihood of success on the merits – the lesser 'fair ground for litigation' will not suffice. *Fair Housing in Huntington Comm. v. Town of Huntington*, 316 F.3d 357, 365 (2d Cir. 2003).

A. Plaintiffs Cannot Show a Likelihood of Success on the Merits

The likelihood that Plaintiffs will succeed on the merits depends, as an initial matter, on whether this Court has jurisdiction over the action. As discussed above, the Plaintiffs have not satisfied their burden of establishing subject matter jurisdiction because the Nation is involved in an internal governance dispute and federal courts do not have authority to resolve such disputes. Moreover, the present action is barred by the doctrine of *res judicata* because the claims set forth in the Plaintiffs' Complaint were either raised, or could have been raised, in the prior action. Thus, for either reason alone, the Plaintiffs cannot show a likelihood of success on the merits, and their motion for a preliminary injunction should be denied. However, even if this Court were to reach the merits of the Complaint, Plaintiffs would fare no better because IGRA does not preempt the application of

state and local laws prohibiting gaming on the Property, or the prosecution by the Village of Union Springs for violations of the 1958 Ordinance.

i. The Property Is Not Eligible for Class II Gaming Because the Nation Does Not Have Jurisdiction Over It

As the Plaintiffs recognize, in order to be authorized to conduct gaming under IGRA, the Nation must satisfy at least two criteria: (1) the land on which it seeks to game must be "Indian lands" as that term is defined in 25 U.S.C. § 2703(4); and (2) the land must be "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). Even assuming for purposes of this motion that the Property falls under the statutory definition of "Indian lands," the Property is not eligible for Class II gaming under IGRA because it is not subject to the Nation's jurisdiction.

It is well-established that tribal jurisdiction is a prerequisite to conducting Class II gaming under IGRA. *See* 25 U.S.C. §§ 2710(b)(1)("An Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands within such tribe's jurisdiction* ..."); 2710(b)(2) ("The Chairman shall approve any tribal ordinance or resolution concerning ... class II gaming on the *Indian lands within the tribe's jurisdiction*"); 2710(b)(4)(A) ("... class II gaming activity conducted on *Indian lands within the jurisdiction of the Indian tribe* ..."); 2710(d)(1)(A)(i) ("... [ordinance] adopted by the governing body of the Indian *tribe having jurisdiction over such [Indian] lands* ..."); 2710(d)(1)(3)(A) ("Any Indian *tribe having jurisdiction over the Indian lands* upon which a class III gaming activity is being conducted...") (emphasis added). Case law is equally clear on this point. *See Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001) (In order for a tract to qualify as "Indian lands" under IGRA, "the Tribe must have jurisdiction over the tract …."). *See also Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 304 (W.D.N.Y.

2007)("The consistent and overarching requirement common to each class of gaming is that it be sited on Indian land within the tribe's jurisdiction.").

The National Indian Gaming Commission ("NIGC") expressly recognized this jurisdictional requirement when it approved the Nation's Class II Gaming Ordinance on November 18, 2003. In its conditional approval letter, the NIGC stated that the Ordinance was approved only for gaming "on Indian lands" and, even then, only if the Nation "has jurisdiction" over those lands. *See* Dkt. 5-8 at ¶ 4 & Ex. B ("It is important to note that the Ordinance is only approved for gaming on Indian lands, as defined in the IGRA and the NIGC's regulations, over which the Nation has jurisdiction.").

This two-step approach to determining the gaming-eligibility of Indian land was formerly employed by the NIGC Office of General Counsel ("OGC") whenever an Indian lands question was raised: the OGC would consider whether the lands at issue constituted Indian lands and then whether the tribe exercised jurisdiction over those lands. *See* Indian Lands Opinion Letter to Bonnie Akaka-Smith, Chairwoman of the Pyramid Lake Palute Tribe, from Penny J. Coleman, NIGC Acting General Counsel, dated August 27, 2005, annexed as Exhibit B to the Murray Decl.[2] *See also* Indian Lands Memorandum to Tracie Stevens, Chairwomen of the NIGC, from Lawrence S. Roberts, NIGC General Counsel, dated July 18, 2011, annexed as Exhibit C to the Murray Decl. ("[T]he Gaming Site does not constitute 'Indian lands' under IGRA because the UKB currently lacks jurisdiction over the Gaming Site."). The NIGC subsequently determined that, in some instances, there is no need for a complete jurisdictional analysis, and, in 2005, it revised its analytic approach to Indian lands within reservation boundaries and adopted a shortcut to assess whether a tribe has jurisdiction

[2] This test was driven by the outcome in *Kansas v. United States*, 86 F.Supp.2d 1094 (D. Kan. 2000), in which the District Court held that the NIGC's failure to focus on the threshold question of whether the tribe possessed jurisdiction over a tract of land rendered the ultimate conclusion

over a particular tract of land. *Id*. Under this approach, the NIGC will in some cases forgo a complete jurisdictional analysis and instead employ the following presumption – "[a] tribe is presumed to have jurisdiction on its own reservation. Therefore, if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists." *Id*. Based on the Supreme Court's holding in *City of Sherrill*, the NIGC's "presumption" is easily rebutted here.

The issue before the *Sherrill* Court was whether the Oneida Indian Nation had the right to exercise sovereign authority over land it purchased within the boundaries of its former reservation area. *Sherrill*, 544 U.S. at 202 ("In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel."). The Court held that it could not. Although the Oneida Nation's historic reservation may continue to exist today, the Supreme Court in *Sherrill* unequivocally held that the tribe cannot "unilaterally revive its ancient sovereignty" over its historic reservation area through open market purchases. *Sherrill*, 544 U.S. at 202-03. The Court further stated that '"standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id*. at 214. As a result, the mere fact that land may still be part of an historic reservation that had not been formally disestablished does not mean that a tribe retains jurisdiction over it. *Id*. at 221 ("Section 465 provides the proper avenue for the OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."). As this Court recognized nearly nine years ago, the Supreme Court's decision in *Sherrill* applies here with equal force, and deprives the Nation of its ability to assert sovereignty over the Property – which is an essential prerequisite to gaming under IGRA. Because

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arbitrary and capricious.

the Nation's gaming facility is not authorized by federal law, IGRA does not preempt state and local laws or regulations prohibiting bingo or any other Class II gaming on the Property.

None of the decisions cited by the Plaintiffs dictates, or even supports, a different result here. For example, the Plaintiffs cite *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010), for the proposition that the Nation's reservation in New York State remains in existence. However, as the *Sherrill* Court held, the fact that a reservation was not disestablished does not mean that the Nation can exercise jurisdiction over it. Indeed, neither the *Gould* Court nor the Nation suggested that the Nation's "reacquisition of the convenience store parcels revive[d] its ability to exert full sovereign authority over the property." *Id.* at 641. Moreover, despite the Plaintiff's repeated emphasis on the reservation status of the Property, it is not necessary to determine whether the 1838 Treaty of Buffalo Creek diminished or disestablished the Nation's reservation, or even whether the Property is characterized as a reservation. *See Sherrill*, 544 U.S. at 215 n.9. Even assuming the Property falls under the statutory definition of "Indian lands," it is not eligible for gaming under IGRA because it is not land over which the Nation exercises jurisdiction.

ii. New York has Concurrent Jurisdiction to Prosecute Violations of State and Local Anti-Gambling Laws on Indian Reservations

Contrary to the Plaintiffs' contentions, 18 U.S.C. § 1166 does not bar state or local officials from enforcing violations of the 1958 Ordinance, or any other anti-gambling law, because Congress has granted criminal jurisdiction to the State of New York over offenses committed by or against Indians on Indian reservations. 25 U.S.C. § 232 ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere in

the state."). In *U.S. v. Cook*, the Second Circuit analyzed the validity of Section 232 in the wake of IGRA's enactment and concluded that the federal government has jurisdiction over criminal prosecutions for violations of state laws, "*unless criminal jurisdiction has been transferred to the state*." 922 F.2d 1026, 1034 (2d Cir. 1991) (emphasis added). In enacting Section 232, Congress did just that, and ceded criminal jurisdiction to the State of New York over offenses committed on Indian reservations. In *Cook*, the Second Circuit recognized that IGRA did not impliedly repeal Section 232's grant of jurisdiction when it held that the "plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York." This holding was reaffirmed by the Second Circuit in *U.S. v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992).

Consistent with the Second Circuit's holdings in *Cook* and *Markiewicz*, IGRA's legislative history indicates that New York retained its criminal jurisdiction over gambling activities on Indian reservations after the enactment of IGRA and IGRA's penal provision, 18 U.S.C. § 1166. Support for this conclusion is contained in the Senate Committee Report on the IGRA, which states: "it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction which may be encompassed in another Federal statute." S.Rep. No. 446, 100th, 2nd Sess. 12 (1988), *reprinted in 1988* U.S.C.C.A.N. 3071, 3082. This statement would certainly apply to the grant of criminal jurisdiction contained in Section 232. Therefore, the Village of Union Springs has jurisdiction, concurrent with the federal government, to enforce the 1958 Ordinance.

In addition, there is a more fundamental reason why Section 1166 does not preempt the Village from exercising criminal enforcement authority over the Property. Section 1166 only has preemptive effect if the land is Indian country with the meaning of 18 U.S.C. 1151, and the Supreme

Court's decision in *Sherrill* calls into question the Property's "Indian country" status. The *Sherrill* Court stated that the OIN did not have sovereign authority over the land, regardless of whether Congress had formally disestablished or diminished the ancient reservation, and that the proper avenue for the tribe to reestablish sovereignty was through the land into trust process. *Sherrill*, 544 U.S. at 216 n.9. The fact that the *Sherrill* Court rejected the OIN's claim of present and future sovereign authority, while also recognizing that the reservation had never been formally disestablished or diminished, was not lost on Justice Stevens, who articulated the substantive effect of the majority's holding in his dissent when he stated that it "effectively proclaimed a diminishment of the Tribe's reservation." *Id*. at 225. Thus, it is highly questionable, to say the least, whether land over which an Indian tribe does not have jurisdiction can qualify as a reservation within the meaning of 1151. *City of Sherrill v. Oneida Indian Nation*, 337 F.3d 139, 153 (2d Cir. 2003)("In general, 'Indian Country' refers to the geographic area in which tribal and federal laws normally apply and state laws do not."), *rev'd on other grounds*, 125 S. Ct. 1478 (2005).

But even assuming the Nation's ancient reservation has not been disestablished, that does not mean that the Property is Indian country within the meaning of 18 U.S.C. 1151. *See* 18 U.S.C. 1151 (defining Indian country as "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government*")(emphasis added); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)("[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation land.'"). As set forth by the United Stated Supreme Court in *U.S. v. John*, the test for determining whether land constitutes "Indian country" is whether it "had been validly set apart for the use of Indians as such, under the superintendence of the Government." 437 U.S. 634, 649 (1978)

(citations omitted). The Plaintiffs have failed to demonstrate, or even allege, that 271 Cayuga Street, Union Springs, New York is under the active supervision of the federal government. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 n.5 (1998) (stating that "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government."). *See also Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996)(holding that federal superintendence exists only "where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area."). Notwithstanding the fact that the Nation is a federally recognized tribe and may be eligible to receive benefits from the federal government, the provision of health, education, and welfare benefits to the tribe's members, for example, does not support a finding of active federal superintendence. *See Venetie*, 522 U.S. at 534 (rejecting the government's provision of social programs as merely general federal aid, and not indicia of active federal control). Accordingly, the Plaintiffs are not likely to show that the Property is under the superintendence of the federal government or otherwise qualifies as Indian country within the meaning of 18 U.S.C. 1151.

iii. The Requested Injunction is Overbroad Because New York Can Enforce the Gaming Ordinance against Individuals Responsible for Illegal Conduct on the Property

Although the Nation enjoys tribal immunity from suit, the Village of Union Springs would not be barred from bringing suits to enjoin individuals, both Indian and non-Indian, who are engaging in illegal conduct on the Property. This is because "tribal sovereign immunity does not extend to individual members of a tribe." *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002)(*citing Puyallup Tribe, Inc. v. Dep't of Game of State of*

Washington, 433 U.S. 165 (1977). The Supreme Court addressed this exception to sovereign immunity in *Michigan v. Bay Mills Indian Community*. Although the Supreme Court held that Michigan's lawsuit against the tribe was barred by the doctrine of sovereign immunity, it acknowledged that "Michigan could bring suit against tribal officials (rather than the tribe itself) seeking an injunction for, say, gambling without a license." *Bay Mills*, 134 S. Ct. 2024, 2035 (2014). The Supreme Court further acknowledged that, if such civil remedies proved ineffective, "Michigan could resort to its criminal law, prosecuting anyone who maintains – or even frequents – an unlawful gaming establishment." *Id*.

This exception to sovereign immunity derives from the *Ex parte Young* doctrine, which allows for a suit against officers of a sovereign government where the plaintiffs allege continuing unlawful conduct, and seek declaratory and injunctive relief only. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). Tribal officials are protected by sovereign immunity if they are sued in their official capacities and are acting within the scope of their authority. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004). However, sovereign immunity does not bar a suit for prospective relief against tribal officials allegedly acting in violation of the law. *See Bay Mills*, 134 S. Ct. at 2035 (stating that "tribal immunity does not bar such suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct"). *See also Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87-88 (2d Cir. 2001); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) ("*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities … to enjoin conduct that violates federal law.") (*citing CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002)). Accordingly, the preliminary injunction requested by

the Plaintiffs is overbroad because, even if the Nation is immune from suit for violations of state and local anti-gambling laws, an individual who is engaging in illegal conduct on the Property cannot take refuge in the tribe's sovereign authority, and can be sued for injunctive relief.[3]

B. Plaintiffs Have Not Shown Irreparable Harm

The Plaintiffs have failed to demonstrate that they will suffer irreparable harm in the absence of a preliminary injunction. "[I]rreparable harm is '[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction.'" *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)(citation omitted). In order to make an adequate showing of irreparable harm, the moving party must establish that injury is likely, which is to say harm is "actual and imminent, not remote or speculative." *See id*. Moreover, for an injury to be deemed irreparable, "it must be the kind of injury for which an award of money cannot compensate, *see Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 12 (2d Cir. 1982), and for which adequate redress cannot be reached by a trial on the merits. *See Kamerling*, 295 F.3d at 214. "A movant's failure to establish irreparable harm is alone sufficient for a court to deny injunctive relief." *Ayco Co. v. Feldman*, 2010 WL 4286154, at *5 (N.D.N.Y. Oct. 22, 2010).

Although the Plaintiffs acknowledge that the Village of Union Springs has notified the

[3] Other Circuit Courts have also recognized this exception to sovereign immunity. *BNSF v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007)("In determining whether *Ex parte Young* is applicable to overcome the tribal officials' claim of sovereign immunity, the relevant inquiry is only whether BNSF has alleged an ongoing violation of federal law and seeks prospective relief."); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466 (8th Cir. 1994)("]T]he dispositive issue before this court is whether the Tribe had the authority to enact the Tribal Utilities Code: If yes, the officers are clothed with the Tribe's sovereign authority; if no, then the sovereign immunity defense must fail."); *State of Wisconsin v. Baker*, 698 F.2d 1323-33 (7th Cir. 1983)(same); *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008)(same); *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984)(same).

Nation of its intention to commence an enforcement action on at least three separate occasions over the past sixteen months,[4] they make no attempt to explain why they waited so long to file the present action. Such undue delay in seeking injunctive relief "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995). *See also Gidatex, S.R.L. v. Campaniello Imports, Ltd*., 13 F.Supp.2d 417 (S.D.N.Y. 1998)("[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985)(delays of ten weeks suggests no irreparable injury).

Nonetheless, even if this lapse of time is not dispositive of the issue, the Plaintiffs have not shown that they will suffer irreparable harm as a result of the Village's potential enforcement action. None of the three categories of harm offered by the Plaintiffs is sufficient to support the relief requested here. First, the Plaintiffs argue that they have worked hard to build a clientele and reputation for operating a well-run business, and that a potential enforcement action will damage the goodwill of the business, cause reputational harm, and potentially result in a major disruption of the Nation's business. Such conclusory allegations are insufficient to support their claim for injunctive relief. *Shepard Industries, Inc. v. 135 East 57th Street, LLC*, 1999 WL 728641, at *7 (S.D.N.Y Sept. 17, 1999) (holding that "conclusory statements of loss of reputation and goodwill constitute an insufficient basis for finding irreparable harm"). Also, the Plaintiffs have failed to present any evidence to suggest that they will suffer a permanent loss of business or lose market share as a result of competition from another gaming facility. Nor can they, as the Nation operates the only class II

[4] Although the Village and the Nation entered into a Standstill Agreement as an interim measure, it expired over six months ago, and did not prohibit the Plaintiffs from bringing the present action.

gaming facility in the Village of Union Springs. *Litho Prestige, Div. of Unimedia Group, Inc. v. News America Publishing, Inc.*, 652 F. Supp. 804, 807-08 (S.D.N.Y. 1986)(holding that irreparable injury justifying injunctive relief typically requires threat of destruction or loss of a going concern); *Caldwell Mfg. Co. North America v. Amesbury Group, Inc.*, 2011 WL 3555833 (W.D.N.Y. Aug. 11, 2011)("Mere speculation about possible market share losses is insufficient evidence of irreparable harm.") (citation omitted). Moreover, any loss of revenue experienced by the Nation during the pendency of the action can be compensated with money damages determined on the basis of past and expected future earnings. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995) (reciting the general rule that irreparable harm does not exist where the loss of goodwill was doubtful and lost profits could be compensated with money damages). Thus, this category of harm does not rise to the level of irreparable harm.

Second, the Plaintiffs argue that they will suffer economic loss because, if the injunctive relief is not granted, they will lose substantial revenue and will have to continue to pay for the bingo machines they are leasing. This is a self-inflicted hardship. The fact of the matter is that the Plaintiffs are operating the gaming facility in violation of federal and state law, and therefore any lost revenues of illegal funds would not constitute irreparable injury. Nonetheless, it is well-established that economic damages are insufficient to establish irreparable harm. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75 (2d Cir. 1990)("[I]t is settled law that when an injury is compensable through money damages there is no irreparable harm."); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979)("For it has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation and that where money damages is adequate compensation a preliminary injunction will not issue.").

The Plaintiffs' third category of harm, that the potential enforcement action would encroach upon the Nation's sovereignty, is similarly insufficient to justify injunctive relief. This Court previously rejected the Nation's contention that the Defendant's attempt to enforce local laws and ordinances against it constituted irreparable harm, and concluded that the "nature and scope of infringement at issue here are not of the level required for a finding of irreparable injury." *Cayuga Indian Nation of New York v. Village of Union Springs*, 293 F.Supp.2d 183, 198 (N.D.N.Y. 2003). This Court further noted that the "conclusion is bolstered by the fact that monetary relief is a remedy available to the Nation," which is also the case here. *Id*. This reasoning applies here with equal force. In addition, gambling is not essential to the Nation's sovereignty, and therefore, any potential enforcement action against the individuals who are responsible for the illegal conduct will not infringe upon the Nation's ability to govern itself or otherwise exercise its sovereign rights. Accordingly, this does not constitute irreparable harm.

C. The Balance of Harms Weighs Heavily in Favor of Defendants

The balance of the hardships and the public interest weigh heavily in favor of the Defendants. If this Court were to deny the requested relief, the Plaintiffs would not suffer any hardship because they would be restored to the same position they were in when this Court dismissed the Nation's Complaint over nine years ago. That position is the "status quo" that needs to be preserved here, not the one that the Plaintiffs have attempted to manufacture by flouting this Court's prior decision and operating the gaming facility in violation of the Village's land use laws and zoning ordinances. The Plaintiffs, who do not even have the authority to operate the gaming facility on behalf of the Nation, seek to preserve a "status quo" that finds no support in federal law and poses health and safety risks to the community. Since the reopening of the bingo hall last year,

the Nation's internal dispute has accelerated to the point of violence and lawlessness, as competing factions of the tribe have competed (and continue to compete) for control of businesses owned by the Nation. *See* Trufant Decl. at ¶¶ 11-17. This power struggle has necessitated intervention by state and county police forces on multiple occasions, as well as road closures and hospitalizations. *See id.* In light of the proximity of the bingo hall to a local school, the residents of the Village fear for the safety of their children. *See id.* at ¶ 14. Although this situation raises issues of sovereignty and tribal governance that could take months or even years to sort out, that cannot be an excuse for the continued violence that immediately threatens the welfare and safety of the citizens of the Village. Under these circumstances, the threat of harm to the community clearly outweighs any harm to the Plaintiffs resulting from a denial of their motion.

Accordingly, for the foregoing reasons, the Plaintiffs' motion for a preliminary injunction should be denied because the Plaintiffs have failed to establish a likelihood of success of the merits of their claims, or that they will suffer irreparable harm in the absence of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the complaint should be granted and the Plaintiffs' request for a preliminary injunction should be denied.

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Respectfully submitted,

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