No. 16-3015

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF KANSAS, *et al*.,
Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Kansas (No. 15-CV-4857-DDC)
Honorable Daniel D. Crabtree, United States District Judge

BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT IS REQUESTED

April 22, 2016

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GLOSSARY OF TERMS

Defined Term	Meaning
"APA"	Administrative Procedure Act
"BIA"	Bureau of Indian Affairs
"IGRA"	Indian Gaming Regulatory Act
"NIGC"	National Indian Gaming Commission
"Quapaw" or "Tribe"	Quapaw Tribe of Oklahoma

PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

Whether the District Court had subject matter jurisdiction is the central issue of this appeal. Plaintiffs-Appellees, the State of Kansas and Board of County Commissioners of Cherokee County, Kansas (together, "State," unless otherwise specified), seek review under the Administrative Procedure Act, 5 U.S.C. 701, *et seq*. ("APA"), of a legal opinion letter issued by Defendant-Appellee National Indian Gaming Commission ("NIGC"). Aplt. App., Vol. I, at 93.[1] The letter concluded that a narrow tract of trust land, part of the former "Quapaw Strip," situated along the Kansas side of the Kansas-Oklahoma border was "eligible for gaming" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). *Id.* The District Court held that it lacked subject matter jurisdiction because the NIGC legal opinion was not a final agency action subject to judicial review under the APA. Aplt. App., Vol. III, at 585-89. The State maintains that the letter was a reviewable final agency action. *See infra* Part I. Therefore the District Court had subject matter jurisdiction under 28 U.S.C. § 1331. This case arises under IGRA, 25 U.S.C. § 2701, *et seq.*, and the APA, 5 U.S.C. § 701, *et seq.*

The District Court entered final judgment dismissing all the State's claims on December 18, 2015. Aplt. App., Vol. I, at 18. The State filed its notice of appeal on January 13, 2016. *Id.* at 19. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] This brief cites to Appellants' Appendix as Aplt. App, Vol. __, at __, and cites to attachments to the brief as Attachment __, at B-__.

STATEMENT OF THE ISSUE

I. Did the District Court err in holding that the NIGC's legal opinion was not a final agency action subject to judicial review under the Administrative Procedures Act, 5 U.S.C. §§ 701-06, and in dismissing the State's challenges to the NIGC's legal opinion for lack of subject matter jurisdiction?

STATEMENT OF THE CASE

The Quapaw Tribe of Oklahoma ("Quapaw" or "Tribe"), a federally recognized Indian Tribe, is maneuvering to expand its Downstream Casino Resort across the Kansas-Oklahoma border into Kansas. The ultimate prize the Tribe seeks from expanding its gaming operations across the state line is adding Class III gaming, the most lucrative class of gaming, which it cannot do in Oklahoma. But IGRA prohibits gaming on the Kansas land unless the land qualifies for an exception to the bar. 25 U.S.C. § 2719(a). So the Tribe asked the NIGC—which is charged with implementing and enforcing IGRA—for a legal opinion determining that the Kansas land satisfies the last recognized reservation exception. *See* Aplt. App., Vol. I, at 93; *see also* 25 U.S.C. § 2719(a)(2)(B). The NIGC concluded that the Kansas land satisfies the exception and "is eligible for gaming." Aplt. App., Vol. I, at 93.

The NIGC's legal opinion enabled the Quapaw to proceed with its plan to expand its gaming operation to the Kansas land. Yet the District Court concluded

that the NIGC's opinion was not a final order for purposes of APA review, insulating the NIGC's decision from judicial scrutiny and leaving the State without a remedy. *See* Aplt. App., Vol. III, at 585-89, 603. As a result, the Tribe has taken aggressive steps to expand its casino into Kansas, even suing the State to force it to negotiate a Class III gaming compact. *See* Complaint, *Quapaw Tribe of Indians v. Kansas*, D. Kan. Case No. 16-2037 (Dkt. 1), filed Jan. 19, 2016 (Attachment 6, at B-126).

A. History of the Quapaw

In 1833, under the United States' Treaty with the Quapaw, the Tribe left its land in Arkansas and relocated to a reservation in what is now northeast Oklahoma and a sliver of southeast Kansas. Aplt. App., Vol. I, at 27. The reservation consisted of 150 sections of land. *Id.* The Kansas portion of the reservation was known as the "Quapaw Strip" because it was only a half-mile wide from north to south. *Id.* In 1867, the Tribe ceded the Quapaw Strip to the United States, except for a small set-aside for a member of the Tribe. *Id.* In 1895, the United States dissolved the remainder of the Quapaw reservation and allotted the Quapaw's Oklahoma land to individual Tribe members. *See* Act of March 2, 1895, 28 Stat. 876, 907 (1895).

When IGRA took effect on October 17, 1988, the State of Kansas had only four resident federally-recognized Indian tribes within its borders: the Sac and Fox

Nation of Missouri in Kansas and Nebraska, the Kickapoo Tribe in Kansas, the Prairie Band of Potawatomi Indians, and the Iowa Tribe of Kansas and Nebraska, each of which had and still has a reservation in Kansas. Aplt. App., Vol. I, at 28 (citing *Oyler v. Allenbrand*, 23 F.3d 292, 295, 296, 299 (10th Cir. 1994)).

Years later, the Quapaw purchased a tract of land in northeast Oklahoma and had the Secretary of the Interior place the land into trust. *Id.* at 28. The land is within the Tribe's historic boundaries and abuts the Kansas state line. *Id.* In 2006, the Quapaw acquired the parcel of land at issue in this case (the "Kansas land")—a 124-acre tract in Kansas adjacent to the Oklahoma parcel. *Id.* In 2008, the Tribe opened the Downstream Casino Resort on its trust land in Oklahoma, adjacent to the Kansas land at issue here. *Id.* On the Kansas land the Tribe built the casino's primary parking lot. *Id. See* Attachment 3, at B-54 (satellite image).

B. The Quapaw Places the Kansas Land Into Trust for *Non*-Gaming Purposes

In 2011, the Tribe applied to have the Secretary of Interior put the Kansas land into trust. *See id.* at 56. The Tribe notified the State of its request by sending the Governor a "Notice of (Gaming) Land Acquisition Application." *Id.* at 56-59. The Notice assured the Governor that the land would be used only for "*additional parking for the Downstream Resort/Casino*." *Id.* at 57. In February 2012, the Miami Agency of the Bureau of Indian Affairs ("BIA"), located in Oklahoma, sent the Kansas Governor a "Notice of (*Non-Gaming*) Land Acquisition Application,"

describing the land as the "Downstream Parking Lot," and explaining that "there is no expected change in use of the property at this time." *Id.* at 49 (emphasis added).

Both notices invited the State to submit written comments about the Quapaw's land-into-trust application and the State did so. *Id.* at 49, 52, 56. In March 2012, the State submitted objections to the BIA regarding the Quapaw's land-into-trust application. *Id.* at 52-53. The State's main concern was that the land would be used for expanding the Tribe's gaming operations into Kansas, which the State opposed. *Id.* at 52. Cherokee County echoed the State's objections in a letter of its own, which it later withdrew based on the Quapaw's assurances that the Kansas land would not be used for gaming purposes. *Id.* at 29; *see also id.* at 222.

In June 2012, the Miami Agency of the BIA agreed to take the land into trust. *Id.* at 60-67. The Agency based its decision in part on the Tribe's assurance that "there will be no change in land use"; one section of the tract would be used for the existing parking lot and the other section would remain primarily agricultural. *Id.* at 63.[2]

[2] Had the Quapaw's land-into-trust application been treated as an application for gaming purposes, rather than non-gaming purposes, the Department of Interior's Assistant Secretary for Indian Affairs would have made the decision, rather than the regional office. That decision would have constituted final agency action and could have been immediately challenged. *See Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501, 510-11 (8th Cir. 2010). The Tribe deftly avoided that result by averring in its application that the Kansas land would be used for non-gaming purposes.

C. The Quapaw Requests Legal Opinion From NIGC that Gaming is Allowed on Kansas Land

After convincing the Secretary of Interior to take the Kansas land into trust for *non-gaming* purposes, the Quapaw did an about-face. It asked the NIGC to issue a legal opinion stating that the Kansas land was eligible for gaming under the last recognized reservation exception to IGRA's general prohibition on gaming on trust lands acquired after October 17, 1988. *See id.* at 86; 25 U.SC. § 2719(a)(2)(B). The NIGC is a commission within the Department of Interior, but the NIGC has exclusive "exclusive regulatory authority for Indian gaming conducted pursuant to IGRA." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1265 & n.12 (10th Cir. 2001); *see also* 25 U.S.C. § 2704(a). Thus, "only the [NIGC] ha[s] authority to oversee" *and enforce* IGRA. *Sac & Fox Nation of Mo.*, 240 F.3d at 1265 n.12.

The NIGC notified the Kansas Attorney General Derek Schmidt of the Quapaw's request and asked for his comments. Aplt. App., Vol. I, at 86. The Attorney General's Office responded, opposing the Tribe's request and rejecting the Tribe's suggestion that the Kansas Governor supports the construction of a casino on the Kansas land. *Id.* at 87-88. The Attorney General argued that the Tribe should be equitably estopped from gaming on the Kansas land because the land was placed into trust based on the Tribe's representation that it would be used for *non-gaming* purposes. *Id.* at 88. He also argued that the Kansas land did not qualify

for the last recognized reservation exception because the Tribe did not satisfy the exception's "presently located" requirement. *See* 25 U.S.C. § 2719(a)(2)(B). Only the second issue, regarding the NIGC's interpretation of the phrase "presently located" is at issue here.

Lands taken into trust after October 17, 1988 are eligible for gaming under the last recognized reservation exception only if "the Indian tribe has no reservation on October 17, 1988" and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe *is presently located*." 25 U.S.C. § 2719(a)(2)(B) (emphasis added). The Attorney General argued that the term "presently located" requires the Tribe to show that it had a *major* governmental presence in the State *when IGRA took effect* on October 17, 1988, and that the Tribe could not satisfy these requirements. Aplt. App., Vol. I, at 88 (citing *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1206 (D. Kan. 2006)[3] and *Carcieri v. Salazar*, 555 U.S. 379, 388-91 (2009)[4]).

[3] In *Wyandotte Nation* the court accepted the NIGC's interpretation of "presently located," which, at the time, it interpreted to mean "where a tribe has its population center and '*major governmental presence*.'" 437 F. Supp. 2d at 1206.

[4] In *Carcieri*, the U.S. Supreme Court held that the phrase, "recognized Indian Tribe now under Federal jurisdiction," in the Indian Reorganization Act ("IRA") unambiguously means "recognized Indian Tribe under Federal jurisdiction *at the time the IRA was enacted*." 555 U.S. at 388-91.

In a 15-page legal opinion letter ("legal opinion"), the NIGC concluded that the Kansas land is "eligible for gaming under the last recognized reservation exception of IGRA as interpreted by Department of the Interior regulations, 292.4(b)(2)." *Id.* at 93. After finding that the Kansas land constitutes "Indian lands" under IGRA, *id.* at 96-101, the NIGC concluded that the Kansas land satisfied the last recognized reservation exception, *id.* at 101-07. The NIGC recognized that 25 U.S.C. § 2719(a)(2)(B) requires a tribe to establish three elements in order to satisfy the last recognized reservation exception. The tribe must show that (1) it had no reservation when IGRA took effect on October 17, 1988; (2) the land is "within the state or states in which the Tribe is presently located"; and (3) the land is "within the [t]ribe's last recognized reservation within such state or states." Aplt. App., Vol. I, at 101.

The State's claims focus on the second element, specifically the "presently located" requirement. NIGC found that although IGRA does not define "presently located," the Department of Interior "interpreted that phrase as part of its interpretation of the last recognized reservation exception." *Id.* at 102. The Department of Interior's regulations state that where a tribe is "presently located" is "evidenced by the tribe's governmental presence and tribal population," 25 C.F.R. § 292.4. Aplt. App., Vol. I, at 102. The NIGC began its analysis by giving *Chevron* deference to the Department of Interior regulation, finding it was

reasonable for the Department to define a tribe's present location based on the tribe's current governmental presence and tribal population. *Id.* at 102-03.

The NIGC interpreted the regulation's "governmental presence" requirement as requiring relatively minimal governmental presence. While the NIGC acknowledged that most of the Tribe's governmental functions and services are based in Oklahoma, the NIGC determined that the Tribe satisfied the governmental presence requirement because it had some governmental presence in Kansas—a tribal government office, a tribal marshal substation, and other ancillary governmental offices and services. *See id.* at 103-06.

The NIGC then interpreted "tribal population" to require only that some relatively small number of tribe members live in the State. *Id.* at 106. It did not address the Attorney General's argument that a tribe's "present[]" location should be determined as of October 17, 1988. The NIGC concluded that the Kansas land is "eligible for gaming under IGRA as after-acquired trust land that satisfies the last recognized reservation exception" because the Tribe had no reservation as of the enactment of IGRA, the land is located in Kansas, the Tribe had some limited tribal government and minimal tribal member presence on the land, and the land is within the Tribe's last recognized reservation. *Id.* at 107. The Department of the Interior's Solicitor's Office reviewed the legal opinion and concurred with it. *Id.* at 93.

Less than a month after the NIGC's opinion, the Quapaw announced its intention to expand the Downstream Casino Resort and build and operate a casino on the Kansas land. Aplt. App., Vol. I, at 32.

D. The State Seeks Judicial Review of NIGC's Decision

Because the NIGC's opinion enabled the Quapaw to proceed with plans to expand its gaming operations to the Kansas land, the State brought this action seeking declaratory and injunctive relief to prevent that from happening.

In Count II of its Amended Complaint, the State challenged the NIGC's determination that a tribe is "presently located" in a State for purposes of the last recognized reservation exception as long as the tribe is found to have some minimal presence in the State at the time the tribe seeks the exception or begins gaming. The State claimed that the NIGC's conclusion should be held unlawful and set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A). Instead, the State claimed, the phrase "presently located" plainly means that the tribe must have been located in the State when IGRA took effect on October 17, 1988. Aplt. App., Vol. I, at 33-34 (citing *Carcieri*, 555 U.S. at 388-91).

In Count III of its Amended Complaint, the State also challenged 25 C.F.R. § 292.4, the Department of Interior's regulation that says a tribe's present location is "evidenced by the tribe's governmental presence and tribal population." Aplt.

App., Vol. I, at 35. The State claimed that the regulation should be held unlawful and set aside as arbitrary and otherwise not in accordance with law because the only case to interpret the last recognized reservation exception's "presently located" requirement found that it required a "*major* governmental presence" in the State, not just *some* governmental presence. *Id.* (citing *Wyandotte Nation*, 437 F. Supp. 2d at 1206) (emphasis added). Alternatively, the State challenged the NIGC's application of 25 C.F.R. § 292.4 as arbitrary and not otherwise in accordance with the law. Aplt. App., Vol. I, at 35-36.[5]

The NIGC moved to dismiss the State's APA claims. It argued the District Court lacked subject matter jurisdiction because the NIGC's legal opinion was not a final agency action under the APA and because the State's challenge to 25 C.F.R. § 292.4 failed to state a claim on which relief could be granted. Aplt. App., Vol. I, at 241-65.[6]

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[5] The State brought Counts II and III, against the "federal defendants," which the State collectively refers to as "NIGC": NIGC, NIGC Chair Jonodev Osceloa Chaudhuri, NIGC Associate Commissioner Daniel J. Little, NIGC General Counsel Eric N. Shepard, the U.S. Department of the Interior, Secretary of the Interior Sally Jewell, and Assistant Secretary of Indian Affairs Kevin K. Washburn. *See* Aplt. App. at 413.

[6] The State also brought a claim (Count I) against "tribal defendants": Downstream Development Authority of the Quapaw Tribe of Oklahoma, the Quapaw Casino Authority of the Quapaw Tribe of Oklahoma, the Quapaw Tribal Development Corporation, and 18 individual officers and members of the tribal entities. Aplt. App., Vol. I, at 20-22, 25-26, 32-33; Aplt. App., Vol. II, at 413. The State claimed that the Tribe should be estopped from gaming on the Kansas land because it had the land put into trust under a false pretense—that the land would *not* be used for

The District Court granted the NIGC's motion to dismiss. It held that the NIGC legal opinion was not a reviewable final agency action under the APA, and therefore it lacked jurisdiction, because (1) 25 U.S.C. § 2714 precluded review, and (2) the opinion did not satisfy the two part test for final agency action under the APA. Aplt. App., Vol. III, at 579-89. The District Court dismissed the State's as-applied challenge to 25 C.F.R. § 292.4 for the same reasons and concluded that the State's facial challenge to 25 C.F.R. § 292.4 was time barred by the APA's six-year statute of limitations on facial challenges to agency regulations. Aplt. App., Vol. III, at 589-93. The District Court did not address the merits of the State's claim that the NIGC's application of IGRA's last recognized reservation exception (25 U.S.C. § 2719(a)(2)(B)) and the Department of Interior regulation (25 C.F.R. § 292.4) should be held unlawful and set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The State timely appealed. *See* Aplt. App., Vol. III, at 607.

E. The Tribe Sues the State to Force a Class III Gaming Compact

Just one month after the District Court ruled that the NIGC's legal opinion was not a final agency action under the APA and therefore not reviewable, the Tribe sued the State of Kansas in the Kansas federal district court to force the State

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gaming. Aplt. App., Vol. I, at 32-33. The District Court granted the tribal defendants' motion to dismiss this claim, Aplt. App., Vol. III, at 593-603, and the State does not appeal that decision.

to negotiate a Class III gaming compact. Complaint at 7, 10, 11, *Quapaw Tribe of Indians v. Kansas*, D. Kan. Case No. 16-2037 (Dkt. 1).

As the Tribe's Complaint explains, IGRA divides gaming on Indian lands into three categories. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and certain state-authorized card games, but does not include banking card games, such as blackjack (21), or slot machines. *Id.* § 2703(7). Class III gaming—the most lucrative category of gaming—is a catch-all category that includes "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8); *see also United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998).

IGRA has established a framework under which tribes may conduct coveted Class III gaming. The framework reflects the "finely-tuned balance" Congress struck "between the interests of the states and the tribes" with respect to Class III gaming. *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007). *First*, "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C.

§ 2710(d)(3)(A). *Second*, "[u]pon receiving such a request, the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* (emphasis added). *Third*, the compact takes effect "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *Id.* § 2710(d)(3)(B).

"Absent a tribal-state compact, the statute forbids tribes to offer Class III gaming." *Texas*, 497 F.3d at 507. Yet the Department of Interior has issued regulations, 25 C.F.R. Part 291, that allow tribes to obtain Class III gaming procedures from the Secretary over the objection of non-consenting States. *See id.* The Tribe's Complaint makes two things painfully clear: the Tribe has opted to force Class III gaming procedures on the State under 25 C.F.R. Part 291, and the NIGC's legal opinion directly enabled the Tribe's action.

SUMMARY OF THE ARGUMENT

The issues on appeal boil down to a single question: Is the NIGC's 15-page legal opinion, which (1) was approved by the Department of Interior, (2) lays out in detail, with thorough (albeit incorrect) legal analysis, the NIGC's decision that the Kansas land "is eligible for gaming under the last recognized reservation exception," and (3) has already caused the State to be sued to enforce the State's purported obligations under the letter, constitutes reviewable final agency action under the APA. The District Court held that it was not, thereby insulating the

NIGC's decision from judicial review, triggering the Quapaw's action to force the State to accept Class III gaming on the Kansas land, and depriving the State of any opportunity to challenge the NIGC's fundamentally flawed interpretation of IGRA's last recognized reservation exception. The District Court decision is wrong for several reasons.

First, this Court should reverse the District Court's holding that IGRA, specifically 25 U.S.C. § 2714, precludes review of the NIGC's legal opinion. Section 2714 provides that NIGC decisions made under four different sections of IGRA are judicially reviewable final agency actions under the APA. Even though § 2714 does not purport to provide an exclusive list of judicially reviewable NIGC decisions, the District Court interpreted § 2714 to preclude review of any decision not expressly listed in § 2714, including the NIGC's legal opinion at issue here.

The District Court's interpretation and application of § 2714 is wrong and should be reversed for at least five reasons: (1) the District Court ignored the longstanding presumption that agency action is judicially reviewable and instead applied a presumption *against* judicial review of agency actions (Part I.A.1.); (2) the District Court's decision that § 2714 precludes judicial review of the NIGC's legal opinion is contrary to the plain text of § 2714 and this Court's precedent (Part I.A.2.a.); (3) neither the District Court nor the NIGC pointed to anything in IGRA as a whole that displays a congressional intent to preclude

judicial review of the NIGC's legal opinion (Part I.A.2.b.); (4) at best, the legislative history of IGRA sends mixed signals regarding Congress's intent in enacting § 2714 and by no means provides reliable evidence of congressional intent to preclude judicial review (Part I.A.2.c.); and (5) the Department of Interior's own regulations assume that agency actions under 25 U.S.C. § 2719—the provision the NIGC's legal opinion interpreted—can be judicially reviewable (Part I.A.2.d.).

Second, this Court should reverse the District Court's holding that the NIGC's legal opinion was not a final agency action under the APA. A two-part test (the "*Bennett* test") governs whether an agency action is a final action reviewable under the APA: (1) the action must mark the consummation of the agency's decisionmaking process, and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. Both the U.S. Supreme Court and this Court have instructed that this test be applied "pragmatically, rather than inflexibly," looking to the substance and context of the decision rather than labels. Yet the District Court based its decision on a superficial understanding of the NIGC's legal opinion, ignoring the real and substantial effect it has on the State.

The NIGC's legal opinion satisfies both prongs of the *Bennett* test. The first prong is satisfied because the NIGC's legal opinion reflected the NIGC's final

decision that the Kansas land "is eligible for gaming." Under the NIGC's opinion the coast is now clear for the Tribe to game on the Kansas land with no additional approval from the NIGC required. (Part I.B.1.) The second prong is also satisfied. The NIGC's legal opinion created obligations for the State by requiring it to negotiate a Class III gaming compact with the Tribe or face federally-imposed Class III gaming rules. (Part I.B.2.a.) And substantial legal consequences have flowed from the letter; the Tribe sued the State to enforce its purported right to engage in (and the State's purported obligation to allow) Class III gaming on the Kansas land. (Part I.B.2.b.)

Because the District Court erred in holding that the NIGC's legal opinion was not a reviewable final agency action, it erred in dismissing the State's claims (Counts II and III) challenging the NIGC's interpretation and application of IGRA's last recognized reservation exception (25 U.S.C. 2419(a)(2)(B)) and the Department of Interior regulation (25 C.F.R. § 292.4) that purports to interpret the exception. (Part I.C.)

Finally, if the District Court's decision insulating the NIGC's legal opinion from judicial review is reversed, the case should be remanded to the District Court for that court to reach the merits of the State's important claims. (Part II.)

ARGUMENT

I. The NIGC's Legal Opinion Was a Final Agency Action Under the APA.

Under the APA, 5 U.S.C. § 701, *et seq.*, the State challenges the NIGC's determination that IGRA's last recognized reservation exception applies to the Kansas land. The APA provides that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; *see also* 5 U.S.C. § 702 (expressly waiving sovereign immunity). The APA's waiver of sovereign immunity and judicial review provisions do not apply, however, if a "statute[] preclude[s] judicial review." *Id.* § 701(a)(2). The District Court granted the NIGC's motion to dismiss, concluding that 25 U.S.C. § 2714 precludes judicial review of the NIGC's legal opinion and that the opinion was not a reviewable "final agency action." This Court reviews the District Court's dismissal for lack of jurisdiction de novo. *Painter v. Shalala*, 97 F.3d 1351, 1355 (10th Cir. 1996).

A. IGRA does not limit the NIGC actions that are final under the APA.

In determining whether the NIGC's legal opinion constitutes reviewable final agency action under the APA, the District Court starts off on the wrong foot from the very beginning by holding that IGRA, specifically 25 U.S.C. § 2714, "unequivocally defines the [NIGC] actions that are final agency decisions subject to judicial review under the APA." Aplt. App., Vol. III, at 585; *see also id.* at 582

(concluding that "§ 2714 provides clear and unambiguous direction about which NIGC actions are final"). This conclusion ignores the well-established presumption favoring judicial review of agency action, has no basis in IGRA's text, and is belied by the Department of Interior's own regulations.

1. The District Court ignored the presumption that agency action is judicially reviewable.

The starting point for deciding whether a statute precludes judicial review is the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). But instead of beginning with the presumption of judicial review, the District Court applied a presumption *against* judicial review, presuming the NIGC's decision was *not* reviewable because "nothing in § 2714 or any other part of the IGRA identifies [NIGC legal opinions] as final agency action." Aplt. App., Vol. III, at 580. *C.f. Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1113 (E.D. Cal. 2002), *aff'd sub nom.*, *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (warning against relying on "robust expression unius doctrine" because it "would create the reverse presumption"—against review—"for most statutes"). This initial error led the District Court's entire analysis astray.

2. Nothing in IGRA's text, structure, or legislative history overcomes the presumption of reviewability of agency actions.

The presumption that agency actions are judicially reviewable may be overcome only by "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671-72. The agency can "discharge [its] heavy burden of overcoming the strong presumption," *id.*, where congressional intent to preclude judicial review of the particular administrative action involved is "fairly discernible" based on a statute's express language, the statutory scheme as a whole, and legislative history, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012). Because the District Court ignored the presumption favoring review of agency actions, it failed to address these factors in proper context and ignored some of them altogether.

a. The District Court's interpretation of 25 U.S.C. § 2714 is contrary to the statute's plain text and binding precedent.

The District Court's interpretation of 25 U.S.C. § 2714 is contrary to the statute's plain text and binding precedent. Section 2714 provides: "Decisions made by the [NIGC] pursuant to sections 2710 ['Tribal gaming ordinance'], 2711 ['Management contracts'], 2712 ['Review of existing ordinances and contracts'], and 2713 ['Civil penalties'] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5."

On its face, § 2714 is an "*authorization* of judicial review, *not a bar*." *Bowen*, 476 U.S. at 674 (emphasis added). "Nowhere in the IGRA . . . is there any indication that this list is exhaustive or that these are the *only* final NIGC actions subject to judicial review." *United Keetoowah Band of Cherokee Indians in Okla. v. Oklahoma*, No. CIV-04-340 (E.D. Okla. Jan. 26, 2006) (Attachment 5, at B-111). Yet that is exactly how the District Court interpreted § 2714.

The District Court's interpretation of this provision as implicitly precluding review of any NIGC decision not made pursuant to §§ 2710, 2711, 2712, or 2713, also is contrary to Tenth Circuit and U.S. Supreme Court precedent. The "'mere fact that some acts are made reviewable [by the express language of the relevant statute or statutes] should not suffice to support an implication of exclusion as to others.'" *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1277 (10th Cir. 1991) (quoting *Bowen*, 476 U.S. at 674) (alteration in *Hamilton Stores*). "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen*, 476 U.S. at 674 (internal quotation marks omitted).

Indeed, the presumption of judicial review is "inconsistent" with the District Court's strong reliance on the *expressio unius* doctrine, which says that expression of one implies the exclusion of others, because it "create[s] the reverse presumption, one against APA review for most statutes." *Artichoke Joe's*, 216 F. Supp. 2d at 1113.

In *Amador County v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011), the D.C. Circuit rejected the District Court's review-inhibiting interpretation of § 2714 for this very reason. "It is well established," the D.C. Circuit held, "that the existence of a judicial review provision covering certain actions under a statute does not preclude judicial review of other actions under the same statute." *Amador Cnty.*, 640 F.3d at 381 (citing *Bennett v. Spear*, 520 U.S. 154, 175 (1997)).

The District Court's application of § 2714 as precluding judicial review of the NIGC's legal opinion cannot be squared with the text of the statute or this Court's precedent.

b. Neither the District Court nor the NIGC pointed to anything in IGRA as a whole that displays congressional intent to preclude judicial review of the NIGC's legal opinion.

Neither the District Court nor the NIGC has pointed to anything in IGRA as a whole that evinces congressional intent to preclude judicial review of the NIGC's legal opinion. Instead, the District Court relied on nonbinding dicta and a nonbinding unpublished opinion to reach its conclusion.

The District Court's reliance on *Oklahoma v. Hobia*, 775 F.3d 1204, 1210 (10th Cir. 2014), is misplaced. *Hobia* did not involve the reviewability of an NIGC decision, and its passing reference to § 2714 was nonbinding dicta. *Hobia* cited § 2714 in the context of determining whether a letter from the NIGC Commissioner mooted the case in light of *Michigan v. Bay Mills Indian*

Committee., 134 S. Ct. 2024, 2030 (2014). The Court held that the letter, which concluded that the land the tribe wanted to use for Class III gaming did not constitute "Indian lands," did not moot the case because the letter "anticipated the possibility of future wrongful conduct on the part of the Tribe . . . and in turn future agency action," and therefore was not "final agency action."[7] *Hobia*, 775 F.3d at 1211. This rationale, which *Hobia* emphasized twice, was the basis for its holding, not § 2714. *Id.*

Indeed, *Hobia* focused on whether the content and context of the Commissioner's letter made it a final agency action and only in passing commented on § 2714. The Court's fleeting statement that the "letter did not constitute 'final agency action' under IGRA," with a "*see*" cite to § 2714, and a parenthetical explanation that § 2714 "defin[es] what constitutes 'final agency action' under IGRA," was not essential to the Court's decision. *See Hobia*, 775 F.3d at 1211; *United States v. Harris*, 695 F.3d 1125, 1132 (10th Cir. 2012) (holding that where the court in a prior case focused on one question and commented on a related question, the comment was "not necessarily involved nor essential to determination of the case in hand" and was therefore dicta); *see also*

[7] *Hobia*'s conclusion that the Commissioner's letter did not constitute final agency action has no bearing on this case because here the NIGC squarely concluded that the Kansas land "*is* eligible for gaming," Aplt. App. at 93 (emphasis added), whereas the Commissioner's letter in *Hobia* was tentative, expressly anticipating future agency action, 775 F.3d at 1211.

Ohio v. Clark, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring) (cautioning that "[d]icta on legal points . . . can do harm, because . . . they can mislead"); *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821) (Marshall, C.J.) (explaining why dicta are not binding).

The District Court's reliance on the unpublished, nonbinding case of *Miami Tribe of Okla. v. United States*, 198 F. App'x 686, 690 (10th Cir. 2006) is also misplaced. *See* 198 F. App'x at 687 n.* ("This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel."); *see also Graham v. Sheriff of Logan Cnty.*, 741 F.3d 1118, 1124 (10th Cir. 2013) (rejecting appellant's reliance on an unpublished opinion). Moreover, just as in *Hobia*, the Court's passing citation to § 2714 on its way to concluding that a Department of Interior letter was not final agency action because it did not represent the culmination of the agency's decision making process, does not indicate a considered judgment regarding the meaning of § 2714. *See Harris*, 695 F.3d at 1132.

c. IGRA's legislative history does not "refute[]" the plain text of § 2714.

Although legislative history has been cited as a relevant factor for determining whether Congress intended to preclude judicial review of certain agency actions, only "legislative history that is a reliable indicator of congressional intent" will do. *Block*, 467 U.S. at 349. Any reliance on legislative history should

be cautious and sparing. *See Sackett*, 132 S. Ct. at 1373 (focusing analysis on statutory text and structure, not even mentioning legislative history). Here, the two pieces of relevant legislative history send conflicting signals of congressional intent.

The Select Committee on Indian Affairs of the U.S. Senate, which favorably reported IGRA (as amended) to the floor of the Senate, issued a Committee Report on the bill. S. Rep. No. 100-446 (1988), 1988 U.S.C.C.A.N. 3071. The "Highlights" section of the Report states: "Judicial review.—*All decisions* of the [NIGC] are final agency decisions for purposes of appeal to Federal district court." *Id.* at 3078 (emphasis added). If anything, this reflects congressional intent not to limit the class of NIGC actions subject to judicial review. *See Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001); *United Keetoowah*, No. CIV-04-340, at 6 & n.3.

The same Report also states: "Sec. 15.—Provides that certain Commission decisions will be final agency decisions for purposes of court review." S. Rep. No. 100-446, 1988 U.S.C.C.A.N. at 3090. Like § 2714 itself, this provision of the Committee Report says nothing about limiting judicial review to the NIGC actions listed in § 2714. Nevertheless, relying on *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004), the District Court concluded that IGRA's legislative history reflects congressional

intent to limit judicial review only to certain NIGC decisions. Aplt. App., Vol. III, at 583-84. Whatever persuasive value *Lac Vieux* may have once had, it is no longer good law on this point as the D.C. Circuit, whose precedent binds the D.C. District Court, rejected *Lac Vieux*'s view of § 2714 in *Amador County*, 640 F.3d at 381.

In any event, these conflicting messages from the Senate Committee that drafted IGRA are insufficient to overcome the presumption in favor of judicial review of agency actions.

d. The Department of Interior's own regulations assume that agency actions under 25 U.S.C. § 2719 can be final agency actions.

The Department of Interior's own regulations belie the District Court's holding, and the NIGC's position, that § 2714 precludes judicial review of the NIGC's legal opinion. The letter interpreted and applied the last recognized reservation exception in 25 U.S.C. § 2719(a)(2)(B), which is not one of the sections listed in § 2714. But 25 C.F.R. § 292.26 assumes that agency actions under § 2719 *are* reviewable, stating that "[t]hese regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations" in 2008, 25 C.F.R. § 292.26(a), which presumably include "written opinion[s] regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment," *id.* § 292.26(b). There is no basis in IGRA or in logic to treat the NIGC's legal opinion at issue here any differently

than the agency decisions mentioned in § 292.26. Section 2714 does not preclude judicial review.

B. The NIGC's legal opinion concluding that the Kansas land is "eligible for gaming under the last recognized reservation exception" is a final agency action under the APA.

The test for determining final agency action under the APA has two prongs: "First, the action must mark the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (internal quotation marks omitted). Second, the "action must be one by which rights or obligations have been determined, *or* from which legal consequences will flow." *Id.* at 178 (internal quotation marks omitted) (emphasis added); *accord Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014). The Court applies the two-part *Bennett* test "pragmatically, rather than inflexibly" in order to give effect to the APA's strong presumption in favor of review of agency action, *Kobach*, 772 F.3d at 1189, and its "generous review provisions," *Bennett*, 520 U.S. at 163. The NIGC's legal opinion satisfies both prongs of the *Bennett* test.

1. The NIGC's legal opinion reflected the NIGC's final decision that the Kansas land is eligible for gaming.

The District Court's determination that the NIGC's legal opinion was not a final decision turned on superficial labels and the elevation of form over substance—calling the Tribe's request for the legal opinion "no more than a voluntary request for guidance from the NIGC staff"; characterizing the NIGC's

legal opinion as a "voluntar[y]" "advisory opinion"—a loaded term that is found nowhere in the letter itself; and emphasizing that the NIGC legal opinion itself said it "'did not constitute final agency action for purposes of review in federal district court.'" Aplt. App., Vol. III, at 587. But just as an "agency cannot render its action final merely by styling it as such," *Kobach*, 772 F.3d at 1189, a court cannot render an agency action nonfinal and therefore unreviewable by resort to labels and perfunctory characterizations, or by relying on self-serving agency disclaimers. The District Court's reliance on distinguishable, nonbinding, out-of-circuit cases is also misplaced. *See* Aplt. App., Vol. II, at 407-11.

In determining whether an agency action satisfies the first prong of the *Bennett* test—whether it "mark[s] the "consummation" of the agency's decisionmaking process, *Bennett*, 520 U.S. at 178—the Court looks to whether the action represents a "definitive" statement of the agency's position and whether the action "ha[s] a direct and immediate effect on . . . the complaining parties." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239-40 (1980). "If an agency has issued a 'definitive statement of its position,' . . . the agency's action is final notwithstanding '[t]he possibility of further proceedings in the agency' on related issues, so long as 'judicial review at the time [would not] disrupt the administrative process.'" *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779 (1983)).

The NIGC's legal opinion satisfies the first *Bennett* prong because it is and will remain the NIGC's definitive and only assessment of whether the Kansas land is eligible for gaming under IGRA. IGRA sets the requirements for gaming in 25 U.S.C. § 2710. For Class II gaming, IGRA requires NIGC approval in the form of a gaming ordinance approved by the NIGC Chairman. 25 U.S.C. §§ 2705(a)(3) 2710(c). For Class III gaming, IGRA requires an NIGC-approved gaming ordinance and a compact between the tribe and state approved by the Secretary of Interior. 25 U.S.C. §§ 2705(a)(3) 2710(d). IGRA also requires approval by the NIGC Chairman of any management compact for Class II or Class III gaming if the tribe does not manage the gaming itself. *See, e.g.*, 25 U.S.C. §§ 2705(a)(4), 2711. Nothing requires the NIGC to determine that IGRA's other requirements have been met.

The circumstances of this case are rather unique. Here, the Tribe already has a non-site-specific ordinance. *See* Attachment 4, at B-69, 70. Under the NIGC's legal opinion, the Tribe's Ordinance covers the Kansas land. *Id.* The Ordinance purports to authorize Class II gaming on any of the Tribe's "Indian Lands" and purports to authorize Class III gaming on any "Indian Lands" where the Secretary of Interior has approved a tribal-state compact. *Id.* Because nothing in IGRA's text or its implementing regulations requires the NIGC to determine whether the land meets the last recognized reservation exception when a tribe licenses or begins

construction of a Class II or Class III gaming facility, the NIGC's legal opinion is the final word with respect to whether the land is eligible for gaming under § 2719. *See* Facility License Notifications and Submissions, 77 Fed. Reg. 58769-01 (Sept. 24, 2012) ("Commenters are correct that there is no legal requirement that the Commission issue a formal determination (also known as an Indian lands determination) prior to a tribe gaming on a specific site.").

Just because the NIGC's General Counsel issued the legal opinion, as opposed to the NIGC or its Chair, does not change the opinion's "final" character. *See, e.g.*, *Kobach*, 772 F.3d at 1189-90. The Tribe "requested that *the National Indian Gaming Commission (NIGC)* issue a legal opinion, opining that certain land within the State of Kansas qualifies for one of the exceptions set forth in [IGRA] for gaming on trust lands acquired after October 17, 1988." Aplt. App., Vol. I, at 86. That the NIGC's General Counsel responded to the Tribe's request by issuing a legal opinion simply indicates that the NIGC delegated to its General Counsel the task of responding, *on behalf of the NIGC*, to the Tribe's request.

The NIGC's General Counsel issued the legal opinion on behalf of the NIGC and with the imprimatur of the Department of Interior's Solicitor's Office, which "reviewed th[e] legal opinion and concurs with it." *Id.* at 93. The legal opinion states and explains the NIGC's and the Department of Interior's determination that Kansas land "is eligible for gaming under the last recognized

reservation exception." *Id.* at 93. The District Court cited no basis for believing that under these circumstances the NIGC's General Counsel "lacks authority to speak for [the NIGC] on this issue or that his statement of the agency's position was 'only the ruling of a subordinate official' that could be appealed to a higher level of [the NIGC's or Department of Interior's] hierarchy." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

Thus, the NIGC's legal opinion is more than mere "guidance from the NIGC staff," Aplt. App., Vol. III, at 587; it represents the culmination of the agency's consideration of whether the Kansas land is eligible for gaming. All things considered, the NIGC's legal opinion was much more like a "final and binding determination" than a "tentative recommendation," *Bennett*, 520 U.S. at 178, and it bears the hallmarks of final agency decision. It was neither tentative—concluding the Kansas land "*is* eligible for gaming"—nor interlocutory—the NIGC will have no occasion to revisit this issue.

The NIGC's legal opinion also has a direct and immediate effect on the State by allowing Class II gaming on the Kansas land—right now—and by enabling the Tribe to pursue its strategy of forcing the State to allow Class III gaming on the land. Shortly after the District Court announced that the NIGC's legal opinion was not judicially reviewable, the Tribe, relying on the letter, sued the State to force it

either to negotiate a Class III gaming compact or face federally-imposed Class III gaming procedures issued by the Secretary of Interior under 25 C.F.R. Part 291.

Finally, the State's challenge to the NIGC's legal opinion raises a purely "legal issue . . . fit for judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967). Judicial review of the NIGC's opinion at this time will not disrupt the administrative process.

2. The NIGC's legal opinion is an action by which rights or obligations have been determined or from which legal consequences will flow.

The District Court's assessment of the legal and practical effect of the NIGC's legal opinion is flat wrong. It concluded that the NIGC's legal opinion "had no effect on the status quo." Aplt. App., Vol. II, at 421. Not so. The State explained to the District Court the legal and practical significance of the letter, and warned that the letter enabled the Tribe to pursue its efforts to force a Class III gaming compact on the State. That is exactly what happened. *See* Complaint, *Quapaw Tribe of Indians v. Kansas*, D. Kan. Case No. 16-2037 (Dkt. 1). The Tribe's recent actions make clear what the State has argued all along: the NIGC legal opinion determined rights and obligations and resulted in legal consequences detrimental to the State.

a. The NIGC's legal opinion determined the State's and the Tribe's rights or obligations.

The NIGC's decision that the Kansas land is eligible for gaming has already imposed obligations on the State. The State warned the District Court that the Quapaw had announced its intention to expand the Downstream Casino to the Kansas land. And the NIGC legal opinion is an indispensable part of the Tribe's plan. It enables the Tribe both to expand its Class II gaming operation to Kansas immediately and to try to force a Class III gaming compact on the State.

Just as an Indian lands determination under 25 U.S.C. § 2710 "inevitably lead[s] to Indian gaming on the [land]," *Kansas*, 249 F.3d at 1224, so too does the NIGC's determination that land is eligible for gaming under 25 U.S.C. § 2719. Moreover, the NIGC's decision that the Kansas land "*is eligible*" for gaming triggered the State's statutory obligation under IGRA to negotiate with the tribe regarding a Class III gaming compact, *see* 25 U.S.C. § 2710(d)(3)(A), which "plainly has a direct and immediate impact" on the State's authority over gaming on the tract. *Kansas*, 249 F.3d at 1223. Of course, if the last recognized reservation exception did not apply to the Kansas land, these obligations would not apply either. *Cf. id.* The NIGC's legal opinion makes all the difference.

Moreover, when construction and gaming begins, the County will bear the costs associated with increased traffic caused by gaming on the Kansas land. Aplt. App., Vol. I, at 32. These costs include repairing roads and providing increased

law enforcement presence on the Kansas land due to the increase in visitors to the area.

The U.S. Senate's Select Committee on Indian Affairs shared the State's view of the importance of a determination that lands are eligible for gaming. The Committee explained that the State has "significant governmental interests in the conduct of class III gaming" including the "interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." S. Rep. No. 100-446, 1988 U.S.C.C.A.N. at 3083.

The NIGC's legal opinion determined the rights and obligations of the State, and in a way that substantially affects significant governmental interests.

b. Legal consequences flow from the NIGC's legal opinion.

To begin with, the District Court improperly truncated the second prong of the *Bennett* test. The second prong requires that "the action must be one by which rights or obligations have been determined, *or* from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (emphasis added). Because it is written in the disjunctive, even if an agency action does not determine rights or obligations, the action may still be final if legal consequences will flow from it. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004). The State's response to the NIGC's motion to dismiss addressed both aspects of the second prong. Aplt.

App., Vol. II, at 406-07. By applying only the first part—the determining-rights-or-obligations part—of the second prong, the District Court erred. Even if the Court determines that the NIGC legal opinion did not determine the State's rights or obligations, legal consequences clearly flowed from the NIGC's determination that the Kansas land is eligible for gaming.

Just one month after the District Court held the NIGC's legal opinion was immune from judicial review, the Tribe sued the State to force the State to negotiate a Class III tribal-state gaming compact for the Kansas land. *See* Complaint, *Quapaw Tribe of Indians v. Kansas*, D. Kan. Case No. 16-2037 (Dkt. 1), filed January 19, 2016. Forcing the State to defend the Tribe's lawsuit in federal court by itself is a significant legal consequence of the NIGC's legal opinion. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment . . . serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)). And this was just the first step in the Tribe's ongoing effort to have the Secretary of Interior issue Class III gaming procedures over the State's objection under 25 C.F.R. Part 291. The Fifth Circuit has described the procedures for obtaining Class III gaming procedures from the Secretary of Interior as "stacked against the objective interest-balancing Congress intended." *Texas*, 497

F.3d at 508. These are the serious legal consequences that have flowed from the NIGC's legal opinion and will continue to affect the State.

As the Fifth Circuit held in *Texas*, the State believes that 25 C.F.R. Part 291, which provides procedures for the Secretary of Interior to impose Class III gaming procedures on non-consenting States, is unlawful and will continue to oppose the Tribe's efforts to game on the Kansas land. But the fact that the State has been forced into this position to begin with makes crystal clear that the NIGC's legal opinion is a final agency action from which serious legal consequences have flowed.

C. Because the NIGC's Legal Opinion Was a Final Agency Action and Therefore Subject to Judicial Review, the District Court Erred in Dismissing Counts II and III of the State's Amended Complaint for Lack of Subject Matter Jurisdiction.

The State challenged the NIGC's interpretation and application of 25 U.S.C. § 2719(a)(2)(B) (Count II), and also its interpretation and application of 25 C.F.R. § 292.4 (Count III). The District Court dismissed both claims for lack of subject matter jurisdiction based on its erroneous conclusion that the NIGC's legal opinion was not a reviewable final agency action. For the reasons discussed above, that decision must be reversed. Because the District Court addressed Count III separately, the State does the same here.

Count III of the State's Amended Complaint alleged both a facial challenge—that "25 CFR § 292.4 should be declared null and void," Aplt. App.,

Vol. I, at 35—and an as-applied challenge—that the "NIGC's actions in applying 25 CFR § 292.4(b)(2) to the current location of the tribe, and in a manner inconsistent with *Carcieri* [*v. Salazar*, 555 U.S. 379 (2009)] are arbitrary and in excess of its authority," Aplt. App., Vol. I, at 35.

The District Court held that the State's facial challenge to § 292.4 was barred by the APA's six-year statute of limitations. Aplt. App., Vol. III, at 593. The State does not appeal that decision.

With respect to the State's as-applied challenge, the District Court held that because the NIGC's legal opinion, "and its application of § 292.4, was not final NIGC action ripe for judicial review, [the State] cannot assert an as-applied challenge based on it." Aplt. App., Vol. III, at 592. For all the reasons discussed above, that decision must be reversed.

* * *

Because 25 U.S.C. § 2714 does not preclude judicial review of the NIGC's legal opinion and because the letter is a final agency action under the APA, the District Court's order dismissing Counts II and III of the State's Amended Complaint for lack of subject matter jurisdiction must be reversed.

II. The District Court's Decision Should Be Reversed and the Case Remanded to the District Court for it to Decide the Merits of the State's Claims.

Because the District Court dismissed the State's claims challenging the NIGC's legal opinion (Counts II and III) on jurisdictional grounds, it did not reach the merits of those claims. If this Court holds that the NIGC's legal opinion is a reviewable final agency action, it should remand the case to the District Court for that court to determine in the first instance whether the NIGC's interpretation and application of the last recognized reservation exception, 25 U.S.C. § 2719(a)(2)(B), and the Department of Interior's related regulation, 25 C.F.R. § 292.4, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

CONCLUSION

The judgment of the District Court dismissing Counts II and III of the State's Amended Complaint for lack of subject matter jurisdiction should be reversed and remanded with instructions for the District Court to decide the merits of the State's claims.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The State respectfully requests oral argument. *See* Fed. R. App. P. 34(a). This case involves whether a consequential decision by the NIGC is judicially reviewable under the APA. It requires interpretation of a detailed federal statute (IGRA) and an understanding of the important legal and practical consequences of the NIGC's action. The State believes oral argument will assist the Court in deciding these issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,279 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 2007.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface—14-point Times New Roman—using Microsoft Word 2007.

CERTIFICATE OF DIGITAL SUBMISSION, VIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **BRIEF OF PLAINTIFFS-APPELLANTS**, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Sophos Endpoint Security and Control (version 10.6), which is updated daily. According to the program, the document is free of viruses. No privacy redactions were necessary in this document.

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I hereby certify that on the 22nd day of April, 2016, I electronically filed the foregoing **BRIEF OF PLAINTIFFS-APPELLANTS** with the Clerk of the Tenth Circuit Court of Appeals by using the CM/ECF system. I certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further certify that I caused seven hard copies to be delivered to the Clerk's Office by Federal Express within two business days of this filing.

Dated: April 22, 2016

By: /s/ Bryan C. Clark
Bryan C. Clark

ADDENDUM:

RELEVANT STATUTES AND REGULATIONS

25 U.S.C. § 2714

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2719

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

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

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

(A) such lands are located in Oklahoma and—

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

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

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

(b) Exceptions

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

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

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

(i) a settlement of a land claim,

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

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

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and

467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

25 C.F.R. § 292.4

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.

(b) If the tribe had no reservation on October 17, 1988, the lands must be either:

(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma; or

(2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

25 C.F.R. § 292.26

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

ATTACHMENTS

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* The Court may take judicial notice of the Google map provided. *Pahls v. Thomas*, 718 F.3d 1210, 1216 (10th Cir. 2013) (taking judicial notice of a Google map and satellite image).

** The Court may take judicial notice of the Gaming Ordinance of the Quapaw Tribe of Oklahoma, which is a publicly available tribal government document. *See* Fed. R. Evid. 201; *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, ***ex rel. Derek Schmidt, Attorney General,*** **State of Kansas, and BOARD OF COUNTY COMMISSIONERS OF CHEROKEE COUNTY, KANSAS,** **Plaintiffs,** **v.** **NATIONAL INDIAN GAMING COMMISSION, *et al*.,** **Defendants.**	**Case No. 15-CV-4857-DDC-KGS**

MEMORANDUM AND ORDER

Plaintiffs, the State of Kansas and the Board of County Commissioners of Cherokee County, Kansas, bring this action. They seek declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*.; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; and the United States Constitution. They assert claims against two distinct groups of defendants. This Order refers to the first group, consisting of the National Indian Gaming Commission, Chair Jonodev Osceloa Chaudhuri, Associate Commissioner Daniel J. Little, General Counsel Eric N. Shepard, the U.S. Department of the Interior, Secretary of the Interior Sally Jewell, and Assistant Secretary of Indian Affairs Kevin K. Washburn, as the "federal defendants." It refers to the second group, consisting of the Downstream Development Authority of the Quapaw Tribe of Oklahoma, the Quapaw Casino Authority of the Quapaw Tribe of Oklahoma, the Quapaw Tribal Development Corporation, and 18 individual officers and members of the tribal entities, as the "tribal defendants."

This matter is before the Court on multiple motions to dismiss. The federal defendants filed a Motion to Dismiss Amended Complaint (Doc. 42). The tribal defendants filed five, nearly identical Motions to Dismiss (Docs. 50, 55, 68, 76, 86) after receiving service of plaintiffs' Amended Complaint (Doc. 13) at different times. Plaintiffs have responded to all motions and both the federal defendants and tribal defendants have filed replies. For reasons explained below, the Court grants the motions filed by both groups of defendants.

I. Factual Background

A. Acronyms and Other Abbreviations

To express its ruling on the motions, the Court must refer to a number of agencies, other entities, and various regulatory and legislative provisions. Hoping to assist those who read this Order, the Court begins with a glossary of acronyms and other abbreviated jargon it uses.

Defined Term	Meaning
"APA"	Administrative Procedure Act
"BIA"	Bureau of Indian Affairs
"DDA"	Downstream Development Authority of the Quapaw Tribe of Oklahoma
"DJA"	Declaratory Judgment Act
"DOI"	United States Department of the Interior
"IGRA"	Indian Gaming Regulatory Act
"NIGC"	National Indian Gaming Commission
"OGC"	National Indian Gaming Commission Office of General Counsel
"TDC"	Quapaw Tribal Development Corporation
"QCA"	Quapaw Casino Authority of the Quapaw Tribe of Oklahoma
"Quapaw"	Quapaw Tribe of Oklahoma

B. Relevant History

The Quapaw is a federally recognized Indian tribe. In 1833, the Quapaw entered into a treaty with the United States. Under the terms of that treaty, the Quapaw agreed to leave its original territory in Arkansas and relocate to a reservation located near what later became the border separating Oklahoma and Kansas. The Quapaw reservation encompassed 150 sections of land, and the majority of those sections were located on the Oklahoma side of the state boundary. The Kansas portion, known as the "Quapaw Strip," extended only one-half mile north of the state border. On February 23, 1867, the Quapaw ceded the Quapaw Strip—except for a small parcel set aside for one Quapaw member—to the United States. In 1895, the United States dissolved the remainder of the Quapaw reservation and allotted the Quapaw's Oklahoma land to individual members of the Quapaw Tribe under the Act of March 2, 1895. *See* ch. 188, 28 Stat. 876, 907 (1895).

Years later, the Quapaw purchased a tract of land in Oklahoma. The tract is adjacent to the Kansas-Oklahoma border and within the historic boundaries of the Quapaw's reservation. The Quapaw placed the land it had acquired into a trust with the Secretary of the Interior shortly after acquiring it. In 2006, the Quapaw purchased a 124-acre tract of land in Cherokee County, Kansas (the "Kansas Land"). It too is directly adjacent to the Kansas-Oklahoma border and entirely within the historic boundaries of the Quapaw's reservation—*i.e.*, the Quapaw Strip.

In 2008, the Quapaw opened the Downstream Casino Resort on its Oklahoma trust land, just south of the Kansas-Oklahoma border. The Quapaw constructed the primary parking lot, several ancillary facilities, and other infrastructure for the Downstream Casino across the Kansas-Oklahoma border on the Kansas Land.

On April 25, 2011, the Quapaw notified the State of Kansas that it had filed an application with the DOI to have the Kansas Land taken into trust. The Quapaw titled the notice a "Notice of (Gaming) Land Acquisition Application." Doc. 13-3 at 5. Part of this application called on the Quapaw to provide information about "Project Description/Proposed Land Use." In response, the Quapaw stated: "[the] property is to be used for additional parking for the Downstream Resort/Casino." *Id*. at 6 (emphasis omitted).

On February 6, 2012, Kansas Governor Sam Brownback received a similar notice from the BIA, informing him that the Quapaw had filed a "land into trust" application. The BIA titled its notice a "Notice of (Non-Gaming) Land Acquisition Application." Doc. 13-2 at 1 (emphasis omitted). The BIA described the Quapaw's proposed use of the Kansas land as follows:

> The property is commonly identified as the "Downstream Parking Lot." A portion of the property is currently an existing parking lot and the Tribe plans to continue with that use. A portion of the property is primarily agricultural and there are no plans for development of this property at this time. Therefore, there is no expected change in use of the property at this time.

Id. at 2. To inform the BIA's decision whether to take the Kansas Land into trust, the BIA's notice invited the State to submit written comments about the Quapaw's application.

The State submitted objections about the Quapaw's application to the BIA on March 5, 2012. The State based its primary objection "on a concern that [the Kansas Land] would be used for expanded gaming operation[s]." Doc. 13-3 at 1. The State attached a copy of the Quapaw's April 25, 2011 notice—titled a "Notice of (Gaming) Land Acquisition Application"—to its objections and also opined that "[i]t would seem, based on this letter's express reference to 'gaming,' that expanded gaming on this parcel is indeed possible. Although, the BIA's letter of February 3, [2012], is a notice of 'non-gaming' acquisition, that is not legally determinative of

the tribe's proposed use of the land." *Id*. The State also objected to the BIA's consideration of the application as an "on-reservation" request. *Id*.

Plaintiff Cherokee County sent the BIA a letter echoing the State's objections. *See* Doc. 15-3 at 2. But the County later withdrew its objections, explaining: "After consultation with local elected officials, business and community leaders[,] and residents from . . . Cherokee County, the Commission believes it is in the County's best interests to withdraw[] their prior letter of opposition." Doc. 15-3 at 3.

The BIA took the Kansas Land into trust on June 8, 2012. In doing so, the BIA concluded that the Quapaw's "request adequately describe[d] the purpose for which the land will be used." Doc. 13-4 at 3. In response to the State's objection about the application being an "on-reservation" request, the BIA concluded that 25 C.F.R. § 151.3(a)(1) permitted the BIA to take the land into trust because it was "contiguous and adjacent to the historic reservation boundaries of the [Quapaw] Tribe." Doc. 13-4 at 4. The State did not appeal the BIA's decision.

In early 2013, the Quapaw asked the Office of General Counsel for the National Indian Gaming Commission to issue an advisory opinion addressing whether the Kansas Land satisfied the "last recognized reservation" exception to the IGRA's prohibition against gaming on trust lands acquired after October 17, 1988. *See* 25 U.S.C. § 2719(a)(2)(B). This exception provides:

> (a) Prohibition on lands acquired in trust by Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--
>
> . . .
>
> (2) the Indian tribe has no reservation on October 17, 1988, and--
>
> . . .

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

Id.

As part of its analysis of the Quapaw's request, the OGC sent a letter to Kansas Attorney General Derek Schmidt (the "Kansas AG" or "General Schmidt") notifying him of the Quapaw's request and soliciting his comments. *See* Doc. 13-6. General Schmidt's office responded on June 21, 2013. *See* Doc. 13-7. This response advanced two arguments against the capacity of the Kansas Land to qualify under the IGRA's last recognized reservation exception. First, because the Quapaw had placed the Kansas Land in trust for non-gaming purposes, the Kansas AG asserted that the Quapaw should be "equitably estopped from putting forth this parcel as one appropriate for gaming." Doc. 13-7 at 2. Second, the Kansas AG contended that the Quapaw's presence in Kansas did not satisfy the exception's requirement that it be "presently located" within the state. The Kansas AG noted that only one case had interpreted the term "presently located," as used in § 2719 of the IGRA. *See Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193 (D. Kan. 2006) (cited by General Schmidt in Doc. 13-7 at 2). According to the Kansas AG, the *Wyandotte Nation* decision held that a tribe is "presently located" in a state where it has a population center and a "major governmental presence." Doc. 13-7 at 2 (citing *Wyandotte Nation*, 437 F. Supp. 2d at 1206). The Kansas AG argued that the Quapaw lacked such a presence in Kansas and thus did not meet this requirement in § 2719(a)(2)(b). In addition, the Kansas AG asserted that the Quapaw's present location must be determined as of October 17, 1988, the effective date of the IGRA. The Kansas AG cited the Supreme Court's interpretation of the term "now under federal jurisdiction"—as used in the Indian Reorganization Act—to support this contention. *See id*. (citing *Carcieri v. Salazar*, 555 U.S. 379 (2009)).

The OGC issued an advisory opinion on November 21, 2014. In it, the OGC opined that the Quapaw's Kansas Land was eligible for gaming under the IGRA. The OGC also opined that the Quapaw was "presently located" in Kansas under the terms of 25 C.F.R. § 292.4(b)(2), a DOI regulation implementing the IGRA. This regulation—enacted two years after *Wyandotte Nation*—provides that an Indian tribe without a reservation on October 17, 1988, satisfies the last recognized reservation exception if its land is "located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, *as evidenced by the tribe's governmental presence and tribal population*." 25 C.F.R. § 292.4(b)(2) (emphasis added). The OGC's opinion did not explicitly address the arguments advanced by the Kansas AG's written comments. But the OGC did note the conflicting interpretations of the term "presently located" in *Wyandotte Nation* and 25 C.F.R. § 292.4(b)(2). The OGC explained its decision to follow the regulatory meaning of that term over the one favored in *Wyandotte Nation*, asserting that the DOI's regulatory definition deserved deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). And after analyzing the Quapaw's population and governmental presence in Kansas, the OGC opined that the Quapaw met the requirements of 25 U.S.C. § 2719 and thus could engage in gaming on the Kansas Land.

Plaintiffs filed this lawsuit on March 9, 2015. Their Amended Complaint asserts four causes of action, advancing two claims against the federal defendants. Specifically, plaintiffs ask the Court to review the OGC's advisory opinion and declare the OGC's application of the last recognized reservation exception arbitrary and capricious under the APA and IGRA. The Amended Complaint also challenges the federal defendants' promulgation and application of 25 C.F.R. § 292.4(b)(2) because, plaintiffs claim, the federal defendants failed to consider and

incorporate the tribal location standards adopted in *Wyandotte Nation* and *Carcieri*. Plaintiffs' two other claims ask the Court to apply the doctrine of equitable estoppel against the tribal defendants and thus enjoin them from constructing a casino on the Kansas Land.

The tribal defendants, the NIGC, and the individual NIGC officials all have moved for dismissal of plaintiffs' claims under Fed. R. Civ. P. 12(b)(1). They contend that sovereign immunity precludes the Court from exercising jurisdiction. Also, all defendants ask the Court to dismiss plaintiffs' claims under Rule 12(b)(6) because they fail to assert viable claims under the APA, IGRA, DJA, and federal common law.

II. Legal Standards

"Different standards apply to a motion to dismiss based on lack of subject matter jurisdiction under Rule 12(b)(1) and a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). When faced with motions for dismissal relying on both aspects of Rule 12, a court must first determine whether it has subject matter jurisdiction over the controversy before addressing the merits of the case under a Rule 12(b)(6) analysis. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."). Thus, the Court, first, must decide whether it has subject matter jurisdiction over the claims brought against each defendant group before it can address the merits of those claims.

A. Rule 12(b)(1)

"Motions to dismiss for lack of subject matter jurisdiction 'generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter

jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based.'" *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 906 (10th Cir. 2004) (quoting *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)). If the motion challenges the sufficiency of the complaint's jurisdictional allegations, the district court must accept all such allegations as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). But the analysis differs if the movant goes beyond the complaint's allegations and challenges the facts on which subject matter jurisdiction depends. In that circumstance, a court "may not presume the truthfulness of the complaint's factual allegations" and "has wide discretion to allow affidavits [and] other documents . . . to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id*. at 1003.

In this setting, referencing material outside the pleadings does not convert the motion to dismiss into one seeking summary judgment under Rule 56. *Id*. (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)). But the Court must "convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Id*. Such a situation exists where resolving "the jurisdictional question requires resolution of an aspect of the substantive claim." *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000). Because federal courts are courts of limited jurisdiction, a presumption exists against jurisdiction, and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)).

B. Rule 12(b)(6)

Defendants also seek to dismiss plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6), claiming it fails to state a claim upon which the Court can grant relief. Fed. R. Civ. P. 8(a)(2) requires a federal court complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed factual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court has explained, simply "will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Under this standard, 'the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.'" *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original)).

Although the Court must assume that the factual allegations in the complaint are true, it is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 1263 (quoting *Iqbal*, 556 U.S. at 678). And "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'" to state a claim for relief. *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider the complaint itself along with any attached exhibits and documents incorporated into it by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1180 (10th Cir. 2007); *Indus. Constructors Corp. v. U. S. Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir. 1994)). Also, a court "'may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" *Id.* (quoting *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation omitted)).

III. Federal Defendants' Motion to Dismiss

Plaintiffs' Amended Complaint asserts two claims against the federal defendants. First, it asks the Court to declare the OGC's advisory opinion is arbitrary and capricious. Plaintiffs contend that the OGC has misapplied the IGRA's "last recognized reservation" exception and erred by refusing to invoke equitable estoppel to bar the Quapaw from gaming on the Kansas Land. Second, the Amended Complaint asks the Court to declare the federal defendants' enactment and application of 25 C.F.R. § 292.4(b)(2) arbitrary and capricious because its definition of where a tribe is "presently located," as that term is used in the IGRA, is inconsistent with *Wyandotte Nation* and *Carcieri*.

The federal defendants attack these theories for relief under both Rule 12(b)(1) and Rule 12(b)(6), contending, first, that the Court lacks subject matter jurisdiction over the claims levied against defendant NIGC and its officers. According to the federal defendants, the OGC's advisory opinion is not "final agency action" within the NIGC's limited waiver of its sovereign immunity, and thus is not subject to judicial review. Alternatively, and if the Court concludes

that the OGC's opinion is subject to judicial review, the federal defendants contend the Court should dismiss under Rule 12(b)(6). This argument contends that plaintiffs' attack on 25 C.F.R. § 292.4(b)(2) fails to state a claim on which relief can be granted. These alternative attacks implicate two distinct sets of legal principles. The Court thus addresses them separately, beginning with the jurisdictional issue, below.

A. Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Consistent with *Bell v. Hood*, the Court first considers the federal defendants' jurisdictional attack under Rule 12(b)(1). *See* 327 U.S. at 682. Because this aspect of the federal defendants' motion challenges the sufficiency of plaintiffs' jurisdictional allegations, the Court accepts as true all factual allegations made by the Amended Complaint. *See Holt*, 46 F.3d at 1003.

1. Sovereign immunity principles under the APA

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Any waiver of "sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)). Waivers of immunity by the United States or one of its agencies "will not be implied" and any waiver is "strictly construed, in terms of its scope, in favor of the sovereign." *Id*. (citing *United States v. Williams,* 514 U.S. 527, 531 (1995)).

The APA contains a limited waiver of sovereign immunity. It permits a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review. 5 U.S.C. § 702. Establishing standing to challenge agency action under § 702 of the APA is a two-step process.

First, "a plaintiff must . . . identify 'final agency action.'" *Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001) (citing 5 U.S.C. § 704); *see also Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093-94 (10th Cir. 2004) ("Ordinarily, whether the issues are fit for review depends on whether the plaintiffs challenge a final agency action."). Next, the plaintiff must demonstrate that the agency action "subjects plaintiff to a 'legal wrong,' or 'adversely affects or aggrieves' plaintiff 'within the meaning of the relevant statute.'" *Kansas*, 249 F.3d at 1222 (quoting 5 U.S.C. § 702). This step injects a prudential standing requirement into § 702, requiring plaintiffs to demonstrate that the interest they seek to protect is "'*arguably* within the zone of interests to be protected or regulated by the statute in question.'" *Id*. (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998)) (emphasis in original).

2. Final agency action under the IGRA

Plaintiffs, as the parties seeking judicial review, bear the burden to establish that the OGC's advisory opinion amounts to final agency action by the NIGC and thus lies within the APA's limited wavier of sovereign immunity. *See Catron Cty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)).

Section 2714 of the IGRA explicitly identifies which NIGC actions are final for purposes of judicial review under the APA. It provides:

> Decisions by the Commission pursuant to Sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal district court pursuant to [the APA].

25 U.S.C. § 2714. This statute's reference to four sections of the IGRA identifies the following as final agency actions by the NIGC: (1) actions affecting or denying tribal gaming ordinances

(under § 2710); (2) actions approving or denying gaming management contracts (under § 2711); (3) actions reviewing existing tribal gaming ordinances or contracts (under § 2712); and (4) actions imposing civil penalties (under § 2713). In contrast, nothing in § 2714 or any other part of the IGRA identifies OGC advisory opinions as final agency action.

Consistent with this omission, Tenth Circuit precedent suggests that opinions issued by the OGC do not amount to final agency action under the IGRA. *See Oklahoma v. Hobia*, 775 F.3d 1204, 1210 (10th Cir. 2014) (holding that NIGC chairwoman's letter adopting OGC's opinion was not final agency action because § 2714 defines "what constitutes 'final agency action' under the IGRA."); *Miami Tribe of Okla. v. United States*, 198 F. App'x 686, 690 (10th Cir. 2006) (concluding that DOI advisory opinion interpreting the IGRA was not a final agency action because it was "only part of the process that will eventually result in the final NIGC action."). The Circuit's ruling in *Hobia* is particularly instructive.

There, an Indian tribe had informed the NIGC that it intended to license a casino on land it did not own. *See Hobia*, 775 F.3d at 1209. After reviewing the tribe's submission, the OGC issued a memorandum to the NIGC Chairwoman, opining that the casino property did not qualify as "Indian lands," as the IGRA requires, and, therefore, was ineligible for gaming. *Id*. The Chairwoman sent a letter to the tribe adopting the OGC's memorandum and threatening to order the temporary closure of the casino under 25 U.S.C. § 2713(b) if gaming occurred. *Id*. The Tenth Circuit held that the Chairwoman's letter did not amount to final agency action because it "anticipated the possibility of future wrongful conduct on the part of the Tribe, i.e., conducting gaming on the Property, and in turn future agency action, i.e., a hearing before the Commission and a final decision as to whether to permanently close the Tribe's gaming facility," as required by § 2713(b)(2) of the IGRA. *Id*. at 1211.

The OGC's advisory opinion here is similar to the Chairwoman's letter in *Hobia*. Here, the OGC has opined that the Quapaw's Kansas Land is eligible for gaming under the IGRA. His conclusion is neither legally definitive nor binding on the NIGC or its Chairman. *See* Doc. 13-8 at 15 (stating that the advisory opinion "does not constitute final agency action for purposes of review in federal district court"). Instead, the Chairman may disagree with the OGC's opinion. In that case, § 2713 permits the Chairman temporarily to close any gaming facility operating on the Kansas Land in violation of the IGRA. *See* 25 U.S.C. § 2713(b)(1). And, as in *Hobia*, such an order would not become final agency action until the NIGC conducts a hearing and decides whether to close the facility permanently or dissolve the Chairman's temporary order. *See Hobia*, 775 F.3d at 1211 (quoting 25 U.S.C. § 2713(b)(2)). *Hobia* also explained how the Chairman's enforcement of the IGRA progresses to final agency action:

> Section 2713(b) of the IGRA addresses '[t]emporary closure' orders and provides that, '[n]ot later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe . . . involved shall have the right to a hearing before the Commission to determine whether such order should be made permanent or dissolved.' 25 U.S.C. § 2713(b)(2). Section 2713(c) in turn provides that '[a] decision of the Commission . . . to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court.' 25 U.S.C. § 2713(c).

Id. at 1210.

Hoping to overcome this statutory language and Circuit precedent, plaintiffs make two arguments. First, they contend that the IGRA's legislative history indicates that § 2714 does not provide an exhaustive list of final NIGC actions subject to judicial review. Second, plaintiffs argue that the OGC's advisory opinion satisfies the Supreme Court's test for determining whether agency action is final under the APA. Neither argument is persuasive, however, and the next two subsections explain why.

a. Plaintiffs' legislative history argument

Plaintiffs' legislative history argument begins in the wrong place. It presupposes that it is appropriate for the Court to examine the IGRA's legislative history. The Court rejects this premise. A federal court can consider legislative history only when it finds that a statute's terms are unclear or ambiguous. *See United States v. Brian N.*, 900 F.2d 218, 221 (10th Cir. 1990) ("Normally when we find a statute's terms to be unambiguous, our inquiry is complete.") (citing *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987)); *see also In re Roberts*, 906 F.2d 1440, 1442 (10th Cir. 1990) ("Such an expression of contrary legislative intent must appear on the face of the statute, read in its entirety; beyond the statute itself, legislative history should be used to resolve ambiguity, not create it.") (internal quotation omitted).

Here, the Court concludes that § 2714 provides clear and unambiguous direction about which NIGC actions are final and thus subject to judicial review under the APA. A "frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand coverage of the statute to subsume other remedies." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) (holding that statutory provisions creating right to judicial review for one party do not create a corresponding right for another party that the statute did not mention). When it passed the IGRA, Congress defined which actions by the NIGC amounted to final agency actions subject to judicial review. *See* 25 U.S.C. § 2714. No words in this provision suggest that Congress' definition reaches other forms of agency action such as the OGC advisory opinion at issue here.

But, even if it were proper to consider § 2714's legislative history, this history does not support plaintiffs' argument. In fact, it refutes plaintiffs' argument. Plaintiffs' argument relies

on the "Highlights" section of Senate Report 100-446. In relevant part, these Highlights state: "All decisions of the Commission are final agency decisions for purposes of appeal to Federal district court." S. Rep. No. 100-446, at 8 (1988). But later, this same Report explains that only "certain Commission decisions will be final agency decisions for purposes of court review." *Id*. at 20. Indeed, other federal courts have concluded that § 2714's legislative history will not support the proposition that an OGC advisory opinion is final agency action subject to judicial review. Specifically, the District Court for the Northern District of Oklahoma has held:

> A proper analysis of the IGRA illustrates Congress's intent to provide only limited review under the Act. In considering the IGRA, the Senate stated that Section 15 of the Act[1] provides "that certain Commission decisions will be final agency provisions for purposes of court review." Senate Report 100-446 at 20, 1998 U.S.C.C.A.N. 3071, 3090. *Thus, it is clear that Congress intended that a final order be a prerequisite for judicial review since the only reference to judicial review mandate[s] that there must be a decision by the Commission pursuant to only certain sections of the IGRA for it to be considered a final action*. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208, 114 S. Ct. 771, 127 L.Ed.2d 29 (1994) (holding that Congress shows its intent to preclude judicial review where it creates a scheme permitting judicial review only for certain actions).
>
> The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction. Additionally, further evidence of preclusion can be found in § 2714. That section explicitly states that the decisions capable of judicial review are "[d]ecisions made by the Commission." *See* 28 U.S.C. § 2714. Because Chairman issued orders must be reviewed by the full Commission upon appeal before it is considered a final agency action, the IGRA then does not consider these orders "decisions" that warrant a forum in federal district courts. *Thus, an advisory opinion letter from the NIGC's General Counsel office does not rise to the level of a decision from the Commission*.

Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n, 214 F. Supp. 2d 1155, 1171-72 (N.D. Okla. 2002) (emphasis added). Similarly, the United States District Court for the District of Columbia has determined that "the legislative history of the [IGRA] reflects an intent to limit judicial review only to certain agency decisions, thereby overcoming the APA's

[1] 25 U.S.C. § 2714 codifies § 15 of the Act.

presumption of judicial review." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (citing S. Rep. No. 100-446, at 20).

Plaintiffs' legislative history argument also invokes *United Keetoowah Band of Cherokee Indians v. State ex rel. Kuykendall*, No. CIV-04-340-WH, 2006 U.S. Dist. LEXIS 97268, at *1 (E.D. Okla. Jan. 26, 2006). *See* Doc. 60 at 4. But plaintiffs' reliance on this case reflects a truncated view of it.

In *United Keetoowah Band*, a tribe sought judicial review of a letter issued by the OGC. The letter reported "that the NIGC had reached the 'conclusion' that the Land [at issue] is not 'Indian land' as that term is defined by the IGRA, and that accordingly, the IGRA does not apply to Plaintiff's gaming" operations. *United Keetoowah Band*, 2006 U.S. Dist. LEXIS 97268, at *4-5. This "conclusion" "never went to the [NIGC's] Chairman or the full Commission for formal written approval." *Id*. at 5. But after the letter was issued, the NIGC acted upon it. It refused to accept the tribe's gaming operation reports, tried to refund all fees that the tribe previously had paid to the NIGC, and "ceased all regulation of plaintiff's gaming operation[s]." *Id*. This led the State of Oklahoma to announce its intention to pursue criminal sanctions against the tribe because their gaming operations violated state law. *Id*. On these facts, the Oklahoma federal court concluded that "the NIGC certainly appears to have treated [the OGC letter] as the consummation of the agency's decision-making process, and [thus] Plaintiff has suffered legal consequences" permitting judicial review. *Id*. at 17. The jurisdictional facts in the present case are materially different.

Here, the acting OGC has provided his "legal opinion" in a letter to counsel for the Quapaw. The letter is extensive—15 pages—and recites that the Solicitors Office of the DOI has reviewed the letter and concurs with its opinion. But the letter never asserts that it conveys a

decision reached by the Commission, or even that it portrays the view of the Commission's Chair. Instead, it professes a legal opinion about something it calls "a threshold question [that must be considered] prior to considering whether the [Quapaw] Tribe exercises government power over" the trust lands. Doc. 13-8 at 5. Indeed, the letter closes with an explicit statement of what it is not: "This legal opinion does not constitute final agency action for purposes of review in federal district court." *Id*. at 15.

Other material differences exist between the present case and *United Keetoowah Band*. For example, plaintiffs never allege that the NIGC has acted to implement the OGC's legal opinion. In contrast, the Oklahoma court concluded that the NIGC had implemented the OGC's legal conclusions in *United Keetoowah Band*. *See* 2006 U.S. Dist. LEXIS 97268, at *5 (reciting that the NIGC had refused the tribe's operational reports, attempted to return all fees paid to the NIGC, and stopped regulating the tribe's gaming operations).

In sum, § 2714 of the IGRA unequivocally defines the actions that are final agency decisions subject to judicial review under the APA. The Court is not free to examine the Act's legislative history looking for ways to expand the universe of decisions that Congress saw fit to define as final agency action. And even if the Court could consider the IGRA's legislative history, it would not benefit plaintiffs.

b. The Supreme Court's test for determining whether agency action is final

Plaintiffs next argue that the OGC's advisory opinion is a reviewable, final action because it satisfies the two-part test articulated by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In *Bennett*, the Court held that an agency action is final under the APA if it: (1) marks "the 'consummation' of the agency's decisionmaking process;" and (2) is "one by which 'rights or obligations have been determined' or from which 'legal consequences will

flow.'" *Id*. (internal citations omitted). Here, plaintiffs note that the text of the IGRA does not require the NIGC to determine whether the Kansas Land satisfies the last recognized reservation exception before the Quapaw can build or license a class II or III gaming facility. Thus, plaintiffs contend, the OGC's advisory opinion is the consummation of the NIGC's decision-making process because it is "the only definitive assessment by the NIGC of whether the Kansas land is eligible for gaming . . . ." Doc. 60 at 6. Plaintiffs also argue that the advisory opinion has imposed legal consequences because now, the State must negotiate a Tribal-State gaming compact with the Quapaw and the County must repair roads damaged by traffic from a future casino.

The federal defendants respond that plaintiffs' reliance on *Bennett* is misplaced given the Tenth Circuit's conclusion that the IGRA limits review of NIGC actions to those listed in § 2714. *See Hobia*, 775 F.3d at 1210; *Miami Tribe of Okla.*, 198 F. App'x at 690. The federal defendants also contend that, even if that precedent did not exist, the OGC's advisory opinion does not satisfy either prong of the *Bennett* test. The federal defendants argue that the OGC's advisory opinion cannot meet the first prong of the *Bennett* test—*i.e.*, it does not consummate the NIGC's decision-making process—for two reasons. First, the federal defendants assert that the letter is not a "decision" by the NIGC itself. Instead, they contend that it is only "a staff member's letter opinion issued to the Tribe, who is not a party to this case." Doc. 88 at 8. Second, the federal defendants argue that the advisory opinion does not conclude the NIGC's decision-making process, "as numerous other (and truly final) agency actions may occur with respect to this tract of land." *Id*. at 9.

The Court agrees that the OGC's advisory opinion does not constitute a final decision by the NIGC. *See, e.g., St. Croix Chippewa Indians of Wis. v. Kempthorne*, No. 07-2210 (RJL),

2008 WL 4449620, at *5 (D.D.C. Sept. 30, 2008) ("Simply stated, a letter that merely advises the recipient of the agency's position does not amount to a 'consummation' of the agency's decision-making process."), *aff'd*, 384 F. App'x 7 (D.C. Cir. 2010); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1065 (N.D. Cal. 2005) ("[T]he advisory opinion that the lease provisions violate IGRA has no legal effect because it is not a final decision of the agency."); *Lac Vieux Desert Band of Lake Superior Chippewa Indians*, 360 F. Supp. 2d at 68 (holding that the "IGRA specifically limits APA review to 'decisions of the Commission'" and "for the agency to take any official action, the Chairman or Commission must make a decision"). Indeed, the District Court for the Northern District of Oklahoma has held that a similar OGC advisory opinion was not final NIGC action, stating, in relevant part:

> The Court finds more probative the fact that the letter was not signed by the NIGC's chairman as all decisions are, but instead was issued under the name of the General Counsel. *For the NIGC to take any official action, the Chairman or the Commission itself, on appeal, must make a decision. See 25 U.S.C. § 2711, et. seq. The General Counsel is simply a staff member of the NIGC advising the decision-makers and tribal entities when required*. In this case, the Court finds that the advisory letter is simply courtesy correspondence offering the kind of guidance that is intended to prevent the need for official NIGC action.

Cheyenne-Arapaho Gaming Comm'n, 214 F. Supp. 2d at 1168 (emphasis added).

The court's reasoning in *Cheyenne-Arapaho Gaming Comm'n* applies equally here. As plaintiffs concede, "[n]othing in the text of the IGRA . . . requires the NIGC to determine whether the land meets the last recognized reservation exception" before the Quapaw licenses or constructs a class II or class III gaming facility. Doc. 60 at 6. Thus, the Quapaw's request for a legal opinion applying the exception was no more than a voluntary request for guidance from the NIGC staff. Similarly, the OGC issued the advisory opinion voluntarily, and stated explicitly that his opinion "did not constitute final agency action for purposes of review in federal district court." Doc. 13-8 at 15. Notably, the OGC website explains the procedure for tribes, members

of the gaming industry, and other interested parties to request a legal opinion, stating, in relevant part:

> As a general matter, legal opinions are issued by the OGC as a courtesy, and neither IGRA nor NIGC regulations require the OGC to issue a legal opinion on any matter. Further, the legal opinion of the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process, both for the party making the request and the OGC.

Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of General Counsel, 1 (Dec. 2013), http://www.nigc.gov/images/uploads/game-opinions/SubmittingRequestforLegalOpinionDec112013.pdf.

Because the IGRA did not require it and the Chairman or the Commission did not issue it, the Court concludes that the OGC's advisory opinion is not a decision by the NIGC itself. Thus, it cannot consummate an NIGC decision-making process. Plaintiffs therefore have failed to show that the advisory opinion satisfies the first prong of the *Bennett* test.

The OGC's advisory opinion also fails the second prong of the *Bennett* test. This part of the standard asks whether the agency's action imposes legal obligations or consequences on plaintiffs. As explained above, the IGRA does not require the OGC to issue an advisory opinion before the Quapaw may game on the Kansas Land. Thus, the OGC's opinion had no effect on the status quo. While plaintiffs contend that the opinion requires the State to negotiate a Tribal-State gaming compact, this argument misapprehends the State's responsibility under the IGRA. The State must negotiate a compact only if the Quapaw builds a gaming facility in Kansas, decides to conduct class III gaming there, and requests the State enter into negotiations on a Tribal-State compact "governing the conduct of [class III] gaming activities."[2] 25 U.S.C.

[2] Section 2710(d)(3)(A) of the IGRA requires the State to negotiate "with the Indian tribe in good faith to enter into such a compact." If the State refuses to negotiate a compact with the Tribe or does not negotiate in good faith, the Tribe may bring suit in federal district court to resolve the issue under the procedure set out in 25 U.S.C. § 2710(d)(7).

§ 2710(d)(3)(A) (requiring tribe who wishes to conduct class III gaming on Indian lands to request the state to negotiate a Tribal-State compact).

Because plaintiffs have failed to demonstrate that the OGC's advisory opinion was final NIGC action, the Court concludes that it does not have subject matter jurisdiction to review it. The NIGC and its officials have not waived sovereign immunity under the IGRA or APA. The Court thus dismisses plaintiffs' claims against the federal defendants in Counts I and II of the Amended Complaint.[3]

B. Motion to Dismiss Under Rule 12(b)(6) for Failure to State a Claim

1. The parties' positions

Plaintiffs attack the DOI's promulgation and the NIGC's application of 24 C.F.R. § 292.4 in Count III of their Amended Complaint. Specifically, they challenge the regulatory interpretation of the term "presently located" in 25 C.F.R. § 292.4(b)(2).

The DOI's Bureau of Indian Affairs promulgated § 292.4 in 2008 to define and implement the IGRA's last recognized reservation exception (25 U.S.C. § 2719(a)). Section 292.4(b)(2) provides that a tribe that acquires land after October 17, 1988, satisfies the exception if its land is: "Located in a State other than Oklahoma and [is] within the tribe's last recognized reservation with the State or States within which the tribe is presently located, *as evidenced by the tribe's governmental presence and tribal population*." (emphasis added).

[3] Plaintiffs' response in opposition (Doc. 60) alternatively asks the Court, if it determines that the OGC advisory opinion is not a final agency action, to issue an order "prohibiting the Quapaw defendants from gaming on the land unless and until a final agency decision regarding the eligibility of the land for gaming is made." Doc. 60 at 13. But, as plaintiffs concede, "[n]othing in the text of the IGRA . . . requires the NIGC to determine whether the land meets the last recognized reservation exception when a tribe licenses or begins construction of a class II or class III gaming facility already authorized by a non-site-specific ordinance." Doc. 60 at 6; *see also Bd. of Comm'rs of Cherokee Cty., Kan. v. Jewel*, 956 F. Supp. 2d 116, 124-25 (D.C.C. 2013) (finding no statutory or regulatory basis for requiring the NIGC or Secretary of the Interior to determine the gaming eligibility of land on which a tribe plans to game). The Court therefore declines to grant the relief that this request seeks.

Plaintiffs note that Congress did not define "presently located" in 25 U.S.C. § 2719(a). They also assert that the DOI's definition of "presently located" in 25 C.F.R. § 292.4(b)(2) conflicts with this Court's interpretation of the term in *Wyandotte Nation*, a case decided two years before the DOI adopted § 292.4. *See* 437 F. Supp. 2d at 1206. In *Wyandotte Nation*, the Court held that a tribe is "presently located" where it "has its population center and 'major governmental presence.'" *Id*. (emphasis omitted). Plaintiffs assert that "[b]y failing to recognize *Wyandotte Nation*['*s*] . . . major governmental presence standard, the DOI acted arbitrarily and in excess of its authority, and 25 C.F.R. § 292.4 should be declared null and void." Doc. 13 at 16. Plaintiffs also assert that the DOI acted arbitrarily and exceeded its authority by "failing to include in 25 C.F.R. § 292.4 a requirement that the tribe's location be determined as of the date of IGRA's effectiveness, October 17, 1988[.]" *Id*.

The federal defendants advance four independent reasons why the Court should dismiss plaintiffs' challenge to 25 C.F.R. § 292.4. First, they contend that plaintiffs' challenge is barred by the six-year statute of limitations established in 28 U.S.C. § 2401. Second, the federal defendants assert that plaintiffs waived their ability to challenge 25 C.F.R. § 292.4(b)(2) by failing to assert their challenge during the DOI's notice-and-comment rulemaking. Third, the federal defendants argue that the DOI was not bound by *Wyandotte Nation*'s definition of "presently located" during its 2008 promulgation of 25 C.F.R. § 292.4. And last, the federal defendants assert that plaintiffs' contention that the term "presently located" must be interpreted as a "date-of-enactment" restriction is wrong as a matter of law. As the next section explains, the Court concludes that plaintiffs are time-barred from challenging this regulation.

2. Plaintiffs' challenge to 25 C.F.R. § 292.4 is barred by the six-year statute of limitations.

The federal defendants move to dismiss plaintiffs' challenge against 25 C.F.R. § 292.4 because, they contend, it is a facial challenge to a regulation and 28 U.S.C. § 2401(a)'s six-year statute of limitation time-bars such a challenge now. Plaintiffs respond that their action is not a facial challenge. Instead, plaintiffs assert that they challenge the regulation "as-applied" because their "suit is primarily a challenge to the NIGC's land opinion that gaming is permitted on the [Kansas Land]" and they have attacked "the regulation on which the NIGC relied." Doc. 60 at 15.

Our Circuit has provided standards district courts must use to distinguish between a facial challenge and an as-applied challenge. The former "'considers [the regulation's] application to all conceivable parties.'" *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014) (quoting *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007)). In contrast, an as-applied challenge "'tests the application of that [disputed regulation] to the facts of a plaintiff's concrete case.'" *Id*.

This distinction matters because a plaintiff hoping to prosecute a facial challenge must assert it within six years of the regulation's publication in the Federal Register. *See, e.g., Wind River Mining Corp. v. United States*, 946 F.2d 710, 714-15 (9th Cir. 1991) (applying 28 U.S.C. § 2401(a)'s six-year statute of limitation to request for judicial review under the APA). *Wind River* explains the rationale for this outcome: "The grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision" and the "government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of procedure." *Id*. at 715.

An as-applied challenge is not subject to the same limitation. Instead, a plaintiff who challenges an agency's application of a regulation to the plaintiff's specific circumstances must file its action within six years of an adverse agency decision. *See id.* at 716 ("We hold that a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger."); *see also Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). Also, the APA requires that an "as applied challenge must rest on final agency action." *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 3:06-cv-00657-LRH-RAM, 2008 WL 5111036, at *6 (D. Nev. Dec. 3, 2008) ("'Agency action made reviewable by statute and final agency action for which there is no remedy in a court are subject to judicial review.'" (quoting 5 U.S.C. § 704.)).

Count III of plaintiffs' Amended Complaint asserts several objections to the DOI's promulgation of 25 C.F.R. § 292.4(b)(2). It tries to advance an as-applied challenge against the NIGC, alleging: "The NIGC's actions in applying 25 C.F.R. § 292.4(b)(2) to the current location of the tribe, and in a manner inconsistent with *Carcieri*, are arbitrary and in excess of its authority." Doc. 13 at 17. But this allegation cannot serve as the basis for an as-applied challenge. Plaintiffs' challenge arises from the OGC's advisory opinion. Because the opinion, and its application of § 292.4, was not final NIGC action ripe for judicial review, plaintiffs cannot assert an as-applied challenge based on it. *See* 5 U.S.C. § 704; *see also Crosby Lodge, Inc.*, 2008 WL 5111036, at *6. Thus, plaintiffs have failed to assert a viable as-applied challenge to 25 C.F.R. § 292.4.

This leaves plaintiffs' claims against the DOI's promulgation of § 292.4. Specifically, plaintiffs contend that the DOI acted "arbitrarily and in excess of its authority" by: (1) "failing

to recognize *Wyandotte Nation v. NIGC*'s major governmental standard;" and (2) "failing to include in 25 C.F.R. § 292.4 a requirement that the tribe's location be determined as of the date of IGRA's effectiveness" in a "manner [consistent] with *Carcieri*." Doc. 13 at 16. Plaintiffs also ask the Court to "[d]eclare that the DOI acted arbitrarily and in excess of its authority by implementing 25 C.F.R. § 292.4(b)(2) without a temporal restriction, and in a manner that does not rely on tribes' major governmental presence." *Id*. at 18.

The Court concludes that these attacks on the DOI's implementation of 25 C.F.R. § 292.4 amount to facial challenges to the validity of the regulation itself. Plaintiffs contend, in essence, that the DOI acted arbitrarily and exceeded its authority when it promulgated § 292.4. Plaintiffs therefore contend that the regulation is invalid as written—an alleged defect that would affect all conceivable parties. *See Njord*, 774 F.3d at 1264. The grounds for plaintiffs' challenge—*i.e.*, the IGRA, *Wyandotte Nation*, and *Carcieri*—existed in 2008 when the DOI published the regulation in the Federal Register and were "apparent to any interested citizen" within six years of publication. *Wind River Mining Corp.*, 946 F.2d at 715. Because plaintiffs failed to assert their facial challenge to § 292.4 within the six-year period of limitation set out in 28 U.S.C. § 2401(a), it is time-barred as a matter of law. The Court thus dismisses Count III of plaintiffs' Amended Complaint.[4]

IV. Tribal Defendants' Motions to Dismiss

The Court turns now to the five motions to dismiss filed by the tribal defendants. The tribal defendants seek to dismiss plaintiffs' claims against them for lack of subject matter jurisdiction under Rule 12(b)(1). The tribal defendants contend that the Court lacks jurisdiction for two reasons.

[4] Given this conclusion, the Court need not address the federal defendants' other attacks on plaintiffs' challenge to § 292.4.

First, as entities and members of a federally recognized Indian tribe, they assert that tribal immunity shields them from suit in federal court. Plaintiffs respond that the Downstream Development Authority's tribal charter contains provisions that amount to a blanket waiver of the DDA's tribal immunity. To support their argument, plaintiffs attach a Quapaw tribal resolution chartering the DDA and reference the DDA's complete charter in their response in opposition (Doc. 56). Resolution of this issue requires the Court to examine the DDA charter, which plaintiffs did not attach to or reference in their Amended Complaint. Thus, the Court must consider documents outside of the complaint and will not presume that all of plaintiffs' jurisdictional allegations are true. *See Holt*, 46 F.3d at 1003.

Second, the tribal defendants assert that plaintiffs cannot sidestep tribal immunity by bringing an officer suit against tribal officials under *Ex parte Young*, 209 U.S. 123 (1908). The tribal defendants attack both the "legal [and] factual merit [of] the State's claims against the Tribal officers" through their motions to dismiss. Doc. 51 at 11. Thus, the tribal defendants ask the Court to address both the propriety of jurisdiction (a Rule 12(b)(1) motion) and the plausibility of plaintiffs' claims (a Rule 12(b)(6) motion). Before reaching the merits of plaintiffs' substantive claims, the Court first must determine whether it has subject matter jurisdiction over the 18 individual tribal officers under *Ex parte Young*. *See Muscogee (Creek) Nation*, 669 F.3d at 1167-68. If it finds that jurisdiction exists, the Court may then take up the tribal defendants' substantive arguments under Rule 12(b)(6). *See Holt*, 46 F.3d at 1003; *Pringle*, 208 F.3d at 1223. The Court addresses each one of the tribal defendants' arguments below.

A. Plaintiffs have failed to establish that the tribal defendants have waived tribal immunity.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Likewise, an Indian tribe's waiver of its tribal immunity must be unequivocal. *Id.*; *see E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001).

Tribal immunity "may extend to subdivisions of a tribe, including those engaged in economic activities . . . ." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) (citing *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008)). Granting immunity to tribal businesses furthers "'Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.'" *Id*. (quoting *Okla Tax Comm'n*, 498 U.S. at 510). Generally, tribal immunity also extends to tribal officials acting in their official capacities and within the scope of their authority. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (citing *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997)).

Plaintiffs contend that the Quapaw has waived the DDA's tribal immunity expressly by its charter. Plaintiffs assert that the charter exposes the DDA to suit because it permits the DDA

to "[s]ue Persons in its own name" and to "[c]onsent to the exercise of jurisdiction over any suit or over the Authority by the federal courts." Doc. 56-1 at 8. Plaintiffs characterize these provisions as a "sue and be sued clause." And, according to plaintiffs, at least three federal circuits, including our own, have held that such clauses waive a tribal corporation's immunity. *See, e.g., Native Am. Distrib.*, 546 F.3d at 1288 (affirming district court opinion); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006), *vacated*, 540 F.3d 916, 921 (9th Cir. 2008); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989).

In response, the tribal defendants contend that the provisions of the DDA's charter are not a "sue and be sued clause" and thus did not waive immunity. Instead, they contend that the DDA's provisions authorized the DDA to waive its tribal immunity on a transaction-by-transaction basis. Tribal defendants note that the DDA charter also provides that it "shall be entitled to all of the privileges and immunities of the Tribe, including without limitation, sovereign immunity from suit." Doc. 73 at 3.

As discussed above, a tribe or tribal entity must express any intent to waive tribal immunity in unequivocal words. *See C&L Enters., Inc.,* 532 U.S. at 418; *Breakthrough Mgmt. Grp.*, 629 F.3d at 1183-84. Here, the DDA's tribal charter grants it the power to "[*c*]*onsent* to the exercise of jurisdiction over the Authority by the federal courts . . . ." Doc. 56-1 at 7 (emphasis added). This language does not manifest an intent to waive tribal immunity. Instead, it vests the DDA with the power to waive its immunity at its election. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000) (finding no waiver of immunity where the "ordinance . . . authorizes the Authority to shed its immunity from suit 'by contract,' and these words would be utter surplusage if the enactment of the ordinance itself served to perfect the waiver").

For this reason, the provisions of the DDA charter differ from the traditional "sue and be sued clauses" cited by plaintiffs. Indeed, the clauses on which plaintiffs rely demonstrate that the tribes in those cases intended to shed the immunity of their corporate entities. *See Marceau*, 455 F.3d at 979-81 (clause giving "irrevocable consent to [allow] the [tribal] Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation" amounts to an express waiver of tribal immunity); *Rosebud Sioux Tribe*, 874 F.2d at 552 (tribal charter permitting entity "[t]o sue and to be sued in courts of competent jurisdiction" waived immunity); *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056, 1065 (N.D. Okla. 2007) (charter allowing entity "[t]o sue and be sued; to defend in any court" constituted a waiver of tribal immunity). In contrast, the DDA's charter does not expose the DDA to suit in any context.

Here, the charter evinces the Quapaw's intent to preserve the DDA's tribal immunity. The Quapaw granted the DDA the ability to decide when, and under what circumstances to waive its immunity. The charter itself shows as much. Section 6 authorizes the DDA to "[g]rant limited waivers of the sovereign immunity of the Authority to enter into contracts or agreements or other business relations . . . ." Doc. 56-1 at 8. And Section 8 provides that the DDA is an "instrumentality of the Tribe," "enjoys an autonomous existence[,]" and "*shall be entitled to . . . sovereign immunity from suit*." *Id*. (emphasis added). Thus, the charter contains no unequivocal waiver of tribal immunity.

In sum, plaintiffs have adduced no facts plausibly supporting the conclusion that the DDA, the QCA, or the TDC have waived tribal immunity. Because plaintiffs have failed to establish that the Court has subject matter jurisdiction over these three entities, the Court dismisses plaintiffs' claims against them under Rule 12(b)(1).

B. Plaintiffs cannot establish subject matter jurisdiction over individual tribal officers under *Ex Parte Young*.

Next, the tribal defendants ask the Court to dismiss plaintiffs' claims against the 18 individual tribal officers. This aspect of the Amended Complaint tries to overcome tribal immunity by asserting claims against the officers under the exception established in *Ex parte Young*, 209 U.S. 123 (1908). "[U]nder *Ex parte Young*, a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation*, 669 F.3d at 1166 (citing *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). The *Ex parte Young* exception applies "not just to state sovereign immunity but also to tribal sovereign immunity." *Crowe & Dunlevy, P.C.*, 640 F.3d at 1154.

To determine whether plaintiffs may bring claims against the tribal officers, the Court "'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Muscogee (Creek) Nation*, 669 F.3d at 1167 (quoting *Verizon Md. Inc.*, 535 U.S. at 645). Plaintiffs allege an ongoing violation of federal law if they state a "'non-frivolous, substantial claim for relief against the [tribal] officers that does not merely allege a violation of federal law solely for the purpose of obtaining jurisdiction.'" *Id*. (quoting *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 866 (10th Cir. 2003)). "But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md. Inc.*, 535 U.S. at 636-37 (citing *Idaho v. Coeur d'Alene*, 521 U.S. 261, 281 (1997)).

Here, plaintiffs have asserted claims against individual tribal officers and have asked the Court to enjoin them from constructing or operating "an illegal, unauthorized gaming facility" on the Kansas Land. Doc. 13 at 17. Plaintiffs emphasize the request that the Quapaw made in its

2012 application to the BIA. It asked the BIA to take the Kansas Land into a trust that the Quapaw intended to use for non-gaming purposes. Because plaintiffs say that they relied on this representation when they decided not to appeal the BIA's decision, plaintiffs argue that the Court must declare the tribal defendants equitably estopped from gaming. Plaintiffs assert that "[i]f the [t]ribal [d]efendants game on the Kansas [L]and, they will be in violation of IGRA[,] as the land does not meet the exception set forth in 25 U.S.C. § 2719 and is not eligible for gaming." Doc. 56 at 11.

The tribal defendants respond, contending that plaintiffs may not circumvent tribal immunity merely by asserting a claim characterized as equitable estoppel. The tribal defendants contend that the Eleventh Amendment bars plaintiffs' claim because it is frivolous and asserted only to obtain jurisdiction. The tribal defendants also assert: plaintiffs have failed to allege an ongoing violation of federal law; *Ex parte Young* cannot apply because the tribal officers named by plaintiffs have no authority to act individually; and application of *Ex parte Young* requires a violation of the "supreme law" of the United States and equitable estoppel is only a civil remedy.

Beginning with the tribal defendants' first argument—that plaintiffs assert an equitable estoppel claim merely to circumvent the IGRA's jurisdictional limitations—the Court returns to the fundamental purpose of the IGRA. Congress enacted the IGRA "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. § 2702). The IGRA grants Indian tribes exclusive jurisdiction to regulate gaming on Indian lands if: (1) "the gaming activity is not specifically prohibited by Federal law;" and (2) it "is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The IGRA

also defines when a state may sue an Indian tribe for gaming violations on Indian lands. *See* 25 U.S.C. § 2710(d)(7)(A). Section 2710(d)(7)(A)(ii), in relevant part, provides:

> The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

But the Supreme Court has determined that § 2710(d)(7)(A)(ii) "does not even cover all suits [seeking] to enjoin gaming on Indian lands . . . ." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2034 n.6. Instead, the Court has determined:

> Section 2710(d)(7)(A)(ii) recall, allows a State to sue a tribe not for all class III gaming activity located on Indian lands . . . , but only for such gaming as is conducted in violation of any Tribal-State compact . . . that is in effect. Accordingly, *if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue*; only the Federal Government can enforce the law. *See* 18 U.S.C. § 1166(d).

Id. (emphasis added) (internal quotations omitted).

The Supreme Court also has held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a [tribe] of a statutorily created right"—such as that set out in § 2710(d)(7)—"a court should hesitate before casting aside those limitations and permitting an action against a [tribal] officer based upon *Ex parte Young*." *Seminole Tribe of Fla.*, 517 U.S. at 74. Thus, if plaintiffs' equitable estoppel claim here seeks to prevent a threatened violation of the IGRA, jurisdiction against the tribal officers does not exist under *Ex parte Young*.

Plaintiffs argue that their claims against the tribal officers "arise not under the IGRA specifically, but from the common law principles of equitable estoppel." Doc. 56 at 12. Plaintiffs contend that the tribal defendants misrepresented their intended use of the Kansas Land and, therefore, deprived plaintiffs of the opportunity to contest the Quapaw's BIA trust

application. Thus, according to plaintiffs, no statutory rights under the IGRA are at issue. But plaintiffs' response in opposition contains numerous statements indicating otherwise.

For example, plaintiffs' introduction, in relevant part, provides:

> Because the Kansas [L]and does not meet the [25 U.S.C. § 2719] exception, constructing and operating a casino on the land would violate the Indian Regulatory Gaming Act, 25 U.S.C. §§ 2701-2721 ("IGRA") and the [t]ribal [d]efendants should be estopped from doing so based on their representations to the BIA.

Doc. 56 at 2. Later, plaintiffs contend that they have alleged an ongoing violation of federal law under *Ex parte Young* because they are "prospectively ensuring that the [t]ribal [d]efendants do not act upon [the NIGC opinion] letter because the NIGC's application of the 'last reservation exception' is wrong, and to conduct gaming on such land would be a violation of IGRA and federal law." Doc. 56 at 9. Plaintiffs' response continues, stating:

> IGRA prohibits [t]ribes from conducting gaming, including Class II gaming, on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain requirements are met. 25 U.S.C. §§ 2710(a)(2), 2719. *The Amended Complaint alleges that to conduct gaming on the [t]ribe's trust land in Kansas would not meet those requirements and thus, constitute a violation of federal law*. [Doc. 13 at 9, 14-17.] Thus, the Amended Complaint seeks prospective relief to prevent the tribal members from acting in violation of federal law.

Id. at 9 (emphasis added). Finally, plaintiffs argue: "If the Tribal Defendants game on the Kansas land, they will be in violation of the IGRA as the land does not meet the exception set forth in 25 U.S.C. § 2719 and is not eligible for gaming." Doc. 56 at 11.

To determine whether relief sought by a party is permitted under *Ex parte Young*, the Court must "look to the substance rather than to the form of the relief sought . . . ." *Papasan v. Allain*, 478 U.S. 265, 279 (1986). Plaintiffs here assert a claim they call "equitable estoppel." But it is evident that they seek to prevent the tribal defendants from committing an alleged violation of the IGRA—*i.e.*, gaming in violation of 25 U.S.C. § 2719. Plaintiffs cannot use *Ex*

parte Young to bring such a claim. *See Seminole Tribe of Fla.*, 517 U.S. at 74 (affirming dismissal of *Ex parte Young* suit seeking to remedy alleged IGRA violation because Congress enacted the IGRA as a detailed remedial scheme designed to address such violations); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2034 n.6 ("[I]f a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law.").

Even if plaintiffs' Amended Complaint did not seek to deter a potential violation of the IGRA, their equitable estoppel claim still would not satisfy *Ex parte Young*. As discussed above, application of *Ex parte Young* requires a party to allege an ongoing violation of federal law and seek prospective relief. *See Muscogee (Creek) Nation*, 669 F.3d at 1166. Plaintiffs, however, assert that the Quapaw misrepresented its intended use for the Kansas Land during its 2012 BIA land-into-trust proceeding and "deprived plaintiffs the opportunity to be fully heard during the trust application process." Doc. 56 at 12. This alleged misrepresentation happened in the past. Thus, plaintiffs do not assert an ongoing or threatened violation of federal law. Instead, they seek to remedy something even they perceive as a past wrong, and this cannot abide a suit under *Ex parte Young*. *See Papasan*, 478 U.S. at 277-78 ("*Young* has been focused on cases in which a violation of federal law . . . is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . ."); *Fuller v. Davis*, 594 F. App'x 935, 940 (10th Cir. 2014) (finding *Ex parte Young* inapplicable where plaintiffs claimed "they were tricked long ago" because the relief requested would "address alleged past harms rather than prevent prospective violations of federal law") (internal quotations omitted); *Sanders v. Kan. Dep't of Soc. & Rehab. Servs.*, 317 F. Supp. 2d 1233, 1243-44 (D. Kan. 2004) (denying *Ex parte*

Young jurisdiction where suit would not "remedy any future wrongs, and it does not appear that the circumstances . . . will reoccur with any level of frequency, if at all.").

The Court concludes that the *Ex parte Young* exception to tribal immunity does not apply to plaintiffs' claims against the individual tribal defendants. The Eleventh Amendment therefore shields the tribal defendants from this suit in federal court. The Court thus dismisses plaintiffs' claims against the tribal defendants under Rule 12(b)(1).

V. Conclusion

Plaintiffs have failed to establish that this Court has subject matter jurisdiction over their claims against the tribal defendants, the NIGC, or the named NIGC officials. In addition, plaintiffs' claims against the DOI and its officials are barred by 25 U.S.C. § 2401(a). For reasons explained by this Order, the Court grants the federal defendants and tribal defendants' motions to dismiss.

IT IS THEREFORE ORDERED BY THE COURT THAT the federal defendants' Motion to Dismiss (Doc. 42) is granted.

IT IS FURTHER ORDERED THAT the tribal defendants' Motions to Dismiss for Lack of Jurisdiction (Docs. 50, 55, 68, 76, 86) are granted.

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Preliminary Injunction (Doc. 14) and the tribal defendants' Motion to Continue or Stay Proceedings on Pending Request for Preliminary Injunction (Doc. 87) are denied as moot.

IT IS FURTHER ORDERED THAT the Iowa Tribe of Kansas and Nebraska and Sac and Fox Nation of Missouri's Motion to Intervene (Doc. 58) and the tribal defendants' Unopposed Motion to Continue Response to Motion to Intervene (Doc. 79) are denied as moot.

IT IS SO ORDERED.

Dated this 17th day of December, 2015, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

November 21, 2014

Via First Class Mail & Facsimile

Stephen R. Ward
Conner & Winters, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
Fax: 918-586-8982

Re: Trust land in Cherokee County, Kansas – Last Recognized Reservation exemption

Dear Mr. Ward:

On behalf of your client, the Quapaw Tribe of Indians of Oklahoma ("Tribe"), you requested a legal opinion that certain after-acquired trust land located within Cherokee County, Kansas qualifies for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(a)(2)(B), as lands within the Tribe's last recognized reservation within the state or states within which the Tribe is presently located. Specifically, the request involves Section 13 of a tract of trust land known as the "Quapaw Strip."

As detailed below, this trust land is eligible for gaming under the last recognized reservation exception of IGRA as interpreted by Department of the Interior regulations, 25 C.F.R. § 292.4(b)(2), because the Tribe had no reservation as of October 17, 1988; Section 13 is located in Kansas, a state other than Oklahoma; Kansas is one of the states in which the Tribe is presently located; and Section 13 is within the Tribe's last recognized reservation in Kansas.

The Department of the Interior Solicitor's Office has reviewed this legal opinion and concurs with it.[1]

Factual & Legal Background

A. The Trust land

As noted above, the trust land at issue is located in Cherokee County, Kansas along the Oklahoma-Kansas boundary.[2] The Tribe acquired the parcels that make up the Quapaw Strip trust tract, including Section 13, in unrestricted fee in 2006 and 2007 for use as a parking lot and support area for its adjacent Downstream Casino property, which is located in Oklahoma.[3] The

[1] E-mail from Venus Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Eric Shepard, NIGC Acting General Counsel (November 20, 2014).
[2] U.S. Department of Interior, Bureau of Land Management Plat of Dependent Resurvey and Survey (Nov. 19, 2010).
[3] Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 1, 5, and 6.

NEW MAILING ADDRESS: NIGC/DEPARTMENT OF THE INTERIOR 1849 C Street NW, Mail Stop # 1621 Washington, DC 20240 Tel: 202.632.7003 Fax: 202.632.7066
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WWW.NIGC.GOV

tract, which consists of approximately 124 acres, was taken into trust by the Department of the Interior in August 2012.[4] The trust deed describes the tract as:

> All of U.S. Government Lot 8, in Section 12, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 2010 BLM re-survey....
>
> AND:
>
> All of U.S. Government Lots 4, 5, and 6, in Section 13, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 2010 BLM re-survey. ... EXCEPT ANY PART TAKEN OR DEEDED FOR ROADS, AND SUBJECT TO ANY EASEMENTS OR RESTRICTIONS OF RECORD. Containing 123.79 acres more or less, Surface only.[5]

In 2011, the Department of the Interior Bureau of Land Management confirmed that Section 13 of the Quapaw Strip, containing approximately 100.42 acres, is within the boundaries of the Tribe's former reservation in Kansas.[6]

B. Tribe's Last Reservation in Kansas and Oklahoma

The Tribe was removed from its homeland in Arkansas and ultimately relocated to a reservation that spanned across both of the present day states of Oklahoma and Kansas pursuant to the Treaty with the Quapaw, dated May 13, 1833.[7] In accordance with the treaty, the reservation consisted of 150 sections of land.[8] The portion of the reservation in Kansas consisted of approximately 12 full sections of land and 6 fractional sections of land and included Section 13 at issue here.[9] Because the Kansas portion of the reservation was only approximately one-half mile in width from north to south, it came to be known as the Quapaw Strip.[10] The Tribe ceded

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[4] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012) (land taken into trust on Aug. 21, 2012).

[5] *Id.*

[6] Letter from Robert A. Casias, U.S. Department of Interior, Bureau of Land Management, Deputy State Director for New Mexico Cadastral Survey/Geographic Sciences to Stephen Ward (Mar. 14, 2011).

[7] Treaty with the Quapaw, 7 Stat. 232, Art. 1 (Nov. 15, 1824) ("The Quapaw Nation of Indians cede to the United States of America, in consideration of the promises and stipulations hereinafter made, all claim or title which they may have to lands in the Territory of Arkansas..."); Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833) ("The United States hereby agree[s] to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the commissioners of Indian affairs west, and which is expressly designed to be (in) lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon...").

[8] Treaty with the Quapaw, 7 Stat. 424, Art. 2, *supra*.

[9] Letter from Robert A. Casias, *supra* at 1.

[10] Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5; Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867) ("The Quapaws cede to the United States that portion of their land lying in the State of Kansas, being a strip of land on the north line of their reservation, about one half mile in width, and containing about twelve

the Kansas portion of the reservation, except for a small tract set aside for a member of the Tribe, to the United States pursuant to a treaty, dated February 23, 1867.[11] In the same treaty, the Tribe ceded approximately 18,500 acres in the western part of the reservation in Oklahoma to the United States.[12]

Applicable Law

IGRA permits an Indian tribe to "engage in, or license and regulate, gaming on Indian lands within such Tribe's jurisdiction."[13] The Act defines "Indian lands" to include:

> (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.[14]

NIGC regulations, interpreting IGRA, provide that "Indian lands" mean:

> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either --
>
> > (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> >
> > (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.[15]

However, IGRA also prohibits gaming on lands acquired into trust after October 17, 1988, unless certain exceptions are met. In the last recognized reservation exception, IGRA states that a tribe may game on after acquired land if:

> (2) the Indian tribe has no reservation on Oct. 17, 1988 and—
>
> …
>
> (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located. [16]

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sections in all, excepting therefrom one half section to be patented to Samuel G. Vallier, including his improvements. Also the further tract within their present reserve, bounded as follows: Beginning at a point in the Neosho river where the south line of the Quapaw reserve strikes that stream, thence east three miles, thence north to the Kansas boundary line, thence west on said line to the Neosho river, thence down said river to the place of beginning; and the United States will pay to the Quapaws for the half-mile strip lying in Kansas at the rate of one dollar and twenty-five cents per acre … and the land in Kansas herein ceded shall be open to entry and settlement, the same as other public lands, within sixty days after the completion of the survey thereof.").

[11] *Id.*

[12] *Id.*; Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5.

[13] 25 U.S.C. §§ 2710(b)(1), 2710(d)(1)(A)(i), 2710(d)(3)(A).

[14] 25 U.S.C. § 2703(4).

[15] 25 C.F.R. § 502.12.

Further, Department of the Interior regulations implement the last recognized reservation exception in the following way:

> (b) If the tribe had no reservation on October 17, 1988, the lands must be []:
> ...
>
> (2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.[17]

Analysis

To address whether Section 13 of the Quapaw Strip qualifies as gaming eligible land under IGRA, it is necessary to examine whether the land constitutes "Indian lands" as defined by IGRA and NIGC regulations. If it does, then because Section 13 is after-acquired trust land, IGRA and DOI regulations, interpreting Section 20 of IGRA, must be applied to ascertain whether the land satisfies the last recognized reservation exception of IGRA.

A. Indian Lands

The initial question is whether the land constitutes "Indian lands" within the meaning of IGRA and NIGC regulations. For the Tribe to conduct gaming pursuant to IGRA, such gaming must be conducted on "Indian lands,"[18] defined by the Act as: "all lands within the limits of any Indian reservation and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."[19] NIGC regulations further define "Indian lands" as: "[l]and within the limits of an Indian reservation; or [l]and over which an Indian tribe exercises governmental power and that is either -- (1) [h]eld in trust by the United States for the benefit of any Indian tribe or individual; or (2) [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation."[20]

The land at issue here is not within a present day reservation, but it is land held in trust by the United States for the Tribe.[21] If the land were within a present day reservation, that would be the end of the Indian lands analysis.[22] However, here, Section 13 is trust land.

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[16] 25 U.S.C. § 2719(a)(2)(B).
[17] 25 C.F.R. § 292.4(b)(2).
[18] 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2.
[19] 25 U.S.C. § 2703(4).
[20] 25 C.F.R. § 502.12.
[21] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).
[22] Memorandum to NIGC Acting General Counsel from Cindy Shaw re: Tribal jurisdiction over gaming fee land on White Earth Reservation (Mar. 14, 2005) ("White Earth legal opinion") ("The land at issue in this matter is fee land within the exterior boundaries of the White Earth reservation. The land thus 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).").

1. Jurisdiction

In order for trust land to constitute Indian lands, the second requirement of IGRA, 25 U.S.C. § 2703(4)(B), must be satisfied - the Tribe must exercise governmental power over the land.[23] 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."[24] The Tenth Circuit's approach is consistent with IGRA's other sections providing that "an Indian tribe may engage in, or license and regulate class II [and III] gaming on Indian lands within such tribe's jurisdiction" if it satisfies other requirements of IGRA.[25] Moreover, courts have uniformly held that tribal jurisdiction is a threshold requirement to the exercise of governmental power as required by IGRA's definition of Indian lands.[26] Therefore, whether the Tribe possesses jurisdiction over the trust tract is a threshold question prior to considering whether the Tribe exercises government power over it.

The question of the Tribe's jurisdiction "focuses principally on congressional intent and purpose,"[27] as "an Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute."[28] Evidence of congressional intent and purpose can be found in the language of the legislation and treaties.[29] "To a lesser extent," congressional intent may also be found in "events occurring within a reasonable time after passage of these laws and treaties," including Congress' own actions as to the land and actions by the Bureau of Indian Affairs and local judicial authorities.[30] In this instance, no federal statutes limit the Tribe's jurisdiction over the trust tract, which was taken into trust by the Department of the Interior in August 2012 for the benefit of the Tribe.[31]

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[23] 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

[24] *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001).

[25] 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1).

[26] *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) ("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").

[27] *Kansas*, *supra*, at 1229 ("A proper analysis of whether the tract is "Indian lands" under IGRA begins with the threshold question of the Tribe's jurisdiction. That inquiry, in turn, focuses principally on congressional intent and purpose…").

[28] *Id.* quoting *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to ... eliminate tribal rights.") and *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

[29] *See, e.g., id.* at 1229-30.

[30] *Kansas*, *supra*, at 1229-30.

[31] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012) (land taken into trust on Aug. 21, 2012).

Moreover, generally, an Indian tribe possesses jurisdiction over "over both their members and their territory."[32] It is well settled that a tribe retains primary jurisdiction over land that the tribe inhabits if the land qualifies as Indian country.[33] 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 ….[34]

"This definition applies to questions of both criminal and civil jurisdiction."[35]

The Tenth Circuit has held that "[o]fficial designation of reservation status is not necessary for the property to be treated as Indian country under 18 U.S.C. § 1151;" rather, "it is enough that the property has been validly set aside for the use of the Indians, under federal superintendence."[36] Further, "reservation status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian country pursuant to 18 U.S.C. § 1151."[37]

Accordingly, because the trust land was validly set aside for the Tribe and is under the superintendence of the federal government, the tract qualifies as Indian country. And, because the trust land is the Tribe's Indian country, the Tribe possesses jurisdiction over it.

2. Exercise of Governmental Power

In addition to possessing jurisdiction, the Tribe must also exercise governmental power over Section 13 of the Quapaw Strip trust tract to satisfy IGRA's requirements for "Indian lands."[38] IGRA is silent regarding how the NIGC should determine whether a tribe exercises

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[32] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations'").

[33] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (The Supreme Court has stated that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress."); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (tribe and its members not subject to state tax within Indian country); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, 567 F.3d 1235, 1240 n.5 (10th Cir. 2009) ("[A]s a general matter, Indian tribes exercise court jurisdiction over Indian country – reservations, dependent Indian communities, and Indian allotments"); *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987) ("Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands").

[34] 18 U.S.C. § 1151.

[35] *Cabazon*, 480 U.S. at 253 n.5.

[36] *United States v. Roberts*, 185 F.3d 1125, 1133, n.4 (10th Cir. 1999); *see also Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert. denied Mustang Fuel Corp. v. Hatch*, 520 U.S. 1139 (1997) ("Indian tribes have jurisdiction over lands that are Indian country, and allotted lands constitute Indian country.").

[37] *United States v. Roberts*, 185 F.3d at 1130.

[38] *See* 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b)(1); *see also Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

governmental power over its Indian lands. Further, manifestations of governmental power can differ dramatically depending upon the circumstances. Therefore, the NIGC has not formulated a uniform definition of "exercise of governmental power," but, instead, makes a determination in each instance based upon the circumstances.[39]

Several court cases provide guidance as to what constitutes an exercise of governmental power. For example, the First Circuit Court of Appeals in *Rhode Island* v. *Narragansett Indian Tribe* held that whether a tribe satisfies this requirement depends "upon the presence of concrete manifestations of [governmental] authority."[40] Some examples of such manifestations include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs.[41] In addition, the court in *Cheyenne River Sioux Tribe v. State of South Dakota* found that several factors might also be relevant to a determination of whether off-reservation trust lands constitute Indian lands.[42] Those factors are:

(1) Whether the areas are developed;
(2) Whether the tribal members reside in those areas;
(3) Whether any governmental services are provided and by whom;
(4) Whether law enforcement on the lands in question is provided by the Tribe; and
(5) Other indicia as to who exercises governmental power over those areas.[43]

Here, several actions demonstrate the Tribe's present exercise of governmental power over the Quapaw Strip trust tract. Specifically, the Tribe has manifested its governmental authority in the following ways:

(1) The Tribe has a governmental services center on the Quapaw Strip trust tract, which houses: a Tribal Marshals substation; the Quapaw Services Authority, a tribal enterprise that offers services as a construction manager, general contractor, and remediation contractor; the Tribe's Bison Ranch operations; and the Tribal Secretary-Treasurer's office, from which she performs much of her official work;[44]

(2) The Tribe's Marshals Service patrols the tract and has agreements with a local Kansas law enforcement agency to provide support for its law enforcement services;[45]

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[39] *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).
[40] *Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d at703.
[41] *Id.*
[42] 830 F. Supp. 523 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993).
[43] *Id.* at 528.
[44] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014); Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 5 & 6.
[45] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 4; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014); Deputization Agreement between Cherokee County, Kansas Sheriff and the Quapaw Tribal Marshals Service (Dec. 27, 2011).

(3) The Tribe's Fire and Emergency Medical Services provide services on the tract;[46]

(4) The Tribe developed and maintains the parking lot and surrounding area of its casino resort on the tract;[47]

(5) The Tribe constructed and maintains a water distribution and storage system on the tract, including support areas and access roads;[48]

(6) The Tribe constructed and maintains a wetlands sanctuary and habitat for the broadhead skink on the tract;[49]

(7) The Tribe tests and monitors the water system and maintains compliance with environmental permits on the tract;[50]

(8) The Tribe undertakes program obligations associated with a Superfund Memorandum of Agreement with the U.S. Environmental Protection Agency on the tract;[51] and

(9) The Tribe designed and is in the process of constructing a deep water well on the tract to serve as a source of irrigation water.[52]

The public safety, conservation, law enforcement, and other governmental programs administered by the Tribe on the tract constitute "concrete manifestations of governmental authority." In particular, the actions of the tribal marshals, tribal fire and emergency medical personnel, tribal governmental officer, and tribal environmental department demonstrate the exercise of such authority. Also, the Tribe developed the tract with significant infrastructure, including a water system, a parking lot, an outdoor amphitheater, a wetlands sanctuary, and a habitat for an endangered species.[53] All of the infrastructure is located in Section 13, with the exception of the constructed wetlands that is located in Section 12.[54] In light of the above, the

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[46] Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶ 3; Letter from John Berrey, Chairman Quapaw Tribe of Oklahoma to Tracie Stevens, NIGC Chairwoman (Apr. 30, 2013) at 2.

[47] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 7.

[48] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 3; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 3; Letter from John Berrey to Tracie Stevens, *supra* at 1.

[49] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 7 & 8; Letter from John Berrey to Tracie Stevens, *supra* at 1-2.

[50] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 6.

[51] *Id.* ¶ 10.

[52] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 5.

[53] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 7; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (May 9, 2014) ¶ 4.

[54] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (May 9, 2014) ¶¶ 3-5; Declaration of Trenton R. Stand, Director, Realty & Trust Services Department, Quapaw Tribe (May 12, 2014) ¶ 3.

Tribe exercises governmental power over the Quapaw Strip trust tract. And, the trust tract, including Section 13, constitutes "Indian lands," as defined by IGRA and NIGC regulations.

B. Last Recognized Reservation Exception

Because Section 13 of the Quapaw Strip was taken into trust in 2012, for the land to be eligible for gaming it must satisfy one of the exceptions to IGRA's general prohibition against gaming on lands acquired in trust after October 17, 1988.[55] At issue is whether Section 13 qualifies for IGRA's last recognized reservation exception, 25 U.S.C. § 2719(a)(2)(B), which allows gaming on Indian after-acquired lands if the Indian tribe had no reservation on October 17, 1988, and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located."[56]

In this instance, the first part of this exception is met, because the Tribe had no reservation on October 17, 1988. The portion of the Tribe's reservation in Kansas was ceded to the United States in 1867 via a treaty.[57] In the same treaty, the Tribe ceded approximately 18,500 acres in the western part of the reservation in Oklahoma to the United States.[58] The second part of the exception is also satisfied, because Section 13 of the Quapaw Strip trust tract is in Kansas,[59] a state other than Oklahoma. Although a portion of the reservation had been located in Oklahoma, the exception only requires that the land at issue is not located in Oklahoma. Thus, the only remaining questions are: (1) whether Section 13 is within the state or states in which the Tribe is presently located and (2) whether Section 13 is within the Tribe's last recognized reservation within such state or states.

1. Presently Located – Governmental Presence & Tribal Population

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[55] 25 U.S.C. § 2719; 25 C.F.R. part 292.

[56] 25 U.S.C. § 2719 (a)(2)(B).

[57] Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867) ("The Quapaws cede to the United States that portion of their land lying in the State of Kansas, being a strip of land on the north line of their reservation, about one half mile in width, and containing about twelve sections in all, excepting therefrom one half section to be patented to Samuel G. Vallier, including his improvements.").

[58] *Id.* ("The Quapaws cede to the United States … Also the further tract within their present reserve, bounded as follows: Beginning at a point in the Neosho river where the south line of the Quapaw reserve strikes that stream, thence east three miles, thence north to the Kansas boundary line, thence west on said line to the Neosho river, thence down said river to the place of beginning"); Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5; In discussing the Osage Indian reservation, the Tenth Circuit has explained that Congressional policy in the early 1900s was to seek disestablishment of all Oklahoma reservations. *See Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) ("The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. ... In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations."); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 4.07(1)(b) fn. 743 (5th Ed.2012) (recent statutes indicate that Congress considers Oklahoma to be comprised of "former reservations").

[59] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).

IGRA does not define "presently located." However, the Department of the Interior interpreted that phrase as part of its interpretation of the last recognized reservation exception in its Part 292 regulations issued on May 20, 2008. For this exception, the regulations mandate that if the tribe had no reservation on October 17, 1988, the land at issue must be . . . "located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population."[60] Thus, the plain language of the regulation dictates that a tribe may demonstrate that it is "presently located" in a state or states by showing a governmental presence and tribal population there.

Interior's interpretation of this phrase differs from the only court holding concerning this exception, issued 2 years prior to the regulations, which found that a tribe is presently located where "a tribe has its population center and major governmental presence."[61] Although in the preamble to the Part 292 regulations Interior did not discuss *Wyandotte Nation v. National Indian Gaming Commission*[62] or explain why it chose the criteria of "governmental presence and tribal population" as opposed to the court's criteria of "population center and major governmental presence," those terms are significantly distinct.

Nonetheless, Interior's interpretation as articulated in this regulation is owed *Chevron* deference.[63] Review by a court of an agency interpretation is a two-step analysis.[64] In *Chevron's* first step, the court must answer "whether Congress has directly spoken to the precise question at issue."[65] If the language of the statute is clear, the court and the agency must give effect to "the unambiguously expressed intent of Congress."[66] If, however, the statute is "silent or ambiguous," the court must invoke the second step of the *Chevron* analysis and determine whether the agency's interpretation is "based on a reasonable construction of the statute."[67] "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[68] "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer…."[69] Here, in IGRA, Congress did not define the term "presently located," and thus the statute is silent on the meaning of it. Further, Interior's interpretation of the term is reasonable since "presently located" in a state or states may be shown by a tribe's governmental

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[60] U.S. Department of Interior, *Gaming on Trust Lands Acquired After October 17, 1988*, 73 FR 29354-01.
[61] *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1206 (Kansas 2006).
[62] *Id.*
[63] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").
[64] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) ("[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.").
[65] *Id.*
[66] *Id.*
[67] *Id.* at 842-843.
[68] *Id.* at 844.
[69] *Id.*

presence and population. Thus, as one of the agencies charged with administering IGRA, Interior's interpretation of § 2719(a)(2)(B) is entitled to deference under step two of *Chevron*.[70]

Both the plain language of IGRA and the Interior regulation, 25 C.F.R. § 292.4(b)(2), provide that the last recognized reservation exception applies in "the State or States within which the tribe is presently located."[71] In the *Wyandotte Nation* case, which predates the Part 292 regulations, the court recognized this to be the case in reviewing a NIGC final Commission decision that applied the last recognized reservation exception to the Wyandotte Nation's Shriner Tract in Kansas. In that agency decision, the NIGC viewed "presently located" to mean where a tribe physically resides, and "to determine where this is the NIGC looks to the seat of tribal government and population center."[72] The court found that "[b]y defining the term 'presently located' to mean where a tribe's seat of tribal government is located, the NIGC decision only permits a tribe to qualify for the exception in a single state. This definition contradicts the plain language of the statute, which expressly applies the last reservation exception to 'State or States' where the Indian tribe is presently located."[73]

Thus, a tribe may be "presently located" in "states."[74]

So, where is the Tribe "presently located?" Given the evidence, the Tribe is "presently located" in both Oklahoma and Kansas, as it has a governmental presence and tribal population in each. This is not surprising given that in the 1800s, the Tribe was ultimately relocated to a reservation that spanned both the present day states of Oklahoma and Kansas.[75] As noted previously, the Kansas portion and significant acreage in the Oklahoma portion of the reservation were ceded to the United States in 1867.[76] And, according to the 10th Circuit, in the early 1900s, Congress intended to disestablish all Oklahoma reservations.[77] Today, the Tribe's trust land spans both these states.[78]

a. Governmental Presence

In regard to the Tribe's "governmental presence," governmental functions and services are directed, implemented, and occur both in the Tribe's trust lands in Oklahoma and in Kansas,

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[70] The NIGC and Interior are each charged with specific duties under IGRA. When two or more agencies administer a statute and work together on its interpretation, the interpretation of each agency is granted Chevron deference. *Individual References Servs. Group, Inc. v. Federal Trade Comm'n*, 145 F. Supp. 2d 6, 24 (D.D.C. 2001).
[71] 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).
[72] *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1205 (Kansas 2006).
[73] *Id.* at 1206.
[74] 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).
[75] Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833).
[76] Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867); Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5.
[77] *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010).
[78] Letter from John Berrey to Tracie Stevens, *supra* at 1; Aerial photograph of Quapaw Strip tract, 2012 Google Earth;
Declaration of Trenton R. Stand, Director, Realty & Trust Services Department, Quapaw Tribe (May 12, 2014) ¶¶ 2 & 4.

and are provided to tribal members and non-members in both states.[79] The seat of the Tribe's government is in Quapaw, Oklahoma and many of the tribal governmental functions and services are based there, including the offices of the Tribal Administrator, the Tribal Chief Financial Officer, the Tribal Historic Preservation Officer, the Social Services Department, the Enrollment Department, the Realty and Trust Services Department, the Environmental Department, and the Tribal courts.[80] In addition, in Quapaw, Oklahoma, the Tribe has its Indian Child Welfare programs, a library, a pre-school , a childcare center, elder housing, a nutrition center, and a wellness center.[81] Elsewhere in Oklahoma, the Tribe has fire, emergency medical services, and marshals' stations.[82]

As for the Tribe's governmental presence in Kansas, although certain tribal government functions occur from offices located in Oklahoma, it is significant that the Tribal Secretary-Treasurer performs her official work from a tribal governmental office in Kansas.[83] Thus, crucial aspects of the Tribe's government – the review of tribal Business Committee minutes and the work of the treasury – is overseen, directed, and executed from Kansas.[84]

Further, the governmental services center in Kansas houses a substation for the Tribal marshals from which they service tribal members and non-members within the Tribe's trust lands in Oklahoma and Kansas and provide law enforcement assistance to the Cherokee County, Kansas Sheriff.[85] Although the main tribal marshals' station is in Oklahoma, two tribal marshals are assigned to the Kansas substation as their regular duty station.[86] Nevertheless, all 13 tribal marshals regularly work out of the Kansas substation due to the fact that they patrol, handle matters, and respond to calls from across the Tribe's trust lands, which span Oklahoma and Kansas.[87] The work of the tribal marshals at the substation includes preparing reports, interviewing witnesses, speaking with crime victims, holding evidence, and temporarily detaining individuals as well as convening there with the officers from the Cherokee County Sheriff's office for purposes of providing the county law enforcement assistance.[88] Further, the tribal marshals are deputized in Kansas and may handle cases throughout Cherokee County.[89]

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[79] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶¶ 4, 5, & 7; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 4; Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 3 & 4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 2; Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 3 & 4.

[80] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 5.

[81] *Id.*

[82] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶5; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 4; Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 3 & 4.

[83] Declaration of Tamara Smiley Reeves, Secretary-Treasurer, Business Committee, Quapaw Tribe (Jan. 24, 2014) ¶¶ 3,4 & 6.

[84] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 3.

[85] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014).

[86] *Id.* ¶ 5.

[87] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 5; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶¶ 3 & 4.

[88] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 5-7.

[89] Letter from John Berrey to Tracie Stevens, *supra* at 2; Deputization Agreement between Cherokee County, Kansas Sheriff and the Quapaw Tribal Marshals Service § 3(D) (Dec. 27, 2011).

In addition, other important governmental functions occur in Kansas. The Tribal Fire and Emergency Medical Services Department provides full service fire and EMS services not only in Oklahoma but also in Kansas to both tribal members and the general public.[90] Moreover, the Department has mutual aid agreements with numerous municipalities in Oklahoma and Kansas, including the municipalities of Baxter Springs, Kansas; Cherokee County, Kansas; and Columbus, Kansas.[91]

The Tribe also engages in environmental programs in Kansas, not only on the Quapaw Strip trust tract but also through a Superfund Memorandum of Agreement with the United States Environmental Protection Agency relating to remedial activities with the Cherokee County Superfund Site in Kansas.[92] Additionally, the Tribal Environmental Department maintains an endangered species habitat and wetlands habitat as well as a water tower, potable water system, and permitted storm water detention area in Kansas on the Quapaw Strip trust tract.[93] Lastly, the Tribal Environmental Department oversees environmental permits pertaining to the tract and designed a deep water well on the tract that the Tribe is in the process of constructing to serve as a source of irrigation water for its lands in Kansas.[94]

Moreover, the Quapaw Services Authority (QSA), a governmental authority of the Tribe and tribal enterprise employing 18 persons: engages in construction management, general contractor services, and environmental remediation services; has its offices in the tribal governmental services center located in Kansas; and conducts business in Kansas and Oklahoma.[95] In Kansas, QSA served as construction manager and general contractor for the construction of 4 greenhouses, which were built to produce vegetables and herbs for the Tribe's restaurants at its resort, and served as construction manager for the drilling of a deep water well on the Quapaw Strip trust tract, which will provide irrigation water for the Tribe's land in Kansas.[96]

Furthermore, the Tribe is a co-founding member of the Shoal Creek Basin Regional Waste Water Authority, chartered under Kansas law, along with three other governmental bodies in Kansas.[97] The Authority is planning new waste water facilities in Cherokee County, Kansas to improve water quality not only in the immediate area but also in the waterways that flow into the

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[90] Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 2 & 3; Letter from John Berrey to Tracie Stevens, *supra* at 2.
[91] *Id.* ¶ 4.
[92] Programmatic Agreement among the United States Environmental Protection Agency, Region 7; Quapaw Tribe; Kansas State Historic Preservation Office; Advisory Council on Historic Preservation regarding the Baxter Springs and Treece Subsites of the Cherokee County, Kansas Superfund Site (Aug. 29, 2011) at I(A); Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 2 &10.
[93] Letter from John Berrey to Tracie Stevens, *supra* at 1-2; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶¶ 3-4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3, 6-8.
[94] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 2, 3 & 5.
[95] Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 2-6.
[96] *Id.* ¶¶ 3 & 4.
[97] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 9; Letter from John Berrey to Tracie Stevens, *supra* at 2.

Tribe's lands in Oklahoma.[98] The Tribe also is working with Galena, Kansas to construct a new water line in the area to enhance economic development.[99]

Finally, the Tribe has an agreement with the United States Environmental Protection Agency, the Kansas State Historic Preservation Office, and the Advisory Council on Historic Preservation for the protection and preservation of the Tribe's historical and cultural sites within the Quapaw Strip trust tract.[100]

As detailed herein, the Tribe conducts numerous, significant governmental functions, activities, and decision-making in Kansas and Oklahoma that not only effect its trust land and tribal members in those states but also the greater non-member community and non-tribal land in those states. Consequently, the Tribe possesses a governmental presence in Kansas and in Oklahoma.

b. Tribal Population

The second prong of the test to establish whether a tribe is presently located within a state or states requires a determination as to whether the tribe has a tribal population there.[101] The Tribe possesses a tribal population in both Kansas and Oklahoma. Specifically, of the Tribe's 4,500 members, 10% live in Kansas (451 tribal members) and approximately half of those – or 5% - live within Cherokee County, Kansas (281 tribal members) where Section 13 is located.[102] 1,857 tribal members live in Oklahoma.[103]

Although the foregoing is enough to show tribal population in Kansas and Oklahoma, it is noteworthy that despite the passage of approximately 150 years since the Kansas portion of the Tribe's reservation was ceded to the United States as well as a significant amount of the Oklahoma portion, a substantial number of tribal members still live within the historic reservation boundaries or in the areas next to it in Kansas and Oklahoma. In particular, 246 tribal members – or approximately 5% - live within the Oklahoma portion of the Tribe's historic reservation and 11 tribal members live within the Kansas portion.[104] Moreover, approximately 20% of tribal members live next to the historic reservation in Ottawa County, Oklahoma (810 tribal members) and, as mentioned above, approximately 5% (270 tribal members) live within Cherokee County, Kansas next to the portion of the historic reservation in Kansas.[105]

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[98] *Id.*

[99] Letter from John Berrey toTracie Stevens, *supra* at 2.

[100] Programmatic Agreement among the United States Environmental Protection Agency, Region 7; Quapaw Tribe; Kansas State Historic Preservation Office; Advisory Council on Historic Preservation regarding the Baxter Springs and Treece Subsites of the Cherokee County, Kansas Superfund Site (Aug. 29, 2011); Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 10.

[101] 25 C.F.R. § 292.4(b)(2).

[102] Declaration of Cathy Daugherty, Director, Enrollment Deparment, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 3; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 5; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶¶ 3 & 5.

[103] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 6; Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶ 3.

[104] Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 5; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶ 4.

[105] Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 4.

As demonstrated above, the Tribe has a governmental presence and tribal population in Oklahoma and Kansas. Therefore, the Tribe is presently located in both states.

2. The Tribe's Last Recognized Reservation

The final requirement of the last recognized reservation exception is whether the land at issue is in fact part of the Tribe's last recognized reservation within the state or states within which it is presently located. As explained previously, the Tribe's last original reservation boundaries spanned the present states of Oklahoma and Kansas.[106] The reservation was ultimately ceded by treaty to the United States in 1867.[107] The Department of the Interior Bureau of Land Management has confirmed that Section 13 of the Quapaw Strip trust tract is "within the original boundaries of the Quapaw Reserve in the State of Kansas."[108] As detailed above, the Tribe is presently located in both Oklahoma and Kansas. Thus, Section 13 is part of the Tribe's last recognized reservation within one of the states within which the Tribe is presently located.

Conclusion

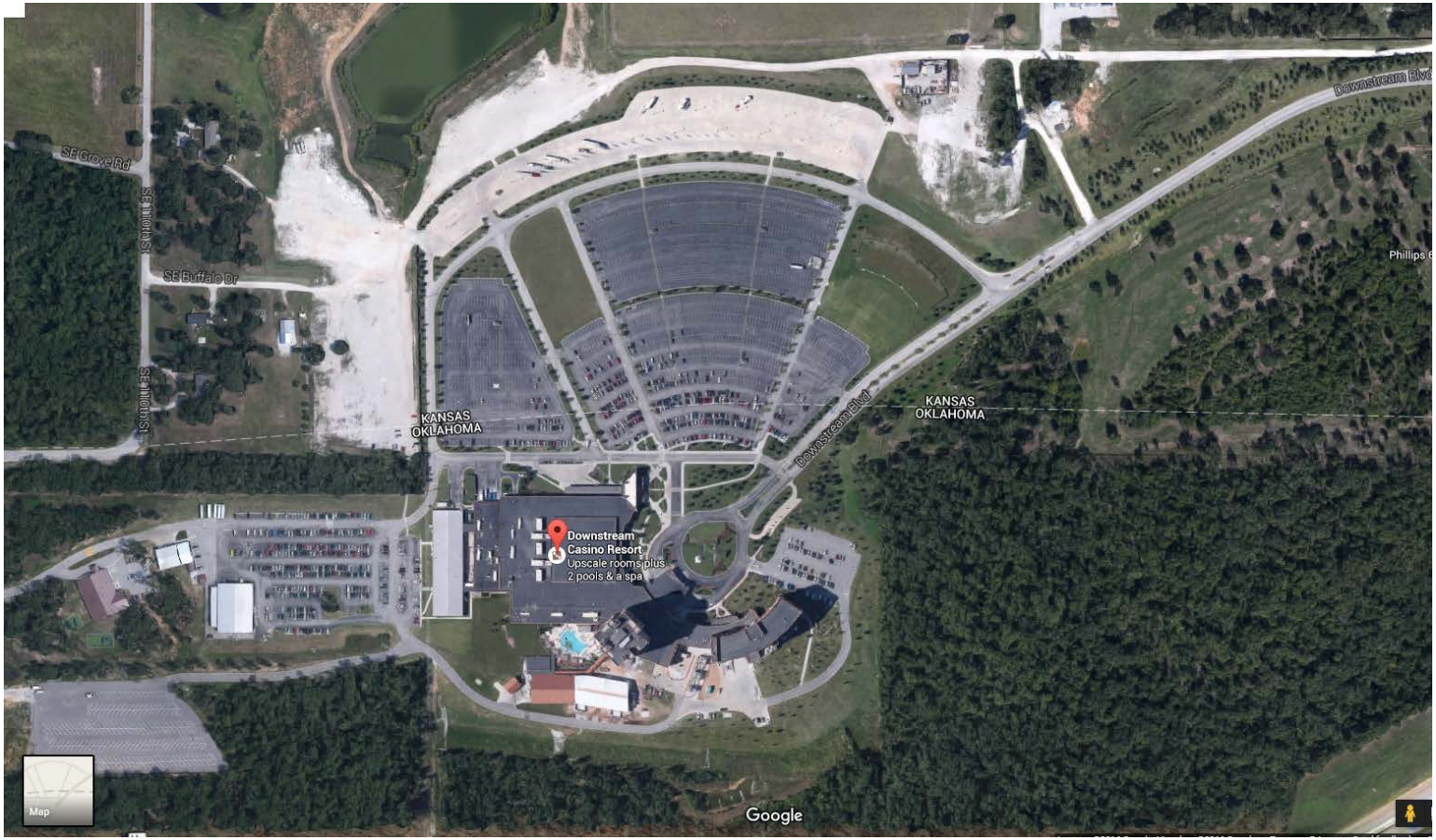
Section 13 of the Quapaw Strip trust tract is eligible for gaming under IGRA as after-acquired trust land that satisfies the last recognized reservation exception of Interior's regulations, § 292.4(b)(2). As detailed above, in accordance with treaties with the United States ceding the Tribe's reservation lands, the Tribe had no reservation as of the enactment of IGRA; Section 13 is located in Kansas, a state other than Oklahoma; the Tribe is presently located in Kansas given its governmental presence and tribal population; and Section 13 is within the Tribe's last recognized reservation, which is within Kansas.

This legal opinion does not constitute final agency action for purposes of review in federal district court. If you have any questions, please contact Jo-Ann M. Shyloski, Of Counsel, at 202-632-7003.

Sincerely,

Eric N. Shepard
Acting General Counsel

[106] Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833) ("The United States hereby agree to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the commissioners of Indian affairs west, and which is expressly designed to be (in) lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon…").
[107] *See supra* note 63.
[108] Letter from Robert A. Casias, U.S. Department of Interior, Bureau of Land Management, Deputy State Director for New Mexico Cadastral Survey/Geographic Sciences to Stephen Ward (Mar. 14, 2011).



https://www.google.com/maps/place/Downstream+Casino+Resort/@36.9989961,-94.6246342,766m/data=!3m1!1e3!4m2!3m1!1s0x0:0x447eb6fffa7062d9

October 16, 2012

John L. Berrey, Chairman
Quapaw Tribe of Oklahoma
P.O. Box 765
Quapaw, OK 74363-0765

Re: Gaming Ordinance Amendments

Dear Chairman Berrey:

This letter responds to your request on behalf of the Quapaw Tribe of Oklahoma for the National Indian Gaming Commission (NIGC) to review and approve the Tribe's amendments to its gaming ordinance. The amendments were adopted by the Tribe's Business Committee by Resolution No. 082112-A on August 21,2012.

The ordinance amendments are approved as they are consistent with the requirements of the Indian Gaming Regulatory Act and the NIGC's regulations. Thank you for bringing the amendments to my attention and for providing a copy of the updated ordinance. If you have any questions, please contact Sr. Attorney Maria Getoff at 202-632-7003.

Sincerely,

Tracie L. Stevens
Chairwoman

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

Resolution No. 082112-A

AUG 24 2012

To Amend the Provisions of the Tribal Gaming Ordinance With Respect to Regulation of Gaming Financiers and to Enact Additional Amendments to Comply with Certain Current Regulations of the National Indian Gaming Commission

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BEFORE THE BUSINESS COMMITTEE OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH)

August 21, 2012

The TRIBAL BUSINESS COMMITTEE introduced the following Resolution to enact a Tribal ordinance.

WHEREAS, the Quapaw Tribe of Oklahoma (O-Gah-Pah) is a federally recognized Indian Tribe and is governed by a Governing Resolution adopted by the Quapaw Indian Council on August 19, 1956, and approved by the Commissioner of Indian Affairs on September 20, 1957; and

WHEREAS, the Quapaw Tribe asserts tribal governmental jurisdiction to the fullest extent recognized by law over the lands within the original Quapaw Reservation, as established as a homeland for the Quapaw Nation by the Treaty of May 13, 1833; and

WHEREAS, the Governing Resolution delegates authority to the Quapaw Tribal Business Committee to speak and act on the behalf of the Quapaw Tribe; and

WHEREAS, the Quapaw Tribal Business Committee is thus empowered and obligated to transact Tribal business, including but not limited to enacting laws and ordinances for the Tribe, including laws relating to regulation of the gaming operations and activities of the Tribe; and

WHEREAS, the Tribe's governmental subdivisions engaged in the operation and management of gaming have encountered difficulties in obtaining necessary financing due to the procedures in the existing Tribal Gaming Ordinance relating to

the registration of Qualified Gaming Financiers, and the Tribal Business Committee has therefore determined that it is necessary and appropriate to amend such procedures both to make it easier for such authorities to obtain needed financing, and to bring such procedures into conformity with the tribal-state class III gaming compact currently in effect in Oklahoma; and

WHEREAS, by and through Resolution No. 060812-A the Tribal Business Committee previously approved the amendments to the requirements for the registration of Qualified Gaming Financiers set forth herein, although additional language in the Tribal Gaming Ordinance must be amended as well so that the Ordinance conforms with the current language of the regulations of the National Indian Gaming Commission (hereinafter the "NIGC"), in particular the regulations at 25 C.F.R. §§ 556.2 and 556.3.

NOW THEREFORE BE IT RESOLVED by the Tribal Business Committee that the following amendments to Tribal law, as described herein and/or with deletions to the existing ordinance indicated by strikethroughs and with additions to the existing ordinance indicated by underlining, shall be enacted as the law of the Tribe:

Section 1. The definition of "Qualified Gaming Financier" in Section 5 of the existing ordinance is hereby amended as follows:

> "Qualified Gaming Financier" means any Gaming Financier that is: a federally or state-regulated bank, savings and loan, or trust, or other federally or state-regulated lending institution, or other commercial lending institution; any agency of the federal, a state, or a tribal or a local government, a broker-dealer registered under the Securities Exchange Act of 1934, as amended; an investment company registered under the Investment Company Act of 1940, as amended; an investment advisor registered under the Investment Advisors Act of 1940, as amended; ~~or~~ an insurance company registered under any federal or state insurance agency; or any person or entity, including but not limited to, an institutional investor who, alone or in conjunction with others, lends money through publicly or commercially traded bonds or instruments or their assignees or transferees, or which bonds or commercially traded instruments are underwritten by any entity whose shares are publicly traded or which underwriter, at the time of the underwriting, has assets in excess of One Hundred Million Dollars ($100,000,000.00).

Sec. 2. Section 12(B)(1) of the existing ordinance is hereby

amended as follows:

"1. The following notice shall be placed on the application form of a key employee or a PMO before that form is filled out by the applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. § 2701, et seq. The purpose of the requested information is to determine the eligibility of individuals to be ~~employed in a gaming operation~~ granted a gaming license. The information will be used by the Tribal gaming regulatory authorities and by the National Indian Gaming Commission members and staff who have need for the information in the performance of their official duties. The information may be disclosed to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a ~~t~~tribe or the National Indian Gaming Commission in connection with the ~~hiring or firing of an employee, the~~ issuance, denial, or revocation of a gaming license, or investigations of activities while associated with a ~~T~~tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a ~~T~~tribe's being unable to ~~hire~~ license you ~~in~~ for a primary management official or ~~K~~key employee position. The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application."

Sec. 3. Section 12(B)(3) of the existing ordinance is hereby amended as follows:

"3. The following notice shall be placed on the application for a key employee or PMO before that form is filled out by an applicant:

A false statement on any part of your license application may be grounds for ~~not hiring you, or for firing you after you begin work~~ denying a license or the suspension or

revocation of a license. Also, you may be punished by fine or imprisonment. (U.S. Code, Title 18, Section 1001)."

Sec. 4. Section 17 of the existing ordinance is hereby amended as follows:

"**§ 17. Regulation of Qualified Gaming Financiers**

A. Licensing of Qualified Gaming Financiers

Any Qualified Gaming Financier may be licensed as a gaming-related vendor under this Ordinance upon receipt by the TGA of an application in the form required by the TGA, and upon payment of the required licensing fee, if any.

B. Standards and Procedures

The TGA shall promulgate standards and procedures for the issuance of a Qualified Gaming Financier license consistent with this Ordinance, subject to the approval of the Commission.

C. Scope of License

1. A license granted to a Qualified Gaming Financier shall constitute a license to the named applicant only and shall be effective only with respect to such applicant's activities as a Gaming Financier, and those activities necessary or incidental thereto, and no other activity which would otherwise cause the applicant to constitute a gaming-related vendor.

2. Notwithstanding anything to the contrary in this Ordinance, none of the following persons or entities, solely in their capacity as such, shall be deemed to be a Gaming Financier or a Gaming Related Vendor subject to licensing under this Ordinance: (a) any person or entity holding or owed any debt securities, notes, loans, obligations under letters of credit or relating to cash or interest rate management, bonds, or other commercially traded instruments of a Gaming Operation initially purchased from such Gaming Operation by a Qualified Gaming Financier; and (b) any trustee, administrative agent, or entity performing similar functions, with respect to any debt securities, notes, loans, obligations under letters of credit or relating to cash or interest rate management, bonds or other commercially traded instruments of a Gaming Operation; and (c) any assignee of the rights and obligations of a person identified in subparts (a) or (b) of this

paragraph.

D. Obligations of Qualified Gaming Financiers

Except as otherwise provided herein, or as required by the TGA pursuant to its duties and powers under this Ordinance, applicants licensed as Qualified Gaming Financiers hereunder will not be subject to regular reporting requirements, including such reporting requirements applicable to other licensees, during the term of their licenses. If a Qualified Gaming Financier's license lapses or otherwise terminates as herein provided, the recipient of such license shall not act as a Gaming Financier until it again duly files a completed application for such license.

E. Term of Qualified Gaming Financier Licenses

Each Qualified Gaming Financier License shall remain in effect until the earlier of (i) the date upon which any loan obligations have been paid in full and all loan commitments by any party have terminated or have been fully satisfied ~~December 31 of the second calendar year following the year in which the application was submitted to the TGA~~ or (ii) withdrawal of the application by the applicant or (iii) the expiration of any engagement letter or term sheet or loan agreement or other financing or security agreement between the Qualified Gaming Financier and the respective Gaming Operation.

F. Background Investigations

Except as otherwise required by the Director within his or her discretion, the background investigation of each Executive Officer of an applicant for a Qualified Gaming Financier license will consist solely of a review of publicly available information contained in filings with the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Securities and Exchange Commission, the National Association of Securities Dealers, various stock exchanges, and other Tribal, federal, and state agencies regulating Qualified Gaming Financiers, depending upon the organization and the corporate charter of each such applicant."

BE IT FURTHER RESOLVED that the Tribal Business Committee finds and resolves as follows:

1. The foregoing Ordinance shall become effective immediately upon is

certification.

2. The Chairman of the Tribal Business Committee, or, at the Chairman's direction, the General Counsel of the Tribe, is hereby authorized and directed to submit these amendments to the Chairwoman of the NIGC forthwith.

3. The Chairman of the Tribal Business, or, at the Chairman's direction, the General Counsel of the Tribe, is hereby authorized to withdraw from review and consideration by the Chairwoman of the NIGC the amendments to the Tribal Gaming Ordinance set forth in Resolution No. 060812-A.

4. In order to ensure that the holders of existing and effective Qualified Gaming Financier licenses receive the benefit of these amendments, and in the interest of maintaining good business relationships with existing lenders to Tribal gaming operations, the Business Committee hereby directs that the terms of all existing and effective Qualified Gaming Financier licenses are hereby extended by operation of law in accordance with these amendments, and no such license now in effect shall expire except in accordance with the provisions for license terms set forth herein.

5. Resolution No. 060812-A is hereby superseded and replaced in its entirety with this resolution.

6. The foregoing ordinance shall, upon approval by the Chairwoman of the NIGC, be codified by the General Counsel in the Quapaw Code *as the permanent law of the Tribe.*

CERTIFICATION

The foregoing resolution of the Quapaw Tribal Business Committee was presented and duly adopted through a telephonic/electronic poll of the Tribal Business Committee on August 21, 2012, with a vote reflecting 6 yes, 0 no, 0 abstaining, and 1 absent.

John L. Berrey, Chairman
Quapaw Tribal Business Committee

Thomas C. Mathews, Vice-Chairman
Quapaw Tribal Business Committee

THE QUAPAW CODE

Titles 17 through 21

GAMING AND AMUSEMENTS • HEALTH CARE
HOUSING • INTOXICATING LIQUORS
JUDICIDARY AND JUDICIAL PROCEDURE

Interim Edition—February 2006

CONTENTS OF THIS PART

This Code should be cited as:
Quapaw Code tit. ___, § ___ (2006).

THE CODE OF THE LAWS OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH)

TITLE 17. GAMING AND AMUSEMENTS

CHAPTER 1—GAMING ORDINANCE OF THE QUAPAW TRIBE OF OKLAHOMA

Section

NOTES

1986 and 1994 Ordinances: The Tribal Business enacted the "Quapaw Tribal Gaming Control Commission Ordinance," Ordinance No. 32986-B, on March 29, 1986. Subsequently the Business Committee enacted the "Electronic Video Gaming Machine Ordinance," Ordinance No. 91-01-100, on October 24, 1994.

1996 Ordinance: The Tribal Business Committee approved a revised gaming ordinance on October 24, 1996. The 1996 ordinance was expressly repealed by Bus. Comm. Res. No. 101604-C (Oct. 16, 2004) approving the 2004 ordinance.

2004 Ordinance: A new Tribal gaming ordinance was enacted by Quapaw Bus. Comm. Res. No. 101604-C on October 16, 2004. This ordinance was submitted to the Chairman of the National Indian Gaming Commission on November 15, 2004. By letter dated January 26, 2005, the Chairman of the NIGC requested that the Tribe make certain technical revisions to the ordinance.

2005 Amendments: Amendments to the 2004 gaming ordinance were adopted through Quapaw Bus. Comm. Res. No. 013105-A on January 31, 2005. The Tribal Business Committee enacted further technical amendments to the ordinance on February 14, 2005, through Resolution No. 021405-A, and this amended version of the ordinance was titled the "Revised Gaming Ordinance of the Quapaw Tribe of Oklahoma."

2009 Amendments: Amendments to this ordinance were adopted by Quapaw Bus. Comm. Res. No. 082709-B on August 27, 2009. The Tribal Business Committee enacted technical corrections to the ordinance on September 28, 2009, through Resolution No. 092809-A.

Approval by the Chairman of the National Indian Gaming Commission: The 2004 gaming ordinance, as amended and as adopted through Quapaw Bus. Comm. Res. No. 013105-A, on January 31, 2005, was approved by the Chairman of the National Indian Gaming Commission, Philip N. Hogen, by letter dated February 3, 2005. The 2009 amendments to the ordinance made pursuant to Quapaw Bus. Comm. Res. No. 082709-B, as well as the technical corrections adopted through Quapaw Bus. Comm. Res. No. 092809-A, were approved by the Chairman of the National Indian Gaming Commission, Philip N. Hogen, by letter dated September 30, 2009.

§ 1. Title, Authority and Purpose

A. Title

This ordinance shall be known as the Gaming Ordinance of the Quapaw Tribe of Oklahoma (O-Gah-Pah).

B. Authority

This ordinance is enacted pursuant to the authority vested in the Quapaw Tribal Business Committee through the Resolution Delegating Authority to the Quapaw Tribal Business Committee to Speak and Act in Behalf of the Quapaw Tribe of Indians duly adopted on August 19, 1956, and approved by the Commissioner of Indian Affairs on September 20, 1957, as amended, subject to the approval of the Chairman of the National Indian Gaming Commission under the Indian Gaming Regulatory Act, Pub. L. 100-497, 25 U.S.C. §§ 2701, et seq., and 18 U.S.C. §§ 1166-68. The Quapaw Tribe shall commence implementation of this Ordinance immediately upon enactment by the Business Committee, provided that the provisions of the Quapaw Tribal Gaming Ordinance of October 24, 1996, required by IGRA and its implementing regulations shall remain effective until this Ordinance is approved by the Chairman of the NIGC at which time this Ordinance shall govern the operation and regulation of Quapaw Tribal gaming facilities and activities on Tribal lands at which time the Ordinance of October 24, 1996, shall be revoked in whole and superseded in full by this Ordinance.

C. Purposes

The purposes of this Ordinance are to:

1. Establish the legal and regulatory framework for the regulation, control, and licensing for the operation of all gaming activities within the jurisdiction of the Tribe;

2. Make clear and explicit that a Tribal license to operate a gaming activity is a revocable privilege, not a right or property interest;

3. Ensure that the operation of Tribally regulated gaming will continue as a means of generating Tribal governmental revenues;

4. Ensure that Tribally regulated gaming is conducted fairly and honestly by both gaming operators and players, and that it remains free from corrupt, incompetent, unconscionable and dishonest persons and practices; and

5. Ensure that Tribal gaming laws are fairly enforced against all persons involved in gaming activities within the jurisdiction of the Tribe.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Comm. Res. No.

013105-A § I (Jan. 31., 2005); Quapaw Bus. Comm. Res. No. 021405-A § I (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B §§ 1(A)-(C) (Aug. 27, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B amended former subsections (A) and (B) of Section 1 of Title 17 of the Quapaw Code, renumbered them as subsections B and C, and added a new subsection A.

§ 2. Jurisdiction of the Tribe Over Gaming Activities

A. As a sovereign nation, the Quapaw Tribe possesses and exercises its governmental authority, powers, and jurisdiction and to the fullest extent permitted under law over all of its Indian Country, including over all gaming activities and gaming operations and other activities conducted within its Indian Lands, subject to the authority of the United States where and as specified under pertinent federal law.

B. The act of entry by any person or entity upon the premises of any gaming establishment subject to this Ordinance, the act of transacting business with any Tribal governmental instrumentality, agency, component, enterprise, authority, or other tribal entity subject to this Ordinance, the act of applying or accepting employment with a Gaming Operation, or the act of applying for any license, permit, or registration required by this Ordinance shall constitute consent to the civil and/or, where applicable, criminal jurisdiction of the Tribe, including consent to the jurisdiction of the courts and the governmental bodies and agencies of the Tribe, with respect to any civil or regulatory matter arising out of such consensual relationship with the Quapaw Tribe. The act of entry into the jurisdiction of the Tribe by an extraterritorial seller or merchant or other person engaged in commerce, or by their agent, shall be considered consent by such person or entity to the jurisdiction of the Tribe, including the jurisdiction of the courts, governmental bodies, taxing authorities, and regulatory agencies of the Tribe, for any dispute or other matter arising out of such transaction, regardless of where the sale or transaction was made or took place.

C. All entities or persons who apply for licenses under this Ordinance shall be required, as a condition to such licensing, to acknowledge the authority and jurisdiction of the Tribe, including the jurisdiction of the courts of the Tribe, the Tribal Gaming Agency, and the Tribal Gaming Commission, over their activities and transactions conducted within the Indian Country of the Tribe and with the Gaming Operations of the Tribe. As a further condition to such licensing, all such persons or entities shall be required to acknowledge their duty to comply with all applicable Tribal and federal laws and regulations and the terms of any gaming compact(s) between the Tribe and the State of Oklahoma then in effect and as may subsequently be amended.

Quapaw Bus. Comm. Res. No. 082709-B § 2 (Aug. 27, 2009).

NOTES

2009 Amendments: Section 2 was added to the ordinance pursuant to Quapaw Bus. Comm, Res. 082709-B § 2. Concerning new § 2, the *Report on Res. No. 082709-B* explained:

> "This is a new section to be added to the Ordinance. It contains a statement of the existing law relating to the jurisdiction of Indian tribal governments over Indian lands. It also contains, in new subsection (C), a requirement that all licensees consent to the jurisdiction of the Quapaw Tribe of Oklahoma (O-Gah-Pah). This is intended to make clear the jurisdiction of the Tribe over its gaming licensees, and to place licensees on notice that they are subject to the jurisdiction of the Tribe."

§ 3. Gaming Authorized

Classes I, II, and III gaming as authorized by the IGRA are hereby authorized by the Quapaw Tribe, provided that Class III gaming is authorized only to the extent authorized by the Tribal-State gaming compact(s) between the Tribe and the State of Oklahoma approved by the Secretary of the Interior or as may be later authorized pursuant to an amendment to existing compact(s) or any new Tribal-State gaming compact(s) upon approval of the Secretary of the Interior.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § II; Quapaw Bus. Comm. Res. No. 021405-A § II (Feb. 14, 2005).

§ 4. Ownership of Gaming

The Tribe shall have the sole propriety interest in and responsibility for the conduct of any gaming operation authorized by this Ordinance.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § III; Quapaw Bus. Comm. Res. No. 021405-A § III (Feb. 14, 2005).

§ 5. Definitions

For the purpose of this subtitle certain words shall have the meanings specified in this section. Words used in the singular include the plural, and words used in the plural include the singular. Words used in the masculine gender include the feminine and words used in the feminine gender include the masculine. The following definitions shall apply to gaming and other activities conducted under this Ordinance:

"Business Committee" means the Quapaw Tribal Business Committee, the elected governing body of the Tribe.

"Class I Gaming" means social games solely for prizes of minimal value or traditional forms of gaming engaged in by individuals as a part of, or in connection

with, tribal ceremonies or celebrations.

"Class II Gaming" means:

1. Lotto or the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith):

   a. which is played for prizes, including monetary prizes, with cards bearing numbers or other designations;

   b. in which the holder of the card covers such numbers or designations with objects, similarly numbered or designated, which are drawn or electronically determined; and

   c. in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including, (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo; and

2. Non-banking card games that:

   a. are explicitly authorized by the laws of the State of Oklahoma, or

   b. are not explicitly prohibited by the laws of the State of Oklahoma and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games or as otherwise authorized through a tribal-state compact between the Tribe and the State; and

   c. If played in the same location as bingo: lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.

"Class III Gaming" includes all other forms of gaming not coming within the definitions of Class I or II Gaming, including slot machines and electromechanical facsimiles of any game of chance.

"Commission" means the Tribal Gaming Commission, established to secure, oversee, and protect the honesty, integrity, fairness, and security of Quapaw Tribal gaming by adjudicating matters that come before it and perform such other functions as are authorized by this Ordinance.

"Executive Officer" means, with respect to an applicant who is or proposes to be a Qualified Gaming Financier, its chief executive officer, chief operating officer, if any, and chief financial officer, or the equivalent of these positions.

"Facility" and "Facilities" means the location(s) where any gaming activities of

the Tribe are conducted.

"Gaming Financier" means, unless otherwise provided herein or in a compact in effect with the State of Oklahoma, any provider of financing to a Gaming Operation.

"Gaming Operation" means each economic entity licensed by the Tribe that operates games, receives gaming revenues, issues gaming prizes and pays the expense of operation. Said Gaming Operation may be operated by the Tribe or by a management contractor.

"Gaming Related Vendor" means any person or business entity that supplies any goods or services directly related to the gaming operation. This includes:

1. Suppliers/Manufacturers of gaming equipment and devices including electronic, computer, or technological aids to games;

2. Providers of accounting services; and

3. Gaming Financiers.

"Gross Gaming Revenue" means the annual total amount of cash wagered on Class II and Class III games and admission fees (including table or card fees, if any, less any amounts paid out as prizes or paid for prizes awarded.

"Indian Lands" shall have the same meaning as is set forth under 25 U.S.C. § 2703(4).

"Key Employee" means the four most highly compensated persons in the gaming operation and persons who perform one or more of the following functions:

1. Bingo Caller;

2. Counting room supervisor;

3. Chief of security;

4. Custodian of gaming supplies or cash;

5. Floor manager;

6. Dealer;

7. Custodian of gambling devices including persons with access to cash and accounting records within such devices;

8. Pit bosses;

9. Croupier;

10. Approver of credit; and

11. If not otherwise included, any other person whose total cash compensation is in excess of $50,000 per year.

"Licensee" means any person or entity holding a valid and current license pursuant to the provisions of this Gaming Ordinance.

"Management Contract" means any contract, subcontract, or collateral agreement between Tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

"Net Revenue" means the gross gaming revenue of Indian gaming activity less amounts paid out as, or paid for, prizes and total gaming-related operating expenses, excluding management fees.

"NIGC" means the National Indian Gaming Commission.

"Non-Gaming Vendor" means any person or business entity that provides nonessential goods or services that are not directly related to gaming. This includes but is not limited to:

1. Providers or subcontractors of food and beverage services and goods;

2. Providers or subcontractors of entertainment or entertainment services;

3. Providers or subcontractors of non-gaming products, such as gifts, tobacco, or other non-gaming products;

4. Providers or subcontractors of cash counting machines; and

5. Providers or subcontractors of any other non-gaming machine, equipment, or device;

"Primary Management Official" or "PMO" means

1. The person having management responsibility for a management contract;

2. Any person who has authority:

   a. To hire and fire employees;

   b. To set up working policy for the Gaming Operation;

3. The officers, directors, or members of any Tribal governmental instrumentality or other Tribal entity that is established to operate, manage, or direct the Tribe's Gaming Operations.

4. The chief financial officer or other person who has financial management responsibility.

"Qualified Gaming Financier" means any Gaming Financier that is: a federally or state regulated bank or commercial lending institution; a broker-dealer registered under the Securities Exchange Act of 1934, as amended; an investment company registered under the Investment Company Act of 1940, as amended; an investment advisor registered under the Investment Advisors Act of 1940, as amended; or an insurance company registered under any federal or state insurance agency.

"Secretary" means the Secretary of the Interior of the United States.

"Tribal Gaming Agency" or "TGA" means the administrative department within the Tribal government responsible for day-to-day regulation of the Tribe's gaming operation(s), including the issuance of all gaming licenses and the authority to enforce compliance with this Ordinance and all applicable federal laws related to tribal gaming.

"Tribal Gaming Agency Director" or "TGA Director" or "Director" means the head of the Tribal Gaming Agency charged with overall supervisory and administrative responsibility for directing the Tribe's gaming licensing program; for monitoring the Facilities' compliance with the Indian Gaming Regulatory Act; and for general enforcement of this Ordinance and all regulations issued in relation hereto.

"Tribe" means the Quapaw Tribe of Oklahoma (O-Gah-Pah)."

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § IV; Quapaw Bus. Comm. Res. No. 021405-A § IV (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 3 (Aug. 27, 2009); Quapaw Bus. Comm. Res. 092809-A (Sept. 28, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B amended the former Section 4 of Title 17 of the Quapaw Code by adding definitions for "Executive Officer," "Facility" and "Facilities," "Gaming Financier," "Indian Lands," and "Qualified Gaming Financier," by deleting the former definitions for "Gross Gaming Revenue," and "Tribal Lands," and by reorganizing the definitions into alphabetical order and deleting the capital letter designations for each defined term. Additionally, pursuant to Quapaw Bus. Comm. Res. No. 092809-A, a correction was adopted to the citation to 25 U.S.C. § 2703(4) in the definition of "Indian Lands" to "facilitate their [the amendments] approval by the Chairman of the NIGC."

§ 6. Use of Gaming Revenue

Net revenues from Class II gaming shall be used only for the following purposes:

1. to fund tribal government operations and programs;
2. to provide for the general welfare of the Tribe and its members;

3. to promote Tribal economic development;

4. to donate to charitable organizations; or

5. to help fund operations of local government agencies.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § V; Quapaw Bus. Comm. Res. No. 021405-A § V (Feb. 14, 2005).

§ 7. Audit

A. The Tribe shall ensure that the facility is subjected to an independent audit of its gaming operations annually and the Director of the Tribal Gaming Agency acting on behalf of the Tribe shall submit the resulting audit reports to the National Indian Gaming Commission.

B. All gaming-related contracts that result in the purchase of supplies, services, or concessions in excess of $25,000 annually, except contracts for professional legal and accounting services, shall be specifically included in the audit.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § VI; Quapaw Bus. Comm. Res. No. 021405-A § VI (Feb. 14, 2005).

§ 8. Protection of the Environment and Public Health and Safety

All Tribal gaming facilities shall be constructed, maintained, and operated in a manner that adequately protects the environment, public health and safety of the community.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § VII; Quapaw Bus. Comm. Res. No. 021405-A § VII (Feb. 14, 2005).

§ 9. Gaming Facility License Required

The Tribe shall issue a separate license to each place, facility, or location where gaming is conducted under this Ordinance. Every gaming facility shall display in a prominent place a current and valid license for that location.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § VII; Quapaw Bus. Comm. Res. No. 021405-A § VII (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 5 (Aug. 27, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 5 changed the name of the former Section 8 of Title 17 of the Quapaw Code.

§ 10. Gaming Commission

A. Establishment and Purpose

In order to regulate gaming on Indian lands, the Tribal Gaming Commission is hereby established, and is delegated exclusive jurisdiction to adjudicate appeals of all final actions and decisions of the Tribal Gaming Agency, subject to appellate review by the Tribal Court, as provided under law. The Commission is vested with all necessary powers to:

1. Hear and adjudicate:
   a. patron disputes;
   b. licensing disputes arising under this Ordinance;
   c. appeals of enforcement actions; and
   d. appeals of disciplinary actions related to Tribal Gaming Agency staff;
2. Classify games or review game classification decisions of the Tribal Gaming Agency;
3. Resolve questions of interpretation in relation to this ordinance and such regulations as may be promulgated hereunder;
4. Develop and apply standards, rules, and procedures governing the conduct of hearings before the Commission;
5. Issue advisory opinions interpreting the Tribal-State Gaming Compact, this Ordinance and any rules or regulations adopted pursuant hereto on request of the TGA or the Business Committee;
6. Issue subpoenas, take testimony, and conduct hearings; and
7. Handle such other matters and conduct such other activities as are consistent with the power and authority delegated the Commission under this Ordinance.

B. Qualifications

The Commission shall be comprised of a Commissioner, who shall be appointed by the Business Committee by a majority vote, and such staff as may be needed to carry out the responsibilities of the Commission. The Business Committee may also appoint an alternate(s) who may act for the Commissioner in the event that the Commissioner is unavailable for any reason or in the event of a recusal by the Commissioner. Only persons who have reached the age of twenty five (25) years shall be eligible for appointment as Commissioner or to serve as an alternate. No

person who has been convicted of any gambling or bribery offense or any felony is eligible for appointment to the Tribal Gaming Commission. Neither shall the Gaming Commissioner or any alternate have any financial interest in, or management responsibility for, any gaming activity governed by this Ordinance, including a Management Contract or an entity licensed under this Ordinance.

C. Commission Clerk and Staff

Other than specific employees designated in this Ordinance, the Tribe may employ and compensate a Commission Clerk and any other support staff it deems necessary to carry out the duties of the Commission. The Commission Clerk and any support staff will be compensated for their services. No person who has been convicted of any gambling or bribery offense or any felony is eligible to serve as staff to the Tribal Gaming Commission.

D. Terms

The Gaming Commissioner shall be appointed to a term of four years and may be reappointed at the discretion of the Business Committee.

E. Powers

The Tribal Business Committee delegates the following powers to the Commission, not to be removed, except by amendment of this Ordinance:

1. To secure, oversee, and protect the honesty, integrity, fairness, and security of Quapaw Tribal gaming by adjudicating matters that come before it;
2. To adopt and submit to the Tribal Business Committee an annual operating budget as appropriate;
3. To adopt rules and procedures consistent with its delegated powers;
4. To develop procedures for resolving patron disputes;
5. To issue subpoenas, take testimony, and conduct hearings;
6. To resolve patron disputes not resolved by the gaming operation;
7. To conduct hearings to review actions and decisions of the Tribal Gaming Agency in accordance with Ordinance pertaining to hearings and appeals;
8. To preside over appeals of actions or decisions of the Tribal Gaming Agency and reverse or make final a determination of suspension or revocation for cause issued by the Tribal Gaming Agency following a fair and impartial adjudication;
9. To develop and recommend to the Tribal Business Committee for adoption such regulations as may be needed to fully implement this ordinance;

and

10. To classify games.

F. Rules and Procedures

The Commission shall adopt rules for the conduct of hearings, which shall include the following provisions:

1. The Commissioner will conduct hearings and ensure that such hearings are conducted efficiently and in accordance with principles of due process of law;

2. Commission hearings shall be open to the public and minutes or other records shall be kept;

3. The Commission may take such steps as necessary to protect the confidentiality of the Tribe's proprietary information and to conduct deliberations related to adjudications, including in-camera inspections of books, records, and any evidence before it;.

4. All decisions of the Commission shall be issued in writing and shall be final and such other requirements as set forth herein shall be met; and

5. The Commission shall establish and make public written standards and procedures for the handling of all adjudications, including notice requirements, evidence, and time frames.

G. Compensation

The Business Committee shall establish the Commissioner's rate of compensation, which shall not be diminished during his or her term in office. The Commissioner and any Commission staff shall be reimbursed for all actual expenses incurred on Commission business, including necessary travel expenses, subject to the approval of the Business Committee.

H. Vacancy and Removal

1. Vacancy. The Commissioner's seat shall be deemed immediately vacant upon any gambling offense or bribery or of any felony conviction. The Commissioner shall advise the Business Committee of any need for recusal in any matter or of any anticipated absence or unavailability for any period of time in excess of two weeks in which case the Business Committee shall notify or appoint an alternate to fulfill the duties of the Commissioner as soon as possible, but no later than thirty (30) days from the date of absence, unavailability or vacancy.

2. Removal. The Commissioner may only be removed for cause, which shall include: excessive use of intoxicants or controlled substances; use of office for personal gain; failure to perform Commission duties; violation of this

Ordinance or other law or regulation of the Tribe or the Indian Gaming Regulatory Act; or bringing discredit or disgrace to the Commission or the Tribe. Removal shall be effected by a majority vote of the Business Committee at a meeting duly called by the Business Committee to consider said removal.

3. Suspension. The Business Committee may suspend the Commissioner if he or she is charged with any felony or any gambling or bribery offense until such charges are dismissed or the Commissioner is convicted or acquitted. An alternate will fill such vacancy until the matter is resolved.

4. Due Process. In any proceeding pursuant to this subsection a Notice of Proposed Suspension and/or Removal shall be provided at least fourteen (14) days in advance of the date set for such meeting of the Business Committee and shall set forth in particular the basis for such proposed action with sufficient specificity as to permit the preparation of an answer to such allegations. The decision of the Business Committee shall be final and non-appealable.

I. Prohibitions

The Commissioner shall refrain at all times during his or her term of office from participating in any gaming activities at Facility or any other gaming establishment under the Commission's jurisdiction and shall not adjudicate any matter in which a party to the dispute is a member of the Commissioner's immediate family or is an entity in which the Commissioner has a pecuniary interest. Should the need for recusal arise, the Commissioner shall so notify the Chairman of the Business Committee in order that an alternate may be selected to carry out the duties of the Commissioner in relation to the matter. For purposes of this provision immediate family shall include: spouse, child, sibling, parent, grandparent, and grandchildren, and such other person or persons with whom the Commissioner may have a close personal relationship.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § IX; Quapaw Bus. Comm. Res. No. 021405-A § IX (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 6 (Aug. 27, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 6 added the following language to the former Section 9(A) of Title 17 of the Quapaw Code: "and is delegated exclusive jurisdiction to adjudicate appeals of all final actions and decisions of the Tribal Gaming Agency, subject to appellate review by the Tribal Court, as provided under law."

§ 11. Tribal Gaming Agency

A. Establishment and Purpose

In order to issue licenses to gaming related vendors, key employees, PMOs, and register all other vendors in compliance with the law and to ensure that gaming is conducted in accordance with this Ordinance and any related Tribal ordinances, rules and/or regulations, the Indian Gaming Regulatory Act, and all applicable rules and regulations, the Tribal Gaming Agency) is hereby established and, except as otherwise provided herein, is delegated exclusive jurisdiction to hear and decide all matters under this Ordinance in the first instance.

B. Disclaimer of Liability

Issuance of any license pursuant to this Ordinance does not constitute the creation of a duty by the Tribe to indemnify a licensee for any wrongful acts against the public, or to guarantee the quality of goods, services, or expertise of a licensee, or to otherwise shift responsibility from the licensee to the Tribe for proper training, conduct, or equipment of self or agents, even if specific regulations require standards of training, conduct, or inspection. Nor does it constitute a waiver of any Tribal sovereign immunity from suit.

C. Tribal Gaming Agency Director

To implement this Ordinance with honesty and integrity, the Business Committee will appoint a Director of the Tribal Gaming Agency to direct its day-to-day activities. The Director shall report directly to the Tribal Administrator. The Director shall receive compensation for his or her services, which shall not be diminished during his or her term in office. The Director shall serve a term of three (3) years. The Director may be removed from office for cause by a majority vote of the Business Committee. No person who has been convicted of any gambling or bribery offense or any felony is eligible to serve as the Director of Tribal Gaming Agency. The Director of the Tribal Gaming Agency will make every effort to work closely and cooperatively with the staff, Business Committee, the Tribal Administration, the Tribal Gaming Commission, licensees, registrants, and applicants.

D. Tribal Gaming Agency Staff

Other than any specific employees designated in this Ordinance, the Tribal Gaming Agency, subject to the authorization of the Business Committee, will employ such staff as may be necessary to carry out its duties, but which at a minimum will include compliance officers and licensing officials, as needed. No person who has been convicted of any gambling or bribery offense or any felony is eligible to serve as the Director of Tribal Gaming Agency or in any staff position. The Director of the Tribal Gaming Agency and staff will make every effort to work closely and

cooperatively with the Tribal Business Committee, Tribal Administration, Tribal Gaming Commission, licensees, registrants, and applicants.

E. Duties

The Tribal Business Committee delegates the following powers to the Tribal Gaming Agency, not to be removed except by formal amendment of this Ordinance:

1. To secure, monitor, and safeguard the honesty, integrity, fairness, and security of all Tribal gaming operations;

2. To adopt and submit to the Tribal Business Committee an annual proposed operating budget;

3. To submit to the Business Committee a quarterly report of the status of all its activities and gaming matters;

4. To develop licensing and background procedures applicable to the gaming operation, its employees, gaming vendors, and gaming equipment;

5. To classify and license electronically aided Class II games, provided that the TGA may, seek game classification advisory opinions from the Commission;

6. To maintain vendor licensing and registration systems;

7. To develop and recommend to the Business Committee for adoption such regulations as may be needed to fully implement this ordinance, including recommendations for amendment;

8. To issue, renew, suspend, and revoke licenses of PMOs and key employees upon completion of background investigations in accordance with Agency procedures for same;

9. To conduct background investigations on PMOs and key employees according to requirements at least as stringent as those in 25 C.F.R. Parts 556 and 558;

10. To forward complete employment applications and the results of background investigations for PMOs and key employees to the NIGC. Said applications must include the notices as required hereunder;

11. To forward completed investigative reports on each background investigation for each PMO and key employee to the NIGC prior to issuing a permanent license;

12. To review PMO and key employee applicant activities, criminal record, if any, and reputation, habits, and associations to make a finding of their eligibility for employment in and/or contracting with the gaming operation;

13. To ensure that the Tribal gaming facilities are constructed, maintained, and operated in a manner that adequately protects the environment, public health and safety by reporting suspected violations to the Business Committee and other appropriate divisions of Tribal government for appropriate action;

14. To ensure that audits as required hereunder are conducted and to transmit the reports to the NIGC;

15. To monitor gaming activities to ensure compliance with this Ordinance, the Indian Gaming Regulatory Act, the Tribal-State gaming compacts with the State of Oklahoma, and all other laws applicable to the Tribe's gaming activities, including rules and regulations issued thereunder;

16. To work with law enforcement and regulatory agencies as needed to carry out the Tribal Gaming Agency's duties and responsibilities;

17. To investigate possible violations of this Ordinance and the Indian Gaming Regulatory Act, including rules and regulations issued thereunder and take appropriate enforcement action, which may include the impoundment of evidence and winnings until the matter is resolved;

18. To ensure compliance with the Tribe's internal control standards through oversight and enforcement;

19. To establish standards and procedures for the licensing of gaming related vendors;

20. To develop registration processes and procedures for all non-gaming related vendors;

21. Represent the Tribal Gaming Agency before the Commission;

22. Carry out all duties and functions necessary to implement, carry-out, and enforce the provisions of this Ordinance, including, but not limited to, the development of internal agency forms, schedules, guidance documents, policies and procedures; and

23. Issue such orders and directives as may be necessary to ensure the Tribe's compliance with all applicable laws and the terms of any Tribal-State gaming compact, including, but not limited to orders to compel, cease and desist, and cure.

F. Suspension; Removal for Cause

The Director of the Tribal Gaming Agency may be suspended or removed by the Business Committee, but in the case of removal, he or she shall only be removed for cause, which shall include: excessive use of intoxicants or controlled substances; use of office for personal gain; failure to perform assigned duties; failure to maintain the

confidentiality of licensing information entrusted to it; violation of this Ordinance or other law or regulation of the Tribe or the Indian Gaming Regulatory Act; or bringing discredit or disgrace to the Commission or the Tribe. Removal shall be effected by a majority vote of the Business Committee at a duly called meeting of the Business Committee to consider said removal. Notice of Proposed Suspension and/or Removal shall be provided at least fourteen (14) days in advance of the date set for such meeting of the Business Committee and shall set forth in particular the basis for such proposed action with sufficient specificity as to permit the preparation of an answer to such allegations. The decision of the Business Committee shall be final and non-appealable. The Director shall have hiring, firing, and disciplinary authority over staff, subject to the adjudicatory oversight of the Tribal Gaming Commission.

G. Prohibitions

The Director of the Tribal Gaming Agency and staff shall refrain at all times from participating in any gaming activities at any gaming establishment under the Agency's authority and neither the Director nor staff shall handle any matter in which an applicant or subject is a member of his or her immediate family or is an entity in which he or she has a pecuniary interest. Should the need for recusal arise, the Director and/or staff member shall so notify the Tribal Administrator and another member of the staff shall handle such matter. For purposes of this provision immediate family shall include: spouse, child, sibling, parent, grandparent, and grandchildren, and such other person or persons with whom the Director and/or staff member may have a close personal relationship.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § X; Quapaw Bus. Comm. Res. No. 021405-A § X (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 7 (Aug. 27, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 7 amended the former subsections (A), (B), (D), and (E) of Section 10 of Title 17 of the Quapaw Code. Additionally, § 7 of Quapaw Bus. Comm. Res. No. 082709-A added the following language to the former § 10(A), currently § 11(A): "and, except as otherwise provided herein, is delegated exclusive jurisdiction to hear and decide all matters under this Ordinance in the first instance." Concerning § 10(A), the *Report on Res. No. 082709-B* explained that "[c]hanges are made to Section 10(A) to clarify that the Tribal Gaming Agency has the exclusive jurisdiction to hear and decide gaming matters in the first instance."

§ 12. Licensing for Key Employees and PMOs

A. Application Forms

1. Each person or entity having a management contract, each primary management official and each key employee shall complete an application for an initial license or renewal of an existing gaming license for each gaming

establishment on an application form prescribed by the Tribal Gaming Agency. The application shall set forth:

a. the name under which the applicant transacts or intends to transact business on Indian Lands;

b. the location of the gaming establishment for which the gaming license is sought; and

c. the application shall be signed by the applicant if a natural person, or, in the case of an association or partnership, by a member or partner thereof, or, in the case of a corporation, by an executive officer thereof, or by some other person specifically authorized by the corporation to sign the application, in which case written evidence of the signatory's authority shall be attached. The applicant shall provide evidence of authority of the signatory or any other representative to act for and bind the applicant. If any change is made in that authority, the Tribal Gaming Agency shall be immediately informed in writing and, until that information is filed with the Tribal Gaming Agency, any action of the representative shall be presumed to be that of the applicant.

B. Notice

1. The following notice shall be placed on the application form of a key employee or a PMO before that form is filled out by the applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. § 2701, et seq. The purpose of the requested information is to determine the eligibility of individuals to be employed in a gaming operation. The information will be used by National Indian Gaming Commission members and staff who have need for the information in the performance of their official duties. The information may be disclosed to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory investigations or prosecutions or when pursuant to a requirement by a Tribe or the National Indian Gaming Commission in connection with the hiring or firing of an employee, the issuance or revocation of a gaming license, or investigations of activities while associated with a Tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a Tribe's being unable to hire you in a primary management official or Key employee position. The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply SSN may result in errors in processing your application.

2. Existing key employees and PMOs, if any, shall be notified in writing that they shall either:

a. Complete a new application form that contains a Privacy Act Notice; or

b. Sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice.

3. The following notice shall be placed on the application for a key employee or PMO before that form is filled out by an applicant:

A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment. (U.S. Code, Title 18, Section 1001).

4. The Tribal Gaming Agency shall notify in writing existing key employees and primary management officials, if any, that they shall either:

a. Complete a new application form that contains a notice regarding false statements; or

b. Sign a statement that contains the notice regarding false statements.

C. Payment of Application Fee

Each application shall be accompanied by payment of an application fee established by the Tribal Gaming Agency to which shall include the cost of the background investigation conducted pursuant to the requirements of this Ordinance.

D. Organizational Chart

A management contractor shall file, along with the application, an organizational chart of its management organization and job descriptions for employees of the gaming operation. The chart shall identify which employees are or will be the primary management officials and the key employees of the gaming operation.

E. Description on Application

An application for a gaming license shall include a description of the place, facility, or location on Indian Lands where the applicant will operate a gaming operation or where the applicant will be employed.

F. Other Gaming License

Any applicant for a gaming license shall disclose whether he/she has ever had a management contract in another gaming jurisdiction, whether another gaming jurisdiction has ever revoked, suspended, or denied the applicant a gaming license, or is presently providing management or management services in another gaming jurisdiction, and a description of the location of each such operation.

G. Management Contractor's Application

A management contractor's application shall include information required by 25 U.S.C. § 2711 and 25 C.F.R. § 537.1.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XI; Quapaw Bus. Comm. Res. No. 021405-A § XI (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 8 (Aug. 27, 2009).

§ 13. Background Investigations

The Tribal Gaming Agency shall conduct, or cause to be conducted, a background investigation of the management contractor, gaming related vendor executive officers, and each applicant for a position who is designated as a key employee or PMO sufficient to make a qualification determination under Section 12, Subsection C below. In conducting the investigation, the Tribal Gaming Agency shall keep confidential the identity of each person interviewed in the course of the investigation.

A. The Tribal Gaming Agency shall request from each primary management official and from each key employee all of the following information:

1. full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

2. currently and for the previous ten (10) years: business and employment positions held, ownership interests in those businesses, business addresses, residence addresses since age 18, and drivers license number(s);

3. the names and current addresses of at least five (5) personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (A)(2) of this Section;

4. current business and residence telephone numbers;

5. a description of any existing and previous business relationships with Indian Tribes or Alaskan Natives, including ownership interests in those businesses;

6. a description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;

7. the name and address of any licensing or regulatory agency with which the person has filed an application for license or permit related to gaming, whether or not such license or permit was granted;

8. for each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date

and disposition, if any;

9. for each misdemeanor conviction or misdemeanor prosecution (excluding minor traffic violations) within ten (10) years of the date of the application, the name and address of the court involved and the date and disposition;

10. for each criminal charge (excluding minor traffic charges) whether or not there is a conviction if such criminal charge is within ten (10) years of the date of the application and is not otherwise listed pursuant to paragraph 9 or 10 of this Section, the criminal charge, the name and address of the court involved, and the date and disposition;

11. the name and address of any licensing or regulatory agency with which the applicant has filed an application for an occupational license or permit, whether or not such license or permit was granted and a description and explanation of any disciplinary charges filed, whether or not discipline was imposed by any state or tribal regulatory authority;

12. a current photograph;

13. fingerprints of the applicant shall be taken by the Quapaw Tribal Gaming Agency and transmitted to the NIGC in order that a criminal history check. The criminal history check will include a check through the Federal Bureau of Investigation National Crime Information Center may be obtained; and

14. any other information the Tribal Gaming Agency deems relevant.

B. The Tribal Gaming Agency shall conduct an investigation sufficient to make a determination of employee eligibility under Subsection C.

C. Eligibility Determination

1. The Tribal Gaming Agency shall ensure that any person involved with the conduct of gaming activities is a person of good character, honesty, and integrity.

2. The Tribal Gaming Agency shall review a person's prior activities, criminal record, if any, and reputation, habits, and associations to make a finding concerning the eligibility of such person for employment in the gaming operation. If the Tribal Gaming Agency determines that employment of the person poses a threat to the public interest of the Tribe or to the effective regulation and control of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental to the conduct of gaming, the gaming operation shall not employ that person.

3. Only persons who have achieved the age of eighteen (18) shall be eligible for a tribal gaming license.

D. Procedures for Forwarding Applications and Reports for Key Employees and PMOs to the NIGC.

1. When a key employee or primary management official begins work at a gaming operation authorized by this Ordinance, the Tribal Gaming Agency shall forward to the NIGC a completed application for employment and conduct the background investigation and make the determination referred to in Subsection C above.

2. The Tribal Gaming Agency shall forward the report referred to in Subsection E below to the NIGC within sixty (60) days after an employee begins work or within sixty (60) days of the approval of this Ordinance by the NIGC Chair.

3. The gaming operation shall not employ as a key employee or primary management official a person who does not have a license after ninety (90) days.

E. Report to the NIGC

1. Pursuant to the procedures set out in Subsection D of this Ordinance above, the Tribal Gaming Agency shall prepare and forward to the NIGC an investigative report on each background investigation. An investigative report shall include all of the following:

a. the steps taken in conducting the background investigation;

b. the results obtained;

c. the conclusions reached; and

d. the basis for those conclusions.

2. The Tribal Gaming Agency shall submit, with the report, a copy of the eligibility determination made under Subsection C.

3. If a license is not issued to an applicant, the Tribal Gaming Agency:

a. shall notify the NIGC; and

b. may forward copies of its eligibility determination and Investigative report (if any) to the NIGC for inclusion in the Indian Gaming Individuals Records System.

4. With respect to key employees and PMOs, the Tribe shall retain applications for employment and reports, if any, of background investigations for inspection by the NIGC Chair or his or her designee for no less than three (3)

years from the date of termination of employment.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XII; Quapaw Bus. Comm. Res. No. 021405-A § XII (Feb. 14, 2005).

§ 14. Issuance of Licenses; Renewal; Suspension

A. If, within a thirty (30) day period after the NIGC receives a report, the NIGC notifies the Tribal Gaming Agency that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a PMO for whom the Tribal Gaming Agency has provided an application and investigative report to the NIGC, the Tribal Gaming Agency may issue a license to such applicant.

B. The Tribal Gaming Agency shall respond to a request for additional information from the NIGC Chair concerning a key employee or a PMO who is the subject of a report. Such a request shall suspend the thirty (30) day period described above until the NIGC Chair receives the additional information.

C. If, within the thirty (30) day period described above, the NIGC provides the Tribal Gaming Agency with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the Tribal Gaming Agency has provided an application and investigative report to the NIGC, the Tribal Gaming Agency shall reconsider the application, taking into account the objections itemized by the NIGC. The Tribal Gaming Agency shall make the final decision whether to issue a license to such applicant.

D. The Tribal Gaming Agency may issue or renew a gaming license to an applicant who submits a proper and completed application and pays the appropriate annual fee, provided that no license shall be issued to or renewed for an applicant who:

1. is not a person of good character, honesty, and integrity;

2. is not found by the Tribal Gaming Agency to be eligible for employment under the criteria of Section 12, Subsection C;

3. has had, or who is in privity with anyone who has had, a gaming license revoked for cause in any jurisdiction;

4. is delinquent in the payment of any obligation owed to the Tribe or Tribal Gaming Agency pursuant to this Ordinance or a management contract; and

5. has failed to comply with the Act, regulations of the NIGC, this Ordinance or regulation that the Tribe or Tribal Gaming Agency has or may adopt.

E. Validity

Each gaming license shall be valid for a two-year period commencing January 1 and ending December 31 of a respective year.

F. Assignment/Transfer/Display

A gaming license may not be assigned or transferred and is valid only for use by the person in whose name it is issued and at the gaming establishment for which it is issued. A gaming license shall be conspicuously displayed at all times at the gaming establishment for which it is issued.

G. No Class III Gaming License

Except as authorized by the Tribal-State Compact, no gaming license shall be issued for any Class III gaming.

H. Licensing of Games

All electronically aided Class II games shall be licensed by the Tribal Gaming Agency. In cases where there is uncertainty with regard to the proper classification of a particular game, the Director may conduct a game classification analysis or seek a Game Classification opinion from the Commission, which shall occur prior to the issuance of such license, provided that no such analysis or opinion shall be required in the event that such game or equipment has been determined to be a Class II game by the NIGC, any court of competent jurisdiction or any gaming jurisdiction with authority recognized by the Quapaw Tribal Gaming Agency. The Tribal Gaming Agency shall maintain at all time an inventory of all electronically aided game units, including individual serial numbers.

I. License Suspension

1. If, after the issuance of a gaming license, the Tribal Gaming Agency receives from the NIGC, or any other gaming jurisdiction, reliable information indicating that a key employee or a primary management official is not eligible for employment, the Tribal Gaming Agency shall suspend such license and shall notify in writing the licensee of the suspension and the proposed revocation.

2. Upon suspension, the Tribal Gaming Agency shall within five (5) calendar days forward a copy the notification of the suspension and any other relevant documentation to the Gaming Commission.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XII; Quapaw Bus. Comm. Res. No. 021405-A § XIII (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 9 (Aug. 27, 2009).

§ 15. Gaming License and Fees

A. Gaming Licenses Required

1. All employees of a Quapaw Tribal gaming facility and all gaming related vendors, suppliers, and/or distributors, including principals, technicians, or other persons with access to gaming machines, and/or secure, sensitive, or restricted areas of the gaming operation, must apply for a license prior to the initiation of the licensees' activities.

2. Applicants for any Quapaw gaming license must fully complete the pertinent gaming license application truthfully and honestly and provide the Tribal Gaming Agency all necessary documents and information to obtain a background investigation, including any additional information that may be requested by the Tribal Gaming Agency.

3. All licensees have a continuing obligation to notify the Tribal Gaming Agency in the event of any change of circumstance causing any information on his or her gaming license application to become obsolete, including but not limited to: a criminal charge, arrest, or conviction for any criminal wrongdoing, excluding minor traffic violations;; the filing of a petition for bankruptcy; receipt of a federal, Tribal, or state tax lien; a change of name, address, or other personal information; or entry of a civil judgment.

4. An employee gaming license shall be valid for a period of two-years. Licensees must submit an application for renewal to the Tribal Gaming Agency not less than ninety (90) days prior to the date of expiration of his or her gaming license in accordance with the policies and procedures established by the TGA.

5. Separate licenses will be issued for employees of each Quapaw Tribal gaming operation and may only be transferred between facilities in accordance with the policies and procedures established by the TGA.

B. License Fees

The Quapaw Tribal Gaming Agency shall establish a license and fee schedule for implementation on or about the first day of each calendar year for each of the following types of licenses:

1. Gaming Employee License—All gaming operation employees must be licensed in accordance with the standards established in this Ordinance. The Tribal Gaming Agency shall be authorized to issue temporary employee licenses and to place conditions or restrictions on any employee gaming license.

2. Primary Management Officials/Key Employees—All key employees and primary management officials must be licensed in accordance with the

standards established in this Ordinance. The Tribal Gaming Agency shall be authorized to issue temporary licenses and to place conditions or restrictions on any key employees and primary management official gaming license. Key employees and primary management officials must provide a financial history disclosure form.

3. Gaming Vendors—All vendors, suppliers, and distributors of gaming and gaming related equipment and supplies must be licensed annually.

4. Gaming Machines—Class II and Class III gaming machines and systems must be licensed annually.

C. Employee Credentials

The Tribal Gaming Agency shall be authorized to establish a program and standards for the issuance of credentials to employees of any instrumentality of the Quapaw Tribe for employment in any businesses or enterprise collateral to a Quapaw Tribal gaming operation. Such standards shall include provisions for a background investigation to include, at a minimum, a criminal history check.

D. Adjustment of Annual Fee

The Tribal Business Committee may adjust the amount of the annual fees for gaming licenses and other fees, upon recommendation by the Tribal Gaming Agency, provided that any increase shall take effect only on the ensuing January 1.

E. Payment in Advance

Annual license fees shall be paid in advance of the initial issuance or renewal of a license.

F. Prorated Annual Fee

The fee for licenses required to be paid or renewed annually shall be prorated in the case of each initially issued license.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XIII; Quapaw Bus. Comm. Res. No. 021405-A § XIV (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 10 (Aug. 27, 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 10 amended former Sections 14(A)(1)-(3) and 14(C) and (E) of Title 17 of the Quapaw Code, deleted former Sections 14(B)(1)-(4), and added new subsections 15(A)(4) & (5) and B(1) through (4).

§ 16. Registration for Non-Gaming Related Vendors

A. All non-gaming related vendors, suppliers, and distributors will be subject to "registration." No vendor may transact any business with the Gaming Operation unless and until such vendor has completed the non-gaming related vendor registration process with Tribal Gaming Agency.

B. All non-gaming related vendors will register with the Tribal Gaming Agency. Registration shall include:

1. For persons:
   a. full name;
   b. social security number(s);
   c. address;
   d. date and place of birth;
   e. citizenship;
   f. gender; and
   g. employer.
2. For business entities:
   a. the name of the business,
   b. the purpose of business;
   c. the goods or services to be provided to the gaming operation;
   d. current business address and telephone numbers;
   e. the location of the gaming establishment for which the gaming license is sought;
   f. the name under which the applicant transacts or intends to transact business on Indian Lands; and
   g. such other information as the Director of Licensing and Enforcement may require.

C. The Tribal Gaming Agency shall keep all non-gaming related registration materials on file and provide these materials to the Tribal Business Committee, any independent auditors, the NIGC, or the Gaming Commission.

D. The TGA shall ensure that any additional or different requirements in relation to vendors set forth in any gaming compact between the Tribe and the State shall be followed pursuant to the terms of such compact.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XIV; Quapaw Bus. Comm. Res. No. 021405-A § XV (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 12 (Aug. 27, 2009).

§ 17. Regulation of Qualified Gaming Financiers

A. Licensing of Qualified Gaming Financiers

Any Qualified Gaming Financier may be licensed as a gaming-related vendor under this Ordinance upon receipt by the TGA of an application in the form required by the TGA, and upon payment of the required licensing fee, if any.

B. Standards and Procedures

The TGA shall promulgate standards and procedures for the issuance of a Qualified Gaming Financier license consistent with this Ordinance, subject to the approval of the Commission.

C. Scope of License

1. A license granted to a Qualified Gaming Financier shall constitute a license to the named applicant only and shall be effective only with respect to such applicant's activities as a Gaming Financier, and those activities necessary or incidental thereto, and no other activity which would otherwise cause the applicant to constitute a gaming-related vendor.

2. Notwithstanding anything to the contrary in this Ordinance, none of the following persons or entities, solely in their capacity as such, shall be deemed to be a Gaming Financier or a Gaming Related Vendor subject to licensing under this Ordinance: (a) any person or entity holding any debt securities, notes, bonds, or other commercially traded instruments of a Gaming Operation initially purchased from such Gaming Operation by a Qualified Gaming Financier; and (b) any trustee, or entity performing similar functions, with respect to any debt securities, notes, bonds or other commercially traded instruments of a Gaming Operation.

D. Obligations of Qualified Gaming Financiers

Except as otherwise provided herein, or as required by the TGA pursuant to its duties and powers under this Ordinance, applicants licensed as Qualified Gaming Financiers hereunder will not be subject to regular reporting requirements, including such reporting requirements applicable to other licensees, during the term of their licenses. If a Qualified Gaming Financier's license lapses or otherwise terminates as herein provided, the recipient of such license shall not act as a Gaming Financier until it again duly files a completed application for such license.

E. Term of Qualified Gaming Financier Licenses

Each Qualified Gaming Financier License shall remain in effect until the earlier of (i) December 31 of the second calendar year following the year in which the application was submitted to the TGA or (ii) withdrawal of the application by the applicant or (iii) the expiration of any engagement letter or term sheet or loan agreement or other financing or security agreement between the Qualified Gaming Financier and the respective Gaming Operation.

F. Background Investigations

Except as otherwise required by the Director within his or her discretion, the background investigation of each Executive Officer of an applicant for a Qualified Gaming Financier license will consist solely of a review of publicly available information contained in filings with the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Securities and Exchange Commission, the National Association of Securities Dealers, various stock exchanges, and other Tribal, federal, and state agencies regulating Qualified Gaming Financiers, depending upon the organization and the corporate charter of each such applicant.

Quapaw Bus. Comm. Res. No. 082709-B § 11 (Aug. 27, 2009).

§ 18. Records and Reports

A. Keep and Maintain

Each gaming operation shall keep and maintain sufficient books and records to substantiate the receipts, expenses, and uses of revenues relating to the conduct of gaming activities authorized under a license. Included in the records of the activity shall be session summary sheets, operational budgets and projections, and tour/bus attendance and compensation.

B. Statement of Gross Revenues and Net Revenues

By the third Saturday of the month, each gaming operation shall provide the Tribal Gaming Agency, in a report form prescribed by the Tribal Gaming Agency, a statement of gross revenues and net revenues received or collected at each gaming establishment during the immediately preceding period.

C. Falsification

No licensee shall falsify any books or records relating to any transaction connected with the conduct of gaming activities authorized under this Ordinance.

D. Inspection by Tribal Gaming Agency

All books and records of each gaming operation relating to licensed gaming activities shall be subject to inspection, examination, photocopy and auditing by the Tribal Gaming Agency or a person designated by the Tribal Gaming Agency at anytime during reasonable hours.

E. Audit

The Tribal Gaming Agency shall ensure that an annual audit of the operations compliance with the Tribe's Minimum Control Standards (MICS) is conducted and for submitting to the NIGC the report(s) of the Tribe's annual independent financial audit of the gaming operation(s) and MICS audit.

F. Insurance Policies

A copy of all insurance policies covering each gaming enterprise or any part thereof shall be filed with the Tribal Gaming Agency.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XV; Quapaw Bus. Comm. Res. No. 021405-A § XVI (Feb. 14, 2005).

§ 19. Violations

A. Gaming License

No person shall operate or conduct any gaming activity in a gaming operation within the exterior boundaries of Indian Lands without a gaming license issued by the Tribal Gaming Agency, as required by this Ordinance.

B. Falsifying or Omitting Information

No licensee or license applicant shall intentionally omit or provide false information in connection with any document or proceeding under this Ordinance.

C. Accounting and Inspection

1. No management contractor shall fail to account fully for all moneys received or collected in connection with gaming activities.

2. In compliance with 25 C.F.R. § 571.5 or § 571.6, or a Tribal Ordinance or resolution approved by the NIGC Chair under parts 522 or 523 in Title 25 C.F.R., a gaming operation shall not refuse to allow an authorized representative of the NIGC or an authorized Tribal Gaming Agency or Tribal Gaming Commission official to enter or inspect a gaming operation.

D. Age Limit

No person under the age of eighteen (18) years shall be permitted to participate in

any gaming activity.

E. Cheating

No person shall engage in cheating in any gaming activity.

F. Possession of a Firearm.

No person, other than a law enforcement officer duly authorized by the Tribe or invited by the Tribe to be on the premises may enter or remain in a gaming establishment under this Ordinance while in the possession of a firearm or other weapon.

G. Violation of Any Provision, Rule, Regulation or Order

No person shall violate any provision of this Ordinance or any order of the Tribal Gaming Commission.

H. Facility Compliance with Ordinance

The management of each gaming facility is responsible for ensuring that all PMOs and key employees assisting in the operation of any gaming activity on the licensee's behalf comply with this Ordinance. Management is also responsible to ensure that all electronically aided games are properly classified and licensed in accordance with this Ordinance. A violation by any such officials or employees shall be deemed a violation by management and may subject management to sanctions.

I. Fraudulent Scheme or Technique

No person, playing in or conducting any gaming activity authorized under this Ordinance, shall:

1. Use bogus or counterfeit cards, or substitutes or use any game cards that have been tampered with;

2. Employ or have on one's person any cheating device to facilitate cheating in any gaming activity;

3. Use any fraudulent scheme or technique, including when an operator or player of games of charitable gaming tickets directly or indirectly solicits, provides, or receives inside information of the status of game for the benefit of either person; or

4. Knowingly cause, aid, abet, or conspire with another person or any person to violate any provision of this Ordinance or any rule adopted under this Ordinance.

J. Discretion of Tribal Gaming Agency

Any person found to be in violation of any of the foregoing by the Tribal Gaming

Agency may be permanently excluded from the facility or subject to such lesser sanction as may be imposed by the Tribal Gaming Agency.

The Tribal Gaming Agency shall have the discretion to bring an enforcement action against any person or entity whose actions or inactions present an actual and imminent threat or danger to the public health and safety of the facility or its patrons or to the integrity of gaming. Actions taken by the Tribal Gaming Agency under this provision shall at all times be reasonable and prudent and the specific grounds for such action must be documented. The Tribal Gaming Commission shall have jurisdiction over any appeals of the actions or decisions of the Tribal Gaming Agency.

J. Failure to Maintain Suitability

It shall be a substantial violation for any licensee to fail or cease to meet the suitability standards established by this Ordinance.

K. Fraudulent Conduct

It shall be a substantial violation of this Ordinance for any person or entity to engage in any fraudulent conduct, which shall include:

1. Defrauding the Quapaw Tribe, any licensee, or any participant in any gaming activity or promotion;

2. Providing information that is known or should have been known to be false or making any false statement with respect to an application for employment or for any license or permit;

3. Claiming, collecting or taking, or attempting to claim, collect or take, money or anything of value in or from a game/gaming facility with intent to defraud or claiming, collecting or taking an amount greater than the amount actually won in such game;

4. Providing information that is known or should have been known to be false or misleading or making any false or misleading statement to the Tribe, the Tribal Gaming Agency, or other civil or criminal law enforcement agency of the Tribe in connection with any contract for services or property related to gaming;

5. Making any statement that was known or should have been known to be false or misleading in response to any official inquiry by the Tribal Gaming Agency or other civil or criminal law enforcement agency of the Tribe;

6. Falsifying, destroying, erasing or altering any books, computer data, records, or other information relating to a gaming facility or activity;

7. Entering into any contract, or making payment on any contract for the delivery of goods or services to a gaming facility, when such contract fails to provide for or result in the delivery of goods or services of less than fair value for

the payment made or contemplated;

8. Concealing, altering, defacing, or destroying any records, documents, information, or materials of any kind, including, but not limited to, photographs, audio recordings, or video tapes;

9. Offering or attempting to offer anything of value, to a licensee in an act that is an attempt to induce, or may be perceived as an attempt to induce, the licensee to act or refrain from acting in a manner contrary to the official duties of the licensee under Quapaw Tribal law; and

10. Acceptance by a licensee of anything of value with the expectation that receipt of such thing of value is intended, or may be perceived as intended, to induce the licensee to act or refrain from acting, in a manner contrary to the official duties of the licensee under Quapaw Tribal law.

L. Unlawful Diversion of Tribal Gaming Revenue

It shall be a substantial violation of this Ordinance for any person or entity to divert gaming revenue for any unauthorized purpose of any kind.

M. Impeding a Tribal Investigation

It shall be a substantial violation of this Ordinance for any person or entity to impede a Tribal investigation, including by:

1. Lying to or otherwise providing false or misleading information to the TGA or any civil or criminal law enforcement agency of the Tribe;

2. Attempting to influence another person to:

a. Withhold or otherwise fail to disclose any records, documents, materials, or other information of any kind requested verbally or in writing by the Tribal Gaming Agency or any civil or criminal law enforcement agency of the Tribe;

b. Refuse to be interviewed by the Tribal Gaming Agency or any civil or criminal law enforcement agency of the Tribe;

c. Lie or otherwise provide false or misleading information to the Tribal Gaming Agency or any civil or criminal law enforcement agency of the Tribe;

d. Falsify any records, documents, information, or materials of any kind, including, but not limited to, photographs, audio recordings, or video tapes relevant to a Tribal Gaming Agency or other Tribal investigation; or

e. Conceal, alter, deface, or destroy any records, documents, information, or materials of any kind, including, but not limited to,

photographs, audio recordings or video tapes relevant to a Tribal Gaming Agency or other Tribal investigation.

N. Improper Interference

It shall be a substantial violation of this Ordinance for any person or entity to engage in:

1. Acts or omissions of an individual that interfere with or prevent the Tribal Gaming Agency from fulfilling its duties and responsibilities under this Ordinance; or

2. Making any offer or any promise of consideration or thing of value for the purpose of affecting a decision or actions of the Tribal Gaming Agency.

O. Failure to Comply With Quapaw Gaming Regulations

It shall be a violation of this Ordinance for any person or entity subject to the jurisdiction of the Quapaw Tribe to:

1. Handle cash in a manner inconsistent with Tribal regulations;

2. Allow, assist in or carryout the installation of gaming machines in a manner that is inconsistent with the pre-installation and installation requirements established by the Tribal Gaming Agency;

3. Fail to adhere to gaming license regulations or promptly report to the Tribal Gaming Agency the presence on the floor of any Quapaw Tribal gaming facility any gaming machine that is not properly licensed; or

4. Refuse to comply with an order, directive, request, or demand of the Tribal Gaming Agency or the Commission.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XVII; Quapaw Bus. Comm. Res. No. 021405-A § SVII (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 13 (Aug. 27. 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. No. 082709-B § 13 amended the former Section 17(A) of Title 17 of the Quapaw Code, and also added new Sections 19(J) through (O).

§ 20. Civil Enforcement

A. Civil Action

The Tribal Gaming Agency may take any or a combination of the following actions with respect to any person or entity who violates any provision of this Ordinance:

1. Impose a civil fine not to exceed five thousand dollars ($5000.00) for each violation, and if such violation is a continuing one, for each day of such violation.

2. Suspend, deny, or revoke any gaming or gaming-related license, including machine and vendor licenses;

3. Temporarily or permanently exclude, bar, or deny admission from or to the gaming facility provided that the sanction shall be commensurate with the seriousness of the violation.

4. Permanently remove a non-gaming related vendor from the registry, provided that such sanction shall be commensurate with the seriousness of the violation.

B. Jurisdiction

The Tribal Gaming Commission shall have exclusive jurisdiction over any and all decisions and actions of the Tribal Gaming Agency under this Ordinance, and shall have the authority to reverse, affirm, or modify any and all decisions and sanctions imposed by the Tribal Gaming Agency pursuant to this Ordinance. The decision of the Tribal Gaming Commission shall be final and not subject to further judicial review.

C. Notification

The Tribal Gaming Agency shall provide notice to the affected person or entity, explaining the alleged violation, the proposed action or sanction, and the steps needed for cure, if any. Such notice may be delivered in person or by letter to his/her last known address and shall describe the procedures to be followed for appeal to the Tribal Gaming Commission.

D. Acknowledgment

Every person or entity that applies for a gaming license and accepts such license thereby acknowledges the civil enforcement jurisdiction and authority of the Tribal Gaming Agency, Tribal Gaming Commission, and the Business Committee under this Ordinance.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XVIII; Quapaw Bus. Comm. Res. No. 021405-A § XVIII (Feb. 14, 2005).

§ 21. Hearings and Appeals

A. Request for Reconsideration to the Head of the Tribal Gaming Agency

Any person or entity aggrieved by a decision made or action taken by the Tribal

Gaming Agency may request reconsideration by the Director of the Tribal Gaming Agency.

B. Petition for Appeal to the Tribal Gaming Commission

Any person or entity aggrieved by a final decision by the Director of the Tribal Gaming Agency may appeal to the Tribal Gaming Commission for a hearing. The petition shall be filed within fourteen (14) calendar days from the date the notice of final decision is delivered. Such petition shall specifically set forth the reasons for the grievance and must be filed with the Commission no later than thirty (30) days after the Tribal Gaming Agency's decision or action. The Gaming Commission shall set the matter for hearing no later than thirty (30) days after receipt of the petition, and may, upon finding good cause, affirm, modify, reverse and/or vacate the Tribal Gaming Agency's decision.

C. Filing Fee

A non-refundable filing fee of one hundred dollars ($100.00) made payable to the Tribal Gaming Agency shall be accompany all requests for appeals, provided that such fee may be waived by the Tribal Gaming Agency upon a showing of hardship.

D. Notice of Hearing on Appeal

The Gaming Commission shall notify the parties of the time and place for the hearing on appeal.

E. Notice of Revocation to NIGC

Upon a final decision of revocation of a gaming license or a decision to reinstate a gaming license the decision maker shall notify the NIGC of its decision.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XIX; Quapaw Bus. Comm. Res. No. 021405-A § XIX (Feb. 14, 2005); Quapaw Bus. Comm. Res. No. 082709-B § 14 (Aug. 27, 2009).

§ 22. Appeals from Final Actions of the Tribal Gaming Commission

A. Jursidiction

1. The Quapaw Tribal Court shall have exclusive jurisdiction to review all final orders or actions of the Tribal Gaming Commission, as provided herein.

2. Review of any action of the Tribal Gaming Commission provided for herein shall be shall be initiated by a notice of appeal filed not later than thirty (30) days after the date the order or action appealed from is entered or taken. Failure to seek review as provided herein shall constitute a waiver of all rights of appeal and further shall deprive the Tribal Court of jurisdiction over the matter.

B. Review in Administrative Appeals

1. In appeals to the Tribal Court brought pursuant to this section, review shall be limited to the record that was before the Tribal Gaming Commission at the time of the final decision or action appealed from, including: (a) the order or decision involved; (b) any findings or reports on which such order is based; (c) the notices, pleadings, evidence, and other materials placed into the record before the administrative hearing officer; (d) any transcriptions made of any hearings; and (e) any other materials entered into the record by the hearing officer. administrative record of its decision.

2. The Tribal Court shall afford deference, as appropriate, to the expertise of the administrative agency, and shall not set aside, modify, or remand any action or decision or action except upon a finding that such decision, action, or inaction was:

a. Arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law;

b. Contrary to Tribal law or other applicable controlling law;

c. In excess of statutory jurisdiction, authority, or limitation or short of statutory right;

d. Without observance of procedure required by law; or

e. Unsupported by a preponderance of the evidence in a case reviewed on the record.

3. The Tribal Court may remand any matter to the Tribal Gaming Commission or Tribal Gaming Agency for further proceedings, as warranted by the circumstances.

C. Standing to Seek Review

1. Only those persons or entities directly and adversely affected by a decision or action of the Gaming Operation, the Tribal Gaming Agency, or the Tribal Gaming Commission shall have standing to appeal a decision or action of the Tribal Gaming Commission, except where:

a. The petitioner is seeking relief against the Tribal Gaming Agency for an action unduly or unreasonably delayed or withheld, where such inaction is causing articulable harm to the Petitioner; or

b. The petitioner is a licensee seeking review of an administrative regulation promulgated pursuant to this ordinance on the grounds that such regulation is arbitrary and capricious, constitutes an abuse of discretion, or is otherwise not in accordance with law.

D. Remedies

Upon hearing an appeal hereunder, the Tribal Court may:

1. Affirm, reverse, or modify an order or other action of the Tribal Gaming Commission, or may or remand a matter as appropriate;

2. Compel the Tribal Gaming Agency or Tribal Gaming Commission to take an action unlawfully or unreasonably delayed or withheld; or

3. Set aside a regulation of the Tribe upon a finding that such regulation or some portion thereof is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

E. Other Matters

1. A petitioner in any appeal brought hereunder shall bear the burden of proof.

2. Except as otherwise provided in this ordinance, the manner and requirements for seeking review of administrative decisions by the Tribal Court shall be in accordance with the Court's rules and procedures.

3. A petitioner may be represented by legal counsel in any proceeding or adjudication hereunder at the petitioner's sole expense. The Tribal Court shall not award any attorney fees or costs for any matter arising under this Ordinance.

4. The filing of every appeal under this Ordinance shall be subject to a non-refundable filing fee, as established under Tribal law, to be paid to the Clerk of the Tribal Court upon filing."

Quapaw Bus. Comm. Res. No. 082709-B § 15 (Aug. 27. 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 15 added new Section 22 to Title 17 of the Quapaw Code.

§ 23. Prize Claims and Patron Disputes

A. Procedures

All prize claims and patron disputes arising at Tribal Gaming Operations shall be adjudicated in the first instance by the Tribal Gaming Agency and the Tribal Gaming Commission as set forth herein and under the procedures set forth in applicable administrative regulations.

B. Review by the Tribal Court

1. The Quapaw Tribal Court shall have jurisdiction to review final orders

and decisions entered by the Tribal Gaming Commission in relation to prize claims and patron disputes; provided, however, that the Tribal Court shall not have jurisdiction to hear an appeal of such claim or dispute unless a final order has been entered by the Tribal Gaming Commission.

2. Review by the Tribal Court of any final order or decision of the Tribal Gaming Commission relating to a prize claim or a patron dispute shall be initiated by a notice of appeal filed not later than thirty (30) days after the date the order or action appealed from is entered or taken. Failure by a claimant to seek review as provided hereunder shall constitute a waiver of all rights of appeal and further shall deprive the Tribal Court of jurisdiction over the matter.

3. Review of final agency determinations relating to prize claims and patron disputes shall be in accordance with the procedures hereunder for other administrative appeals.

Quapaw Bus. Comm. Res. No. 082709-B § 15 (Aug. 27. 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 15 added new Section 23 to Title 17 of the Quapaw Code.

§ 24. Tort Claims

A. Jurisdiction

1. All claims for personal injury or property damage arising from or relating to the operation of any Tribal Gaming Operation shall be resolved exclusively in the Quapaw Tribal Court, and in no other venue or locale.

2. The Tribal Court shall have original and exclusive jurisdiction to adjudicate all claims provided for herein, but only if:

a. The purported injury occurred on the premises of a Facility or Gaming Operation licensed under this Ordinance;

b. The claimant (a) followed all required procedures pursuant to Tribal law, including administrative regulations, and the pertinent terms of any compact in effect between the Tribe and the State of Oklahoma relating to such Gaming Operation, (b) exhausted any and all administrative remedies, and (c) provided all of the information required for filing such a claim including, without limitation, the delivery to the Gaming Operation of a valid and timely written notice of tort claim, signed by the claimant under oath or pursuant to a declaration affirming the validity of all information provided in such notice;

c. The Gaming Operation denied the tort or other claim; and

d. The claimant filed an appeal in the Tribal Court no later than on the one-hundred-eightieth (180th) day after the date the claimant received notice of the denial of the claim by the Gaming Operation.

B. Limitations on Tort Claims

1. The Tribal Court shall have no jurisdiction to award damages to any claimant in excess of the limits of the Gaming Operation's liability insurance applicable to tort claims, and no judgment may be entered or recovered except as against the Gaming Operation's public liability insurance policy.

2. A claimant's failure to file a tort claim or prize claim in accordance with the requirements of this subsection and in accordance with all applicable requirements of any compact in effect between the Tribe and the State of Oklahoma relating to the Gaming Operation shall constitute a waiver of all rights of appeal, and further shall deprive the Tribal Court of jurisdiction over the claim.

3. A claimant's failure to file a tort claim within one (1) year of the date of the alleged injury shall deprive the Tribal Court of jurisdiction over the matter and forever bar such tort claim against the Gaming Operation.

4. The Tribal Court shall have no jurisdiction or authority to award any damages from the assets or property of the Gaming Operation or the Tribe.

5. Nothing herein shall be construed as a waiver of the sovereign immunity from unconsented suit of the Gaming Operation or the Tribe; provided, however, no Gaming Operation shall assert its immunity from unconsented suit as a defense to any claim for personal injury or property damage filed hereunder in the Tribal Court if the amount claimed does not exceed the limits of the Gaming Operation's public liability insurance and the claim is otherwise asserted in accordance with the procedures set forth in this Ordinance.

C. Remedies

1. The Tribal Court may award just and reasonable compensation for a personal injury or property damage, subject to the limitations herein, upon a finding that the Gaming Operation is liable as a matter of law given all the facts and circumstances of the case as adduced at a hearing of the case under applicable law, provided that:

a. The amount of such award shall be reduced by ten percent (10%) if the claim is filed with the Gaming Operation more than ninety (90) days after the occurrence of the event allegedly giving rise to the claim; and

b. The amount of compensation awarded for any one person for personal injury, for any one occurrence for personal injury, or for any one

occurrence for property damage may not exceed the amount of the public liability insurance in each such category of personal injury or property damage maintained by the Gaming Operation for the express purposes of covering and satisfying tort claims.

D. Filing Fees

Each tort claim filed pursuant to this Ordinance shall be subject to a non-refundable filing fee, as established under Tribal law, to be paid to the Clerk of the Tribal Court upon filing."

Quapaw Bus. Comm. Res. No. 082709-B § 15 (Aug. 27. 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 15 added new Section 24 to Title 17 of the Quapaw Code.

§ 25. Applicable Law

A. Law Applicable to Tort Claims

The law governing every tort claim brought pursuant to this Ordinance shall be Tribal law.

B. Law Applicable to Gaming Contracts

1. Every contract entered into by a Gaming Operation, the Tribal Gaming Agency, and the Tribal Gaming Commission with any person or entity who is required to hold a license or registration issued pursuant to this Ordinance, or that involves or relates to gaming, shall be subject to all applicable laws relating to and regulating Tribal gaming, including, without limitation, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., and the implementing regulations, 25 C.F.R. Chapter III, all Tribal laws relating to and regulating gaming activities, including but not limited to this Ordinance and the implementing regulations, any applicable compacts in force between the Tribe and the State of Oklahoma, and any other applicable laws and regulations. Any provision of any gaming or gaming-related contract contrary to this section shall be void as a matter of law and policy, and shall be unenforceable.

2. Unless the parties expressly agree to choose another law for the purpose of the interpretation and enforcement of a contract subject to this section, such contract shall be governed by Tribal law, as defined under Tribal law.

Quapaw Bus. Comm. Res. No. 082709-B § 15 (Aug. 27. 2009).

NOTES

2009 Amendments: Quapaw Bus. Comm. Res. 082709-B § 15 added new Section 25 to Title 17 of the Quapaw Code. Section 16 of the 2009 Amendments repealed the former Section 20, as adopted pursuant to Quapaw Bus. Comm. Res. No. 101604-C, which provided:

> "All controversies involving contracts related to gaming entered into under the authority of the Tribe on Tribal Lands shall be resolved, as appropriate, in accordance with:
>
> a. the Indian Gaming Regulatory Act and implementing regulations; and
> b. the laws, ordinances and regulations of the Tribe."

The *Report on Res. No. 082709-B* explained that the new Section 25(B)

> "makes clear that Tribal, federal, and state gaming laws, as applicable, control vendor contracts, regardless of the language in such contracts. This provision is proposed to ensure compliance with the NIGC's minimum internal control standards, and also to address recent claims by vendors that they are not subject to the jurisdiction of the Tribal regulatory agencies. In essence, this language makes clear that regardless of the law chosen for the interpretation and enforcement of a contract applicable gaming law controls all such contracts made by Tribal gaming facilities as a matter of law."

§ 26. Designated Agent for Service of Process

The designated agent for service of process shall be:

Director
Quapaw Tribal Gaming Agency
69300 E. Nee Road
Quapaw, Oklahoma 74363

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XXI; Quapaw Bus. Comm. Res. No. 021405-A § XXI (Feb. 14, 2005); Quapaw Bus. Com. Res. No. 082709-B § 16 (Aug. 27, 2009).

§ 27. Savings Provision

If any provision of this Ordinance or the application thereof to any entity, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Ordinance which can be given effect. Any invalid provisions shall be severed without effect on the remaining provisions of this Ordinance.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XXII; Quapaw Bus. Comm. Res. No. 021405-A § XXII (Feb. 14, 2005).

§ 28. Policies and Procedures for Resolution of Disputes Between Manager and Customers

A. Improper Conduct by Customers

1. Notice of warning regarding the improper conduct set forth in paragraph two (2) of this section or other gaming rules established and enforced by the gaming operation shall be posted by Manager at the entrance of the gaming operation and/or given to patrons upon entering the premises.

2. The following improper conduct shall result in ejection of a patron from any gaming operation:

   a. Cheating;

   b. Possession of weapons in the gaming operation;

   c. Possession of alcohol that has been brought by a patron into the gaming operation;

   d. Possession of a controlled substance in the gaming operation;

   e. Disorderly conduct, including the willful disregard for the rights of others, and any other act disruptive to the gaming operation and its patrons.

3. Failure by a patron to provide proof of age when requested by gaming operation personnel shall result in ejection of the patron from the gaming operation premises. Admission fees, if any, shall be refunded in such instance.

4. Ejection of a patron shall be accomplished by security personnel, upon request of the Manager.

B. Complaints by Customers

1. Either the Manager or an alternate shall be present at all times to resolve complaints by patrons involving the gaming operation.

2. If the Manager or an alternate are unable to resolve any dispute, the matter may, upon request of the patron, be referred to the Tribal Gaming Agency for resolution and, upon appeal, the Tribal Gaming Commission. The decision of the Gaming Commission on any dispute so referred to it for resolution shall be final.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XXIII; Quapaw Bus. Comm. Res. No. 021405-A § XXIII (Feb. 14, 2005).

§ 29. Amendment of Ordinance

A. Amendment by Majority Vote

This Ordinance may be amended by Majority vote of the Tribal Business Committee. Within 15 days after adoption, the Tribal Business Committee shall submit such amendment to the NIGC Chairperson for approval.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XXIV; Quapaw Bus. Comm. Res. No. 021405-A § XXIV (Feb. 14, 2005).

§ 30. Title and Effect of Repeal

A. This Ordinance may be cited as the Quapaw Tribal Gaming Ordinance of 2004.

B. Subsequent repeal of this Ordinance or any portion thereof shall not have the effect of reviving any prior Tribal law theretofore repealed or suspended.

Quapaw Bus. Comm. Res. No. 101604-C (Oct. 16, 2004); Quapaw Bus. Com. Res. No. 013105-A § XXV; Quapaw Bus. Comm. Res. No. 021405-A § XXV (Feb. 14, 2005).

§§ 31 to 100. Reserved.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Plaintiff,

v.

STATE OF OKLAHOMA, ex rel., TIM KUYKENDALL, District Attorney, District 21, Special Prosecutor; the UNITED STATES OF AMERICA, ex rel., GALE A. NORTON, Secretary of the Interior; and PHILIP N. HOGEN, Chairman of the National Indian Gaming Commission,

Defendants.

Case No. CIV-04-340-WH

FILED

JAN 26 2006

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By: Deputy Clerk

ORDER

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Docket # 96), Defendant, State of Oklahoma's (the "State's") motion for summary judgment upon its counterclaim (Docket # 102), and Defendant, USA's (the "USA's") motion for summary judgment (Docket # 110). Also before the Court are the State's motion to supplement the records offered in support of its motion for summary judgment upon its counterclaim and in opposition to Plaintiff's motion for summary judgment (Docket # 112) and the motion by the Cherokee Nation for leave to file a brief *amicus curiae* (Docket # 100). All these motions have been fully briefed. In addition, the Court requested and the parties provided briefs on the issues of whether the September 29, 2000 letter from the General Counsel of the National Indian

Gaming Commission (the "NIGC" or "Commission") is a "final decision" under the Administrative Procedures Act ("APA") and whether that decision is arbitrary and capricious based on the administrative record in this case.

For the reasons delineated below, the Court sets aside the decision of the NIGC that Plaintiff's land that is the subject of this lawsuit, 2450 South Muskogee, Tahlequah, Oklahoma 74464 (the "Land"), is not "Indian land" and remands the matter to the NIGC for further consideration consistent with this Order. Consequently, all of the motions listed above are DENIED as moot.

BACKGROUND

The parties to this litigation agree on very few facts, even disputing whether Plaintiff paid taxes to the State over the past several years. Nevertheless, the Court lists here certain undisputed facts that are sufficient for the purposes of this analysis.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq* (the "IGRA") was enacted in 1988, and established the NIGC. The NIGC and the Department of the Interior (the "DOI") have entered a Memorandum of Understanding (the "NIGC-DOI MOU") that outlines the process by which the DOI will advise and assist the NIGC in making determinations of "Indian land."

Plaintiff purchased the Land in 1990. Plaintiff is (and has been for some time, at least as early as 1991) operating a gaming facility on the Land. As early as 1993, the NIGC began conducting inspections, requiring reports, and collecting fees from Plaintiff regarding those gaming operations. On November 24, 1994, Plaintiff submitted a request to the NIGC to review

and approve a tribal gaming ordinance, but did not specify a gaming site. On May 22, 1995, the NIGC sent a letter to Plaintiff approving the gaming ordinance once Plaintiff acquired "Indian lands."

On September 29, 2000, the NIGC's General Counsel, Kevin Washburn, sent a letter to Plaintiff ("the September 2000 Letter"). This is the action that instigated the current litigation. The September 2000 Letter informed Plaintiff that the NIGC had reached the "conclusion" that the Land is not "Indian land" as that term is defined by the IGRA, and that accordingly, the IGRA does not apply to Plaintiff's gaming. That conclusion never went to the Chairman or the full Commission for formal written approval. Subsequently, the NIGC refused submission of reports from Plaintiff, attempted to return to Plaintiff all fees it previously submitted to the NIGC, and ceased all regulation of Plaintiff's gaming operation. The State has informed Plaintiff that it intends to pursue criminal sanctions against Plaintiff's members for its gaming operations that violate state law.

On April 26, 2005, the USA informed the Court that no administrative record existed in this matter.[1] At the Court's request, the NIGC made its "best effort" to compile an

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[1]The USA asserted that no administrative record existed because there was no final agency decision. The NIGC-DOI MOU states: "the NIGC makes such Indian lands decisions on a regular basis, has increased its resources and expertise on such matters, and has determined that the more complicated Indian lands questions require the development of a complete factual record on which the Chairman may rely." This clause seems to indicate that the NIGC's standard practice during the process of making Indian land determinations on a "regular basis" would be to develop a complete factual record throughout the decision-making process so that when the decision went to the Chairman for decision, s/he would have a record upon which to rely. Surely, given the time it took for the NIGC to make this determination in the present case, it would be considered one of the complicated questions.

The USA's proposition that the NIGC did not have an administrative record because there was no final decision begs the question. If there was no record, upon what was the Chairman and

administrative record and filed it with this Court in May of 2005. This "record" apparently consisted of some of the documents that the General Counsel considered in drafting the September 2000 Letter. The record assembled by the NIGC *post hoc* does include some evidence of the past dealings between the NIGC and Plaintiff; however, the September 2000 Letter does not include any reference indicating a consideration of the past regulation of the Land by the NIGC in making its determination. The September 2000 Letter itself listed five documents, all letters, upon which the conclusion was based.

After the September 2000 Letter, Plaintiff brought this action and argues that it should be granted summary judgment based on estoppel, acquiescence and/or lack of jurisdiction of the NIGC to change its earlier (purported) opinion that the Land was Indian land. The USA argues that it should be granted summary judgment because the Land is not "Indian country" or "Indian land" and Plaintiff's equitable claims fail as a matter of law. The State asserts that it should be awarded summary judgment on its counterclaim because the status of the Land was already decided in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) and Plaintiff exercises no governmental authority on the Land and thus possesses no sovereign immunity from the regulation and control of the State.

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the full Commission to rely in making the "final" determination? It appears as though the NIGC did not intend to send the determination to its Chairman or the full Commission for a "final" determination, as more than five years have passed since that determination, and the NIGC has acted consistently with it. As discussed more *ante*, this seems a clever yet unpraiseworthy tactic for making a consequential decision yet avoiding judicial review.

JUDICIAL REVIEW OF AGENCY DECISION

The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A court shall hold unlawful and set aside agency action if the court finds such action is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706. The reviewing court is tasked with applying the appropriate standard under section 706. *Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598, 1607 (1985).

The court is generally limited to the administrative record; however, the court may look beyond the record for limited purposes only, such as to determine whether the agency considered all the relevant factors. *Florida Power*, 105 S.Ct. at 1607; *Thompson v. United States Department of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). If the court finds the agency did not consider all relevant factors,[2] the court should set aside the action and remand to the agency for additional investigation and/or explanation. *Florida Power*, 105 S.Ct. at 1607. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.*

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[2]Of course, it is important to note that "a formal hearing before the agency is in no way necessary to the compilation of an agency record." *Florida Power*, 105 S.Ct. at 1607. That being said, one might think a formal administrative hearing might be wise under the present circumstances.

ANALYSIS

I. September 29, 2000 Letter

Before the Court may reach the motions before it, the Court must find the answers to two questions. First is the question of whether the September 2000 Letter constitutes a "final agency action" as that term is used in either the IGRA or the APA. Second, the Court considers whether it must set aside that action as arbitrary and capricious based on the administrative record.

A. Final Agency Action

The IGRA provides for judicial review of certain agency actions, specifically, as the USA points out, review of agency actions under sections 2710, 2711, 2712, and 2713. 25 U.S.C. § 2714. Nowhere in the IGRA, however, is there any indication that this list is exhaustive or that these are the *only* final NIGC actions subject to judicial review.[3] Indeed, Congress has provided, by way of the APA, for review of final agency actions that were not specifically provided for otherwise. 5 U.S.C. § 704. The Court, then, looks to whether the September 2000 Letter is a "final agency action" as that term is used in the APA.[4]

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[3]The Tenth Circuit has stated: "Notably, nothing in IGRA limits judicial review of the NIGC's decision under the APA; rather § 2714 of IGRA expressly provides for such review." *Kansas v. United States*, 249 F.3d 1213, 1224 (10th Cir. 2001)(discussing an "Indian land" decision.) Furthermore, the Tenth Circuit pointed out that S.Rep. No. 100-446, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3078 includes the quote: "*All* decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court." *Id.* at 1222 (emphasis added in *Kansas*).

[4]The USA argues that the Tenth Circuit has held that General Counsel letters are not final agency decisions and cites *First American Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3 1166, 1175 (10th Cir. 2005), as referring to "an NIGC Deputy General Counsel's opinion letter and an NIGC Bulletin as 'informal pronouncements.'" In fact, this decision concerned a situation in which the Kickapoo Tribe requested an opinion from the NIGC on the issue of whether a particular contract with First American was an operating lease or a management contract. The NIGC's General Counsel responded with an "informal" opinion on the matter, after which the NIGC

The USA asserts that the September 2000 Letter concluding that the Land is not "Indian land" is not a final agency action, but merely an advisory opinion, a "precursor to a decision by the Chairman, 25 U.S.C. § 2705, prior to consideration by the full Commission." The USA sets forth a "hypothetical" analysis in which it proffers that final agency action would exist, subject to judicial review under the APA, if: (1) Plaintiff had submitted a gaming ordinance for review specifying the exact lands where the gaming were to occur; (2) the General Counsel issued an advisory opinion; (3) the Chairman reviewed all the facts and disapproved the ordinance after determining that the site was not "Indian land"; and (4) the entire Commission upheld the Chairman's disapproval.[5]

In this case, the Plaintiff submitted a gaming ordinance for review without specifying the exact lands where the gaming would occur. On March 22, 1995, the NIGC sent a letter to Plaintiff approving the ordinance with the caveat that the NIGC understood that Plaintiff did not

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acted no further. The Tribe then unanimously decided to terminate its relationship with First American, and First American brought suit. The facts in the instant case are considerably different. Here, the NIGC undertook *sua sponte* to investigate and come to a "conclusion" as to whether the Land is "Indian land," after which the NIGC took definite action in accordance with that conclusion.

[5]The NIGC does not appear to have any defined procedure for making Indian land determinations. Although it makes such determinations "on a regular basis," the NIGC apparently makes those determinations on an *ad hoc* basis. The only process set in place for making these determinations seems to be that set out in the NIGC-DOI MOU, whereby "the NIGC, acting through its General Counsel," requests advice and assistance from the DOI. In reviewing that MOU, as in the hypothetical set out by the USA, it appears the Chairman would generally make the determination; however, no definite NIGC procedure for making "Indian land" determinations has been shown to the Court. Here, the General Counsel made the determination on behalf of the NIGC (using language such as "[w]e conclude" and "[i]n reaching our conclusion"), the NIGC then took action based on that determination, and the determination never went to the Chairman or the full Commission for review. It would be contrary to the APA to presume that an agency could avoid judicial review simply by stating that only the full Commission can affect a "final action," while the Commission itself treats an action by its General Counsel as final.

currently hold any "Indian lands" and could not conduct class II or III gaming until such time that Plaintiff did hold "Indian lands." Despite this "understanding" of the NIGC, however, the NIGC continued to collect fees and arguably "regulate" the gaming being conducted on the Land. Not until September 29, 2000, did the NIGC made its determination through its General Counsel that the Land is not "Indian land," effectively disapproving the gaming ordinance for this site. According to the USA's hypothetical, this disapproval of the gaming ordinance on the Land was simply an "advisory" opinion; yet more than five years have passed since the disapproval, the NIGC has acted in accordance with the disapproval, and the gaming ordinance has never been sent to the Chairman or the entire Commission for consideration or "final" determination. The September 2000 Letter does not read, nor has the NIGC treated it, as an "informal" or "advisory" opinion. Indeed, the USA has never explained why the NIGC stopped regulating the gaming operations on the Land if the opinion was only "informal." To the extent the USA suggests that Plaintiff is required to resubmit the gaming ordinance, making it site specific, in order to receive a "final" reviewable decision by the NIGC, this Court does not agree. The gaming ordinance already has been effectively disapproved for the Land.

Furthermore, the Tenth Circuit has already denied the argument that an "Indian land" determination is not ripe for review. The State of Kansas, in *Kansas v. United States*, 249 F.3d 1213 (10th Cir.), invoked the district court's jurisdiction under the APA to review a determination by the NIGC that a particular tract of land in Kansas leased by the Miami Tribe of Oklahoma (the "Miami Tribe") was "Indian land." The Tenth Circuit rejected the defendants' argument that the "Indian land" determination was not yet ripe for review because the State and the Miami Tribe

had not yet entered negotiations for a Class III gaming compact. "Because the NIGC's decision that the tract constitutes 'Indian lands' within the meaning of IGRA has '*an actual or immediate threatened effect*' upon the State of Kansas and its interests, that decision is ripe for review in all respects." *Kansas*, 249 F.3d at 1224 (citation omitted)(emphasis added). The Tenth Circuit opined that not only did the NIGC's decision deprive the State of Kansas of its "sovereign rights and regulatory powers over the tract," it affected the state's "public policy concerns and 'significant governmental interests' in Class III gaming by imposing a legal duty on the State under IGRA to negotiate a Class III gaming compact at the Tribe's request." *Id.* Similarly here, the "Indian land" determination by the NIGC has effectively deprived Plaintiff of any "sovereign rights and regulatory powers" it may have exercised over the Land.[6] Plaintiff must also adhere to the State's gambling laws or face criminal prosecution. This determination has had "*an actual or immediate threatened effect*" upon Plaintiff.

Moreover, "[i]t is well established that the finality of an administrative action depends on whether the action imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process." *Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1197 (10th Cir. 1999). The Tenth Circuit goes on:

> More recently, the Supreme Court has articulated this test for final agency action as having two conditions. "First, the action must mark the 'consummation' of the agency's decisionmaking process.... And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' "

Id. (quoting *Bennett v. Spear*, 520 U.S. 157, 177-78 (1997)).

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[6]The *Kansas* court stated in its analysis: "The NIGC's action [the "Indian land" determination] plainly has a direct and immediate impact on the sovereign rights which the Miami Tribe, the Federal Government, and the State of Kansas exercise over the tract. *Id.* at 1223.

Though the September 2000 Letter is from the NIGC's General Counsel rather than the full Commission, the NIGC certainly appears to have treated it as the consummation of the agency's decision-making process, and Plaintiff has suffered legal consequences. The consummation of the decision is apparent by the fact that the Commission is acting in accordance with the decision and has not sent it to the Chairman or full Commission for further review. The facts that Plaintiff's rights have been determined and Plaintiff has suffered legal consequences are evidenced by the NIGC ceasing regulation of Plaintiff's operation and attempting to return fees previously paid. Also, the State, based on the NIGC's determination, has informed Plaintiff that it intends to pursue criminal sanctions against Plaintiff under State law.

Accordingly, the Court finds that the September 2000 Letter was a "final agency action" reviewable under the APA. Because the IGRA does not specifically provide for judicial review of final NIGC determinations of "Indian lands," the Court must look to and apply the default standards under the Administrative Procedures Act ("APA"). 5 U.S.C. § 701, *et seq*.

B. Arbitrary and Capricious Standard of Review

The Court applies the arbitrary and capricious standard here. The Tenth Circuit stated in *Kansas*:

> Because the merits of this case involve review of the NIGC's decision that the tract constitutes "Indian lands" of the Tribe within the meaning of IGRA, the APA review principles enunciated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) apply. A federal court may not set aside an agency decision unless that decision fails to meet statutory, procedural or constitutional requirements, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Kansas, 249 F.3d at 1228 (citations omitted). The Court must hold unlawful and set aside

agency action that the Court finds to be arbitrary and capricious. 5 U.S.C. § 706. An agency action is arbitrary and capricious if the agency "has entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Qwest Communications Int'l Inc. v. Federal Communications Comm'n*, 398 F.3d 1222, 1229 (10th Cir. 2005). Ordinarily, a simple determination of "Indian land" likely need not go much farther than an application of the definition of "Indian lands" found in IGRA, 25 U.S.C. § 2703(4), to the basic facts surrounding the land, i.e. whether the land is within the limits of an Indian reservation, whether it is held in trust by the United States or held subject to restriction by the United States, and whether the Indian tribe exercises governmental power over it. Here, the NIGC does not seem to have sufficiently addressed even these issues.[7] What is the status of Plaintiff's trust application? Is the Land within the boundaries of the "original Cherokee territory" in Oklahoma?[8] If so, has the Cherokee Nation been "consulted" regarding Plaintiff's trust application? If so, what were the results of that consultation? Has Plaintiff exercised governmental power over the Land? The answers to these questions are not apparent from the

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[7]The USA notes the General Counsel's meticulous manner in setting out the statutory factors for consideration and thorough analysis of the applicable law and states that "[h]is land opinion was well-researched and meticulously reasoned, as to both the facts and the law." While the General Counsel seems to have sufficiently stated the law on the "Indian land" determination, the Court disagrees in regard to the facts and finds that many, if not most, of the facts were completely ignored.

[8]Plaintiff argues that the law has changed since the *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) decision to allow an Indian tribe to acquire land in trust status within the boundaries of the "original Cherokee territory" in Oklahoma without the written consent of the Cherokee Nation, but instead on consultation with the Cherokee Nation. This change alone would probably not change the outcome of the "Indian land" determination; one of the trust questions, if the Land is within the "original Cherokee territory" in Oklahoma, would simply change from whether the Cherokee Nation had given written consent to whether there had been any consultation with the Cherokee Nation and the outcome of any such consultation.

administrative record.

In a situation such as this, when the NIGC has exercised some sort of regulation over the gaming site for some time, the "Indian land" determination must go beyond the basic analysis. Clearly, the facts surrounding the past regulation are an "important aspect of the problem." While the administrative record compiled by the NIGC in May of 2005 includes some evidence of the past NIGC regulation of Plaintiff's gaming, it is clear from the references to the history of the gaming occurring on the Land in the pleadings that the record is incomplete. For example, when the NIGC first began regulating Plaintiff's gaming on the Land, reports were generated, yet they are not a part of the administrative record. Furthermore, the September 2000 Letter did not give any explanation as to the past regulation of Plaintiff's gaming activities, including whether the NIGC had, in fact, prior to 2000, ever made any determination that the Land was "Indian land" and if it had not, why the NIGC made the decision to regulate Plaintiff's gaming on the Land. A complete record would also include documentation of Plaintiff's tax payments to the State if they were made, and if not, would include documentation showing why they were not paid, including collection notices, if those existed.

From the pleadings of the parties and the September 2000 Letter, there also appears to be some question as to whether the Land at issue here is the same as the land at issue in the Tenth Circuit case *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993). A complete administrative record would include documents showing whether the Land is, in fact, the same as that at issue in *Buzzard*.[9]

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[9]A three line memo to the file regarding a conversation with William Rice in which he confirmed the Land is the same as that at issue in *Buzzard* does not settle the issue.

The Tenth Circuit, in *Buzzard*, held that a restriction against alienation *by itself* is insufficient to make land purchased by an Indian tribe "Indian country." Clearly something more exists here, specifically several years of some type of federal regulation.[10] The administrative record should include evidence showing the exact nature and extent of that regulation throughout the entire period of such regulation. While the Court understands that the definitions of "Indian country" under 18 U.S.C. § 1151 and "Indian land" under IGRA are not identical, the "Indian country" analysis and whether the Land is actually the same as that at issue in *Buzzard* is relevant to the "Indian land" determination here.

The USA seems to suggest that the "Indian land" determination made by the NIGC cannot be arbitrary and capricious because the NIGC's determination was correct in concluding that Plaintiff exercises no governmental power over the Land. At this time, the Court may not and should not entertain whether the NIGC's decision was ultimately correct or incorrect. The arbitrary and capricious standard is very narrow, allowing the Court here only to look beyond the record to find whether the Commission "has entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Considering the past regulation of Plaintiff's gaming operations on the Land, the exceptionally sparse administrative record and the September

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[10]While both the Cherokee Nation's brief *amicus curiae* filed on June 28, 2005, and the proposed brief *amicus curiae* attached to the motion for leave to file such (Docket # 100), cite the *Buzzard* ruling correctly, including the "of itself" or "by itself" language, the analyses in both briefs completely ignore the fact that in this case, there is more than just a restriction against alienation. While the Court generally welcomes helpful analyses from "friends of the court," any analysis that completely disregards pertinent facts is not helpful. Indeed, the Cherokee Nation's first brief came dangerously close to affirmatively misrepresenting the law.

2000 Letter do not provide sufficient evidence even to show whether Plaintiff has ever exercised governmental power over the Land.

Given that the administrative record and the September 2000 Letter have ignored important aspects of the problem, the Court reverses the "Indian land" determination as unlawful and remands the matter to the NIGC for further investigation and explanation. The NIGC shall investigate, compile a complete record[11] and consider all relevant factors before making its final determination of whether the Land is "Indian land" as that term is defined by "IGRA." The NIGC shall then explain that determination fully, including all relevant facts and application of applicable law.[12]

II. Motions Before the Court

Because the Court is remanding this matter to the NIGC for further investigation and explanation, motions for summary judgment and for leave to file a brief *amicus curiae* in this action are moot. Furthermore, in order to examine the specific arguments put forth by parties in support of their motions, the Court would certainly have to go beyond the administrative record. As noted previously, the Court is not presently convinced that it has the authority to look beyond

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[11]Upon remand, the Court's delineation of the gaps and deficiencies in the administrative record should not be seen as complete or exclusive by the NIGC.

[12]Plaintiff suggests that any remand to the NIGC would be a futile effort, resulting in an unfavorable decision by the NIGC and a subsequent appeal before this Court again. While the remand very well may result in an unfavorable decision for Plaintiff that Plaintiff may appeal to this Court, the Court disagrees that remand is futile. The Court believes that the NIGC will follow the Court's Order to investigate, compile a complete administrative record and consider all relevant factors before making it final determination. Furthermore, Congress intended that the NIGC would make "Indian land" determinations, and without a full administrative record, this Court is not equipped, nor authorized, to substitute its judgment for that of the NIGC.

the administrative record for any reason other than to consider whether the NIGC considered all relevant factors in making its decision.[13]

CONCLUSION

For the foregoing reasons, the Court hereby rules unlawful and sets aside the decision of the NIGC that the Land is not "Indian land." The matter is REMANDED to the NIGC for further consideration of all relevant factors.[14] Furthermore, in light of the ruling above and because the Court may only look beyond the administrative record for the limited purpose of deciding whether the agency considered all relevant factors, the motions of the parties (Docket #s 96, 100, 102, 110 and 112) are DENIED as moot. In order to maintain the status quo, the preliminary injunction remains in effect.

IT IS SO ORDERED this 26th day of January, 2006.

Ronald A. White

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

[13]If the court finds the agency did not consider all relevant factors, the court should set aside the action and remand to the agency for additional investigation and/or explanation. *Florida Power*, 105 S.Ct. at 1607. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.*

[14]The Court notes that without a defined process in place for making "Indian land" determinations, such determinations will inevitably be reviewed with some skepticism.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

QUAPAW TRIBE OF INDIANS, Plaintiff, v. STATE OF KANSAS, Defendant.	))))))))))	Case No. 16-2037

COMPLAINT

Plaintiff, the Quapaw Tribe of Indians, alleges as follows:

NATURE OF THIS ACTION

1. The Indian Gaming Regulatory Act of 1988 (the "IGRA") obligates states, upon the request of an Indian tribe, to "negotiate with the Indian tribe in good faith" for a tribal-state compact governing gaming activities on the tribe's Indian lands. 25 U.S.C. § 2710(d)(3)(A). The State of Kansas ("the State" or "Kansas") has failed to enter into good faith compact negotiations with the Quapaw Tribe of Indians ("the Tribe") for gaming activities on Indian lands. The Tribe therefore brings this action pursuant to § 2710(d)(7)(A)(i), seeking, among other relief, a judicial determination that Kansas has failed to comply with the requirements of § 2710(d)(3)(A), and an order requiring the State to enter into a compact with the Tribe within sixty (60) days pursuant to 25 U.S.C. § 2710(d)(7).

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7)(A)(i). As specified in the IGRA, United States District Courts have jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a

State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. The plaintiff, the Quapaw Tribe of Indians, also known as the Quapaw Tribe of Oklahoma and as the "O-Gah-Pah," is a federally recognized Indian nation. *See* 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015). The Tribe exercises jurisdiction over land within the State, the title to which is held by the United States in trust for the benefit of the Tribe, and which is within the Tribe's Indian country jurisdiction for purposes of federal law, and which is also "Indian land" pursuant to the IGRA, *see* 25 U.S.C. § 2703(4)(B), and that is eligible for gaming, *see* 25 U.S.C. § 2719(a)(2)(B).

5. The defendant is the State of Kansas. Congress has permitted this action against states and the State to enable Indian tribes to enforce their rights under the IGRA, including the obligation imposed on states to negotiate tribal-state gaming compacts in good faith. *See* 25 U.S.C. to § 2710(d)(3)(A) & (7)(A) .

FACTUAL BACKGROUND

Tribe's Re-Acquisition of Trust Land Within the Quapaw Strip

6. Through the Treaty of May 13, 1833, 7 Stat. 424 (Kappler 1904, vol. 2, at 395) (the "Treaty of 1833"), the United States government forcibly removed the Quapaw from their homeland in the present-day State of Arkansas to a permanent reservation located within the present-day States of Oklahoma and Kansas. Under the Treaty of 1833, the United States set aside the new reservation, consisting of 150 sections of land, for the Tribe "so long as they shall exist as a nation or continue to reside thereon." *Id*. art. II.

7. As originally established, the Tribe's 1833 reservation was located within the far northeastern corner of present-day Oklahoma and within the far southeastern corner of present-day Kansas. The portion of the original Quapaw Reservation within Kansas consisted of approximately 12 sections of land, and was approximately one-half mile in width from north to south. The area of the reservation within Kansas came to be known—and still is referred to—as the "Quapaw Strip."

8. Pursuant to a subsequent treaty, the Treaty of February 23, 1867, 515 Stat. 513 (Kappler 1904, vol. 2, at 961), the Tribe sold and ceded to the United States most of the Tribal land within the Quapaw Strip portion of the reservation. The reservation boundaries, however, remained intact.

9. In 2008, as part of longstanding efforts by the Tribal leadership to generate economic development and to create jobs for Quapaw people, the Tribe opened the Downstream Casino Resort, an up-scale gaming resort (the "Resort"), on Indian land within the Oklahoma portion of the reservation along the Kansas-Oklahoma state line. Parking lots and other infrastructure of the Resort were constructed on approximately 124 acres of land reacquired by the Tribe within the Quapaw Strip in Cherokee County, Kansas (the "Kansas Tract").

10. During the construction of the Resort, the Tribe began the process of applying to the United States Secretary of the Interior to convey title to the Kansas Tract to the United States, in trust for the Tribe. This process was completed in 2012, when the Secretary acquired title to the Kansas Tract in the name of the United States in trust for the Tribe.

Governor Brownback's Encouragement to the Tribe to Seek a Compact

11. Following the opening of the Resort, the Tribe's leadership received encouragement from both local and state leaders in Kansas to explore conducting class III

gaming on its Kansas trust land pursuant to a tribal-state compact that would yield funds for local governments.

12. In late 2012 and early 2013, Kansas Governor Sam Brownback expressed to the Tribe's Chairman, John L. Berrey, his support for negotiating a tribal-state gaming compact, if the Tribe could confirm its legal right to conduct gaming on its Kansas trust land. Governor Brownback was supportive of a compact with the Tribe that would pay a portion of the proceeds from class III gaming to Cherokee County and other local governments.

13. In early 2013, Governor Brownback assigned his Tribal Liaison and Executive Director of Native American Affairs, Chris Howell, to meet with Quapaw leaders, and to begin compact negotiations. Howell advised the Tribe that, for political reasons, Governor Brownback could not support gaming in general, but that he could support economic development that involved gaming. At a February 2013 meeting Howell advised the Tribe's leadership to begin preparing a proposal for a compact. In late spring 2013, Howell advised the Tribe to submit a proposed compact to Governor Brownback.

14. Throughout the discussions, Governor Brownback made clear to the Tribe that he would proceed with compact negotiations only if the Tribe confirmed its right to conduct gaming on its trust land in Cherokee County. Thus, the Tribe, before submitting a proposed compact to Governor Brownback, requested an advisory letter opinion from the Office of the General Counsel of the National Indian Gaming Commission (the "NIGC") pursuant to 25 C.F.R. § 292.3(a) concerning whether the Tribe's Kansas trust land was eligible for gaming. Howell confirmed this condition for compact negotiations by notifying the Tribe in a letter in September 2013 that the compact negotiations depended on the results of the NIGC's advisory opinion.

Tribe's Submission of a Proposed Compact

15. Pursuant to the IGRA, and in coordination with the Governor's staff, the Tribe submitted a compact proposal to Governor Brownback dated June 6, 2013. In keeping with the Tribal leadership's commitment to Governor Brownback, that initial compact proposal provided that the Tribe would pay compact fees to four local governments, including the Board of County Commissioners of Cherokee County, the City of Baxter Springs, the City of Galena, and the Riverton Unified School District No. 404, located at Riverton.

16. In late 2013 and early 2014, the previously mutually cooperative discussions between Governor Brownback and the Tribe stalled. During that same time, the Kansas Legislature dramatically reduced the fees necessary for an applicant to seek approval to develop and manage a state casino in the Southeastern Kansas Gaming Zone, which includes Cherokee and Crawford Counties. The Kansas Lottery Commission began seeking applications to develop a state-owned casino in the zone in July 2014.

17. On November 21, 2014, the Acting General Counsel of the NIGC, Eric N. Shepard, issued an advisory letter opinion confirming that the Tribe's Kansas trust land is eligible for gaming. The Tribe continued to attempt to pursue a compact, but Governor Brownback refused to engage in any further negotiations.

State's Refusal to Negotiate a Compact with the Tribe

18. Governor Brownback's general counsel sent a letter to the Tribe dated April 9, 2015, notifying the Tribe that the State planned to file a judicial challenge to NIGC's advisory opinion—guidance that Governor Brownback had made a condition for compact negotiations. In fact, on that same date—and without conferring with the Tribe—the State filed an action in this Court challenging the agency's advisory letter guidance, which suit was captioned and styled as

Kansas ex rel. Schmidt et al. v. National Indian Gaming Commission et al., No. 15-cv-4857-DDC-KGS (the "NIGC Lawsuit").

19. On April 14, 2015, without any prior notice or consultation with the Tribe, the State filed an amended complaint in the NIGC Lawsuit, in which it named three governmental entities of the Tribe, as well as 18 individual elected officers, employees of governmental agencies, and members of boards of enterprises of the Tribe as party defendants. Most of the individuals named in the State's amended complaint had no authority or responsibility with respect to gaming, including gaming on the Tribe's Kansas trust land.

20. On December 18, 2015, this Court dismissed the complaint, holding that the State did not have the right to bring a suit against the federal government or the Quapaw Tribe under the IGRA. (Doc. 91.)

REQUIREMENTS UNDER THE IGRA FOR A STATE TO NEGOTIATE GAMING COMPACTS AND TO NEGOTIATE IN GOOD FAITH

21. Indian gaming began to be developed in the 1970s as a means for tribal governments—otherwise lacking viable tax bases—to generate revenues to provide governmental services. Prior to the enactment of the IGRA, tribes established their right to conduct and regulate gaming on Indian lands within states that otherwise allow and encourage gaming. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22, 107 S. Ct. 1083, 1094 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 390, 96 S. Ct. 2102, 2111-12 (1976). In 1988, Congress adopted the IGRA to further tribal economic development through gaming revenues, to promote tribal self-government, and to ensure adequate regulation of Indian gaming. *See* 25 U.S.C. § 2701.

22. Within the IGRA, Congress recognized the right of tribes to conduct and regulate

gaming on Indian lands in two categories—namely, traditional and social games (classified as class I gaming) and bingo and similar games (classified as class II gaming). *See* 25 U.S.C. § 2703(6) & (7). The statute recognized tribes' exclusive jurisdiction over class I and class II gaming, subject to certain provisions within the IGRA. *See* 25 U.S.C. § 2710(a)(1) & (2). The IGRA classified other types of games not within class I and class II—including gaming sometimes referred to as high-stakes or "casino-style" gaming—as class III gaming, *see* 25 U.S.C. § 2703(8), and gave states a limited role in the regulation of gaming in that category, *see id*. § 2710(d).

23. The IGRA established a framework under which Indian tribes may conduct class III gaming. The statute provides that "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity . . . is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). The IGRA requires that "[u]pon receiving such a request, the State *shall negotiate with the Indian tribe in good faith* to enter into such a compact." *Id.* (emphasis added).

24. Under the IGRA, compact negotiations are not voluntary—the act specifies the "State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). As the courts have recognized, through the IGRA "Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities, but imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA permitting the tribes to engage in lawful class III gaming activities." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1030 (9th Cir. 2010).

25. A state's obligation to enter into good faith compact negotiations is triggered immediately upon request of a tribe. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990). "The only condition precedent to negotiation specified by the IGRA is a request by the tribe to enter into negotiations." *Id.* at 1028. The Quapaw Tribe met this condition precedent, and as a result compact negotiations by the State were and are mandatory. States are not excused from their obligation to enter into compact negotiations even if a tribe has not yet received final regulatory approval to conduct gaming on Indian lands. *See id.*

26. Not only must a state enter into compact negotiations upon the request of a tribe, a state must engage in such negotiations in *good faith* as a matter of law. *See* 25 U.S.C. § 2710(d)(3)(A). A failure to negotiate at all constitutes a breach of the duty to renegotiate in good faith. *Northern Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308, 1312 (10th Cir. 2004); (noting "[w]hen a state wholly fails to negotiate . . . it obviously cannot meet its burden of proof to show that it negotiated in good faith."); *Mashantucket Pequot Tribe*, 913 F.2d at 1032-33. The IGRA sets forth a limited number of terms that may be considered during the negotiation process. *See* 25 U.S.C. § 2710(d)(3)(C). The IGRA contains these limitations "in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes . . . ." *Rincon Band*, 602 F.3d at 1028-29.

27. Further, a state cannot use the compacting requirement to exclude a tribe from gaming in order to protect its state-licensed gaming enterprises. Congress intended that "the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S. Rep. No. 100-446, at 13. States may not, for example, exclude a tribe from gaming on the basis that another casino in the area may

provide more financial benefits to the state. The IGRA "was not designed to give states complete power over tribal gaming such that each state can put the opportunity to operate casinos up for sale to the tribe willing to pay the highest price." *Rincon Band*, 602 F.3d at 1030. Rather, "IGRA's stated purposes include ensuring that *tribes* are the *primary beneficiaries* of gaming and ensuring that gaming is protected as a means of generating *tribal revenue*." *Rincon Band*, 602 F.3d at 1035 (emphasis in original).

28. In general, a state may not take a hard line position in negotiations, making a take-it-or-leave-it offer that would require the tribe either to accept provisions outside the permissible scope of the IGRA or go without a compact. *See Rincon Band*, 602 F.3d at 1039. Further, a state's subjective belief that it is not required to negotiate or that it is doing so in good faith does not excuse a failure to negotiate or to do so in good faith. *See Mashantucket Pequot Tribe*, 913 F.2d at 1033. For purposes of the IGRA, "good faith should be evaluated objectively based on the record of negotiations, and . . . a state's subjective belief in the legality of its requests" does not excuse improper actions. *Rincon Band*, 602 F.3d at 1041.

29. If a state fails to enter into mandatory compact negotiations or fails to negotiate in good faith, the IGRA permits a tribe to sue the state in federal court. 25 U.S.C. § 2710(d)(7)(A)(i). In such a suit, if a tribe shows that "the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith" then "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith . . . ." 25 U.S.C. § 2710(d)(7)(B)(ii). If "the court finds that the State has failed to negotiate in good faith . . . the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If a compact is not entered into within a 60-day period, the IGRA requires the parties to attend mediation. *See*

25 U.S.C. § 2710(d)(7)(B)(iv). If, after mediation, the state still fails to consent to a compact, the IGRA requires the Secretary of the Interior to prescribe, in consultation with the Tribe, procedures under which the Tribe may conduct gaming on the Tribe's Indian lands. *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

CAUSES OF ACTION

(Failure by the State to negotiate a tribal-state gaming compact in good faith (25 U.S.C. § 2710(d)(7)(A)(i)).

30. The Tribe hereby incorporates the preceding paragraphs as if set forth herein.

31. More than 180 days have passed since the Tribe's June 6, 2013, request to the Governor of the State of Kansas to begin tribal-state compact negotiations, as required under 25 U.S.C. § 2710(d)(7)(B)(i).

32. Not only has a compact not yet been entered into between the State and the Tribe, but the State has not even responded to the request of the Tribe to negotiate, and has not entered into good-faith negotiations with the Tribe.

33. Contrary to the requirements of the IGRA, the governor of the State—after initially encouraging the Tribe to seek a compact—ceased communicating and cooperating with the Tribe, and instead began taking actions designed to promote a new State-owned gaming operation within the Southeastern Kansas Gaming Zone, and to protect it from competition from Indian gaming. Among other actions, the State—without any consultation with the Tribe, filed an action against the NIGC and other federal parties seeking to challenge the very advisory legal opinion letter Governor Brownback had made a condition of compact negotiations. Subsequently, the State named individual Tribal leaders, officers, department directors and others in claims without legal merit, and primarily to discourage the Tribe from seeking to

pursue its recognized legal rights under the IGRA. Governor Brownback's and the State's actions with respect to a possible class III gaming compact have been arbitrary, in bad faith, and have been designed to retaliate against an Indian tribe for exercising federally recognized rights, to harass and intimidate the Tribal leadership, and to delay compact negotiations improperly under color of law.

34. Because the State has failed to enter into good faith negotiations for a compact with the Tribe, the Tribe is entitled to appropriate relief under 25 U.S.C. § 2710.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court award the following relief:

35. Issue a declaration that the State was and is required to negotiate in good faith with the Tribe to enter into a tribal-state gaming compact relating to the Kansas Tract, but that it has failed to do so in bad faith and in violation of 25 U.S.C. § 2710(d)(3) and other federal law.

36. Issue an order requiring the State to conclude a gaming compact with the Tribe within sixty (60) days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), failing which a compact must be selected by a mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), and providing that if the State fails to consent to the compact selected by the mediator within sixty (60) days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands located in the state of Kansas, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).

37. Any and all other relief that this Court deems just and appropriate.

Respectfully submitted,

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