IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiff,

v.

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

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

THE UNITED STATES OF AMERICA,
THE DEPARTMENT OF THE INTERIOR,
1849 C Street, N.W.
Washington, D.C. 20240,

RYAN ZINKE, in his official capacity as Secretary of the Interior,
1849 C Street, N.W.
Washington, D.C. 20240, and

MICHAEL BLACK, in his official capacity as Acting Assistant Secretary-Indian Affairs, Department of the Interior,
1849 C Street, N.W.
Washington, D.C. 20240,

Defendants.

Civil Action No. 1:14-cv-958-RMC

SECOND AMENDED COMPLAINT

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Plaintiff Fort Sill Apache Tribe, a federally acknowledged Indian Tribe (hereinafter the "Tribe"), as and for its Second Amended Complaint against defendants the National Indian Gaming Commission (the "NIGC" or the "Commission"), NIGC Chairman Jonodev Chaudhuri, the United States of America, the Department of the Interior, Ryan Zinke, the Secretary of the Interior ("Secretary"), and Michael Black, the Acting Assistant Secretary-Indian Affairs, states as follows:

Introduction

1. The Tribe brings this action under 5 U.S.C. §§ 702, 704 and 706 to seek review of a Decision and Order of the NIGC dated May 5, 2015 (the "Decision and Order"), and a final determination by the NIGC relating to reconsideration of the Decision and Order, dated January 12, 2017 (the "Final Determination").[1] The Tribe has suffered legal wrong from, and is adversely affected and aggrieved by, the Decision and Order and Final Determination.

2. The Decision and Order is a ruling by the NIGC on an administrative appeal from a notice of violation issued by the NIGC Chairman to the Tribe for gaming on allegedly ineligible Indian Lands in violation of 25 U.S.C. § 2719 ("NOV 09-35").[2] The Indian Lands in question, located at Akela Flats in Luna County, New Mexico, are the Tribe's ancestral homelands, from which they were illegally removed in the 1880s by U.S. military action. On November 28, 2011, these lands were the first land to be proclaimed to be the Tribe's reservation by the Department of the Interior ("DOI"). The Decision and Order is arbitrary, capricious, an abuse of discretion, not in accordance with law and unsupported by substantial evidence. The Decision and Order also breaches a binding 2007 settlement agreement between the United States and the Tribe.

3. In the Final Determination the Commission reaffirmed the conclusions of its Decision and Order, without explanation, despite having reviewed and given "careful consideration" to an Indian Lands opinion letter from the DOI's Office of the Solicitor, dated

[1] A copy of the Decision and Order is attached hereto as exhibit 1, and a copy of the Final Determination is attached hereto as exhibit 2.

[2] A copy of NOV 09-35 is attached hereto as exhibit 3.

December 9, 2016, which on information and belief provides contrary reasoning and compels contrary conclusions. The NIGC's refusal to follow the reasoning of the December 9, 2016 Indian Lands opinion or to explain the rationale for its disagreement arbitrarily and capriciously contravenes the standard process and practices of the agency, a Memorandum of Agreement ("MOA") between the NIGC and DOI concerning the gaming eligibility of tribal lands, and Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-42 (2001).[3]

4. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), generally prohibits gaming on trust lands acquired after 1988 (the "General Prohibition"), but also provides that this rule does not apply to "the initial reservation of an Indian Tribe acknowledged by the Secretary under the Federal Acknowledgment Process," or to "the restoration of lands for an Indian Tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(ii) & (iii). Contrary to the Decision and Order, the Indian Lands in question are eligible for gaming because they are the Tribe's "Initial Reservation" under 25 U.S.C. § 2719(b)(1)(B)(ii) and because they are "Restored Lands" under 25 U.S.C. § 2719(b)(1)(B)(iii).

5. The NIGC Chairman issued NOV 09-35 on July 21, 2009. NOV 09-35 asserted (among other things) that the Indian Lands in question were not eligible for gaming because they were not the Tribe's "Initial Reservation" and were not "Restored Lands." The Chairman based these findings on: (a) regulations codified at 25 CFR Part 292; (b) factual findings by the Commission's staff that the government-to-government relationship between the United States and the Tribe's ancestors (the Chiricahua and Warm Springs Apache) had never been terminated; (c) a finding that Akela Flats was not acquired in trust as part of the restoration of lands for the Tribe; (d) a finding that the Tribe had failed to demonstrate that it was acknowledged through the Federal acknowledgment process; and (e) a finding that Akela Flats was not (at that time) the Tribe's initial reservation.

[3] A copy of the Memorandum of Agreement is attached hereto as exhibit 4.

6. The May 5, 2015 Decision and Order affirmed NOV 09-35 on grounds that are inconsistent with the notice of violation itself and with other rulings of the NIGC. Two conditions must be met to qualify for IGRA's Initial Reservation exception: the trust land in question must constitute the Tribe's initial reservation, and the Tribe must be an "Indian tribe acknowledged under the Federal acknowledgment process." 25 U.S.C. § 2791(b)(1)(B)(ii). The Decision and Order admits that, subsequent to NOV 09-35, the Akela Flats land has been proclaimed by the DOI to be the Tribe's initial reservation. Yet the Decision and Order nonetheless concludes that the Akela Flats land is not the Tribe's "Initial Reservation" for purposes of IGRA, on the theory that the Tribe has not been federally acknowledged. But to the contrary, in 1974-76 the Tribe went through the Tribal Government Development Program, the federal acknowledgment process in place in the 1970s, and was federally acknowledged in 1976. This acknowledgement is reflected in the DOI's listing of federally-acknowledged tribes published in the January 31, 1979 edition of the Federal Register. On information and belief, the December 9, 2016 Indian Lands opinion issued by the DOI addresses the Tribe's acknowledgment process. Yet the Final Determination reaffirms, without explanation, the conclusions of the Decision and Order.

7. The Decision and Order also contravenes a March 8, 2007 "Agreement of Compromise and Settlement" between the United States of America, the DOI, the Tribe and the Comanche Nation (the "Comanche Settlement Agreement").[4] In this settlement agreement the Tribe agreed to give up its right to acquire additional trust land in the former Kiowa, Comanche and Apache reservation abutting Fort Sill, Oklahoma. The Tribe made this agreement in express consideration for the United States' commitments to take certain actions and stipulate to certain facts in order to assist the Tribe in qualifying the Akela Flats land for the exceptions in IGRA that permit gaming on lands taken into trust after 1988. In particular, in § 7(l)) of the Comanche Settlement Agreement the United States committed to facilitate the issuance of a Reservation

[4] A copy of the Agreement of Settlement and Compromise in the *Comanche* litigation is attached as exhibit 5.

Proclamation stating that Akela Flats was the Tribe's Reservation. The United States also agreed as follows:

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

In concluding that the Tribe is not an "Indian tribe acknowledged under the Federal acknowledgment process," the Decision and Order is silent on this provision and the other provisions of the Comanche Settlement Agreement.

8. The Decision and Order, NOV 09-35 and the Final Determination violate the Comanche Settlement Agreement. The Tribe surrendered valuable land and gaming rights in Oklahoma in consideration for the United States' express and binding agreements, which were bargained for to assist the Tribe in establishing its right to conduct gaming at Akela Flats. The United States induced the Tribe to enter into the Comanche Settlement Agreement on the basis of these agreements, but now seeks to dishonor them. The Comanche Settlement Agreement and its terms bind the United States, and the Decision and Order should be reversed for this reason alone.

9. The Decision and Order is arbitrary, capricious and contrary to law in other particulars as well. NOV 09-35, for instance, is based exclusively on violations of Part 292. The Decision and Order affirms NOV 09-35, however, despite acknowledging that Part 292 *"does not apply to this action."* To affirm a notice of violation based entirely on Part 292, while simultaneously admitting that Part 292 does not apply to Akela Flats, is arbitrary and capricious.

10. The Decision and Order does not discuss or weigh the evidence placed before the NIGC. The Decision and Order concedes the Tribe supplied voluminous historical documents and other relevant evidence to the NIGC during the administrative appeal process, yet it addresses almost none of the evidence. Moreover, the NIGC bears the burden of proof when a

notice of violation is issued, but NOV 09-35 erroneously placed the burden of proof on the Tribe. The Decision and Order repeats that error, and the Final Determination reaffirms the error.

11. By issuing a NOV that threatened the Tribe with draconian daily penalties for operating a gaming facility at Akela Flats, and then refusing to rule for over half a decade on the Tribe's administrative appeal of NOV 09-35, the NIGC accomplished by fiat, and without due process, what its own regulations forbade: it closed the Apache Homelands Casino without alleging, much less proving, a "substantial violation" of IGRA, based on supposed violations of the Part 292 regulations that the NIGC now concedes did not apply. Nonetheless, the NIGC affirmed NOV 09-35, and the Final Determination again reaffirms it. This is arbitrary and capricious agency action, and is contrary to law.

12. In the Final Determination, the NIGC stated: "After careful consideration of the December 9th letter, we have determined that there are no grounds . . for reconsideration of the Commission's May 5, 2015 Decision and Order." This conclusion is arbitrary and capricious and in violation of the agency's procedures and practices. The Department of Justice then came before the Court and claimed that the Final Determination was not final agency action. On June 29, 2017, the Court rejected this contention. "I believe that the intent and explicit language of my order was to the effect that that would be a new final decision from the agency."

13. The Department of Justice's position attempted to repudiate an agreement made by the Tribe, the DOI and the NIGC in October 2015. The Tribe had presented the NIGC and the DOI with a proposed settlement agreement. The DOI and the NIGC counteroffered with a two step resolution process. First, the DOI would issue a letter providing DOI's position regarding Akela Flat's gaming eligibility under the IGRA, analyzing in particular whether the Tribe was acknowledged by the Secretary under the Federal acknowledgment process, and would provide that letter to the NIGC. Second, the NIGC would formally reconsider its Decision and Order in consideration of the letter to be provided by the DOI, and would issue a new Decision and Order incorporating such reconsideration. In return the litigation would be stayed. The parties proceeded on the basis of this agreement, and had numerous meetings,

telephone calls and emails based on it. The agreement between the parties ultimately became the subject of a stipulated order, which was reaffirmed by a subsequent stipulated order. (ECF 51, 60).

14. Although the defendants owe trust duties to the Tribe and entered into an agreement triggering those duties, at the behest of the Department of Justice (on information and belief) the defendants proceeded to violate their agreement with the Tribe. Their violations continued even after the Court's orders were entered. DOI's letter, promised to be ready by the end of 2015, was not produced until on or about December 9, 2016, and then only after repeated attempts by the Department of Justice to betray the agencies' commitment, repeated and unexplained breaches of Court-ordered deadlines, and the Court's threat to hold the DOI in contempt. No coherent explanation has ever been given for the extraordinary delay. It does not take 15 months to write ten pages.

15. On January 12, 2017, the NIGC produced a letter refusing to change the conclusions of its Decision and Order, and even tried to pretend that its letter was not final agency action. These positions contravened the agreement of the NIGC as stipulated in the Court's orders. The parties expressly agreed, and the Court twice entered stipulated orders providing, that "the NIGC shall reconsider its Decision and Order dated May 5, 2015, in consideration of the letter to be provided by Interior, and shall issue a Decision and Order incorporating such reconsideration." This agreement and stipulation is unambiguous, as counsel for the NIGC represented to the Court on September 30, 2016:

> "What happens is the Secretary of Interior issues an opinion to the NIGC. The NIGC takes that into consideration when it issues its decision. It has I believe 30 days from receipt of an opinion from the Interior to issue its decision. ***Then at that time the decision becomes, I believe it becomes final and appealable.***"

(Emphasis added).

16. The resolution process — agreed by the parties, stipulated by the parties, and ordered by the Court — embodied a process that the defendants were required to follow under

federal statutory law and the MOA between the NIGC and the DOI. In 2001, Congress clarified that the "authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701–2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988." 2002 Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). The MOA requires a legal opinion addressing whether land meets one of the exceptions in 25 U.S.C. § 2719. The DOI Office of the Solicitor "must concur in any opinion that provides legal advice relating to . . . The exceptions in 25 U.S.C. § 2719 . . . ." Ex. 4 at ¶ 4.

17. The Final Determination is final agency action, based on "careful consideration" of the DOI's December 9, 2016 letter. Yet the NIGC neither concurred with the DOI's opinion, engaged in the agreed dispute resolution process, nor stated its reasons in writing.

18. For these and all the additional and further reasons set forth in this Second Amended Complaint, the Tribe respectfully requests the Court to find that, in the Decision and Order, NOV 09-35 and the Final Determination, the NIGC acted arbitrarily and capriciously, abused its discretion, failed to follow the MOA and its own procedures and practices, breached the Comanche Settlement Agreement, acted not in accordance with law, and produced a decision that is unsupported by substantial evidence. The Tribe respectfully requests the Court to vacate and invalidate the Decision and Order and Final Determination, and to issue a decision finding that the Tribe's Akela Flats reservation is Indian Land eligible for gaming under IGRA.

Jurisdiction and Venue

19. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a defendant), and 28 U.S.C. § 1362 (civil action brought by an Indian tribe).

20. The sovereign immunity of the United States, including its agencies and commissions, is waived for purposes of this action by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, including § 702; by the Settlement Agreement entered into in March, 2007 by the United States of America, the United States Department of the Interior, the

Tribe and the Comanche Nation; and by the resolution process agreement entered into by Interior, the NIGC and the Tribe in October, 2015.

21. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because defendants are the government of the United States, agencies of the United States and officers of federal agencies, each of whom is located in the District of Columbia. Venue also is proper in this Court under 28 U.S.C. § 1391(e)(2) because this action is brought in the judicial district where a substantial part of the events and omission giving rise to the claims set forth in this first amended complaint occurred.

22. There has been a final agency action and there exists an actual, justiciable controversy between the Parties.

The Parties

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

24. Defendant National Indian Gaming Commission is an independent federal regulatory agency created pursuant to IGRA. The address of the NIGC is 1441 L Street, N.W., Suite 9100, Washington, D.C. 20005.

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

26. Defendant United States of America is a sovereign nation, organized under the United States Constitution and the laws of the United States. The United States includes the

various agencies, commissions and bureaus organized and operating under the laws of the United States, including the NIGC, the DOI and the Bureau of Indian Affairs ("BIA").

27. Defendant the Department of the Interior is an administrative agency of the United States of America whose employees at the BIA have responsibility for administering the relationship between the United States and American Indian tribes, including the plaintiff. The address of the DOI is 1849 C Street, N.W., Washington, D.C. 20240.

28. Defendant Ryan Zinke is the Secretary of the Interior of the United States, and oversees and administers the operations of DOI including the operation of the BIA. Secretary Zinke, along with his successors in office, is sued in his official capacity.

29. Defendant Michael Black is the Acting Assistant Secretary–Indian Affairs, Department of the Interior, and is responsible for overseeing and administering the BIA. Acting Assistant Secretary Black, along with his successors in office, is sued in his official capacity.

The Indian Gaming Regulatory Act

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

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

32. IGRA generally prohibits gaming on lands acquired in trust by the Secretary after IGRA's October 17, 1988 enactment. 25 U.S.C. § 2719(a). This prohibition is commonly described as the General Prohibition against gaming on after-acquired lands (the "General Prohibition").

"Indian Lands" Requirement

33. IGRA also contains specified exceptions to the General Prohibition. Collectively, the exceptions to the General Prohibition are designed to allow all tribes to secure the benefits of IGRA, including tribes that were not recognized or did not have reservation lands of their own on the date of IGRA's enactment. *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for W.D. Mich.*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999).

34. One exception provides that the General Prohibition does not apply to lands taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process" (the "Initial Reservation Exception"). 25 U.S.C. § 2719(b)(1)(B)(ii). Lands qualify for the Initial Reservation Exception if (a) they are formally proclaimed to be a tribe's reservation and (b) the tribe does not have another reservation at the time of that proclamation. The Initial Reservation Exception does not specify any particular form of "Federal acknowledgment process" that must be followed. *Id*.

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

36. In May 2008, the BIA published regulations purporting to implement the General Prohibition, the Restored Lands Exception, the Initial Reservation Exception, and other provisions of IGRA. 73 Fed. Reg. 29354 (May 20, 2008). Those regulations, which appear at 25 C.F.R. Part 292 and are commonly referred to as the "Part 292 Regulations," went into effect on August 25, 2008. 73 Fed. Reg. 35579 (Jun. 24, 2008). The Part 292 Regulations do not apply to matters involving NIGC opinions issued prior to August 25, 2008. *See* 25 C.F.R. § 292.26(b).

In the Decision and Order, the Commission has conceded that Part 292 does not apply to this case. (Ex. 1 at 24-25.)

Notices of Violation

37. The Chairman of the NIGC has the authority to issue notices of violation alleging violations of IGRA. Notices of violation are subject to *de novo* administrative review by the full Commission. 25 C.F.R. §§ 573.3(a); 577.15 (2008).[5] In cases involving an administrative appeal of a notice of violation, the Chairman bears the burden of supporting his notice by a preponderance of the evidence. *See, e.g., In the Matter of JPW Consultants* (NIGC 97-4, 98-8) (Nov. 13, 1998).

Administrative Penalties

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

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

40. Regulations in effect at the time the NOV was issued identify "substantial violations" of IGRA that can justify a closure order. 25 C.F.R. § 573.6(a) (2008). Notably, the operation of a gaming facility on tribal trust lands that do not or may not constitute "Indian lands" eligible for gaming under IGRA is not among them.[6]

[5] The NIGC amended many of its regulations in 2012. *See, e.g.*, 77 Fed. Reg. 47518 (Aug. 9, 2012) (amending Part 573); 77. 58945 (Sept. 25. 2012) (amending Part 577); 77. 58948 (Sept. 25, 2012) (creating 25 C.F.R. Part 853). Unless otherwise stated, references in this Complaint to NIGC regulations are to the regulations in effect at the time the NIGC issued the NOV in 2009.

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

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

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

25 U.S.C. § 2713(b)(2).

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

Factual Background

A. Historical Background

43. The Tribe is the legally determined successor-in-interest to the Chiricahua and Warm Springs Apache tribes that once occupied Southwest New Mexico. The Tribe was forcibly ejected by the United States from its aboriginal homelands in New Mexico in the 1880s and, for more than 27 years, its members were held by the United States as prisoners of war in Florida, Alabama and Oklahoma. Today, the Tribe and its elected government are of modest size and limited resources.

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

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

46. In May 1894, Congress authorized the relocation of the Chiricahua and Warm Springs Apache to the Fort Sill Military Reservation in what was then the "Indian Territory" (now Oklahoma). Most of the Chiricahua and Warm Spring Apache remained imprisoned at Fort Sill for another 19 years.

47. In late 1913 and early 1914, the United States released the surviving Chiricahua and Warm Springs Apache prisoners of war from Fort Sill so that it could use the land on which the surviving prisoners were living as an artillery range. The United States forced individual Chiricahua and Warm Springs Apache to choose between becoming a member of the Mescalero Apache Tribe in New Mexico (a different and pre-existing tribe) or being released to live without tribal affiliation or membership in Oklahoma. Chiricahua and Warm Springs Apache who chose not to join the Mescalero were settled in Oklahoma on parcels of land located within the Kiowa, Comanche and Apache Reservation ("KCA Reservation"), near Fort Sill.

48. In the 1970s the Tribe went through the DOI's Tribal Government Development Process, managed by the BIA, which was a process for obtaining federal acknowledgment in place at the time. The Tribe fulfilled governance contracts entered into with the BIA, submitted its constitution and by-laws which were approved by the BIA, conducted an election to approve the constitution and by-laws, and took a number of other additional steps required by the BIA. The Tribe was acknowledged, at the latest, on August 18, 1976, when the Commissioner of Indian Affairs approved the Tribe's constitution.

49. The process reflected in the documents shows that the Secretary acknowledged the Fort Sill Apache Tribe as an Indian tribe with which the United States maintained a government-to-government relationship. The acknowledgement occurred two years before the DOI promulgated the first regulations governing the federal acknowledgment process (formerly Part 54, now Part 83). The stated purpose of Part 83 was "to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist." 43 Fed. Reg. 39361 (Sept. 5, 1978). With the promulgation of these initial regulations, DOI required that a list be published in the federal register within 90 days, and annually thereafter, "of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs. " *Id*. at 39362. The Tribe was included on that first list and every list thereafter. The United States thereby acknowledged the Tribe as a federally recognized tribal entity entitled to government-to-government relations with the United States. [7]

50. On September 5, 1978, the DOI formally promulgated the Part 83 regulations, effective October 2, 1978. The regulations were intended to formalize a process for regularizing federal acknowledgment of Indian tribes and tribal governments. The regulations required the DOI to compile a list identifying all previously federally acknowledged Indian tribes, and to contact all tribes not yet acknowledged to inform them of the opportunity to petition for acknowledgment. 43 Fed. Reg. 39361, 39362 (Sept. 5, 1978). The regulations were eventually published as 25 C.F.R. Part 83.[8]

51. Pursuant to "step one" of the Part 83 regulations, the DOI published a listing of all federally-acknowledged tribes in the January 31, 1979 edition of the Federal Register. 44 Fed. Reg. 7235 (Jan. 31, 1979). That listing states "The United States recognizes its trust responsibility to these Indian entities and, therefore, ***acknowledges*** their eligibility for programs

[7] *Fort Sill Apache Tribe v. Martinez*, Order, No. 34,464 Mem. Op. at 1-2 (N.M. Apr. 14, 2014). As part of the agreed resolution process, and at the specific request of the DOI, the Tribe provided voluminous government documents demonstrating the federal governments acknowledgement of the Fort sill Apache as a federally recognized tribe.

[8] The regulations were initially published at 25 C.F.R. Part 54. Soon after, they were republished without amendment at 25 C.F.R. 83. For simplicity, the Tribe refers to them as the Part 83 Regulations.

administered by the Bureau of Indian Affairs." *Id*. (emphasis added). The Tribe is one of the tribes "acknowledged" on the initial list. *Id*.

52. On or about October 23, 1998, the Tribe acquired approximately thirty acres of property in fee simple at Akela Flats. The Akela Flats property is within the Tribe's aboriginal homeland, the area where the Chiricahua and Warm Springs Apache lived prior to their dispossession. Shortly thereafter, the Tribe requested that the United States accept title to the Akela Flats property to be held in trust for the Tribe. As part of that process, the Tribe enacted a resolution declaring that acquisition of the Akela Flats property in trust was part of the Tribe's initial efforts to restore its ancestral lands in New Mexico.

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

54. On or about June 26, 2002, the United States formally accepted trust title to the Akela Flats property for the exclusive use and benefit of the Tribe.

55. The Tribe has a significant modern-day connection to the Akela Flats property. The Tribe presently operates businesses on the Akela Flats property. The Tribe also has approved the movement of a number of tribal agencies and programs to Akela Flats, including the Section 106 Consultation Program, Native American Graves Protection and Repatriation Program, the Cultural Resources Management Program, the Fort Sill Apache Environment Protection Agency, the tribal Higher Education program, and the tribal Per Capita program. Unfortunately, the Tribe's ability to move these agencies and programs to Akela Flats (and to raise capital and develop related infrastructure on and near the property) has been hindered by the NIGC's five year delay in issuing the Decision and Order, and by the State of New Mexico's prior refusal to recognize the Tribe, now reversed by the state's supreme court.

56. On April 14, 2014, the New Mexico Supreme Court unanimously ordered the State of New Mexico to recognize the Tribe, to include the Tribe on the list of tribal entities

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

B. The *Comanche* Lawsuit

57. In the meantime, the tribe also had acquired land located within the former KCA Reservation. On March 29, 1996, the United States issued a memorandum opinion concluding that the Tribe had "equal standing" with other tribes within the former KCA Reservation. Individual Chiricahua and Warm Springs Apache prisoners of war had been granted allotments within the KCA Reservation in 1913 and 1914. The memorandum opinion concluded that the BIA could transfer land within the former KCA Reservation into trust for the Tribe and that such transfers did not require consent of other tribes.

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

59. On or about June 30, 1998, the BIA approved the trust-to-trust transfer of the Lawton Parcel for the purpose of gaming.

60. The Comanche Nation objected to the Tribe's efforts to establish a land base within the former KCA Reservation, contending that that the Tribe could not have trust land there and asserting primary jurisdiction over the Lawton Parcel.

61. On March 23, 2005, the Comanche Nation filed suit against the United States, challenging the Tribe's trust acquisition of the Lawton Parcel (the "*Comanche* Litigation"). The Tribe intervened in the lawsuit to protect its interests.

62. The DOI negotiated and was signatory to the Comanche Settlement Agreement, in which the Tribe agreed to relinquish fundamental land and gaming rights in the former KCA Reservation in exchange for agreements and acknowledgments by the United States to assist the

Tribe in qualifying for exceptions to the General Prohibition allowing the Tribe to conduct gaming at Akela Flats.

63. On March 8, 2007, the parties to the *Comanche* Litigation agreed to the terms set forth in the Comanche Settlement Agreement. (A copy is attached hereto as Exhibit 3). Pursuant to that agreement, the Comanche Nation committed to dismiss its lawsuit. The United States committed to withdraw its March 29, 1996 memorandum opinion allowing the Tribe to acquire a land base on the former KCA Reservation in Oklahoma and to enter into certain agreements that would assist the Tribe in establishing equivalent rights in New Mexico. The Tribe committed to withdraw its request for a separate trust-to-trust property acquisition and agreed not to take any additional former Comanche allotments into trust without prior approval from the Comanche Nation. The parties to the Comanche Settlement Agreement made these commitments in consideration of, and in express reliance upon, the specific findings and representations set forth in Section 7 of the Agreement.

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

65. In Section 7 of the Comanche Settlement Agreement, the United States acknowledged and agreed that the Tribe is the successor-in-interest to the Chiricahua Apache and Warm Springs Apache groups:

> 7(g) **The Fort Sill Apache Tribe is successor-in-interest to the Chiricahua and Warm Springs Apache Tribes whose aboriginal territory**, as defined by the Indian Claims Commission and as affirmed by the United States Court of Claims, includes parts of Arizona and New Mexico where the United States currently holds land in trust for the benefit of the Fort Sill Apache Tribe. *See Fort Sill Apache Tribe v. United States*, 19 Ind. Cl. Comm. 212 (1968); *United States v. Fort Sill Apache Tribe*, 477 F.2d 1360, 201 Ct. Cl. 630 (1973), *cert. denied*, 416 U.S. 993 (1974).

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

> 7(h**) The United States once maintained a government-to-government relationship with the Chiricahua and Warm Springs Apache Tribes**, as evidenced by treaties, negotiations with tribal leaders, provision of services to the Tribes and Tribal members, and other government-to-government relationships clearly identified in numerous legal actions maintained before the Indian Claims Commission; United States Court of Claims; United States District Courts and the United States Department of Interior Board of Indian Appeals. See, e.g., Fort Sill Apache Tribe v. United States, supra, 19 Ind. Cl. Comm. at 212.

67. In the Comanche Settlement Agreement the United States further acknowledged and agreed that its government-to-government relationship with the Chiricahua and Warm Springs Apache tribes was terminated:

> 7(i) The United States **does not acknowledge and/or recognize the Chiricahua and/or Warm Springs Apache Tribes as "Federally Recognized Tribes"**, or as entities "acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, Powers, limitations and obligations of such tribes." 70 Fed. Reg. 71194 at 1.

68. In the Comanche Settlement Agreement the DOI stated that it "understands and agrees" that the Tribe is a federally acknowledged Indian tribe:

> 7(j) On or about August 16, 1976 the Commissioner of Indian Affairs formally approved the Constitution of the Fort Sill Apache Tribe, **and thereafter the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe**, see 70 Fed. Reg. 71194, and has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date.

69. In the Comanche Settlement Agreement the United States acknowledged and agreed that the Tribe has no reservation within the State of Oklahoma:

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

70. In the Settlement Agreement, the United States agreed that, in exchange for the relinquishment of the Tribe's right in Oklahoma, the United States would take actions and make

certain factual findings concerning the land at Akela Flats that would establish the basis for the Tribe to receive rights in New Mexico — the site of its original homeland — equivalent to the rights it was foregoing in Oklahoma. Thus the United States agreed that Akela Flats would be designated as the Tribe's initial reservation:

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

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

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

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

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

74. In accordance with IGRA, the Tribe drafted a tribal gaming ordinance and secured approval of that ordinance by the NIGC. The Tribe planned to open a gaming facility known as the "Apache Homelands Casino" on the Akela Flats property. Pursuant to an NIGC-

approved tribal gaming ordinance, on December 16, 2007, the Tribal Gaming Commission issued a license for the operation of a Class II gaming facility at Akela Flats.[9]

75. Although the NIGC had previously reviewed and approved the Tribe's gaming ordinance, on February 27, 2008, it sent the Tribe a "Warning Notice" that a "preliminary review" indicated that operation of a gaming facility at Akela Flats might violate the General Prohibition.

D. The May 2008 Counsel Opinion

76. On May 19, 2008, the NIGC's General Counsel issued a written opinion declaring that the Akela Flats property does not qualify for gaming under IGRA (the "May 2008 Opinion").

77. The May 2008 Opinion contradicted the commitments, assertions, and representations of the United States in the Comanche Settlement Agreement. Among other things, the Opinion concluded that the Tribe could not meet the Restored Lands Exception to IGRA's General Prohibition because the government-to-government relationship between the United States and the Tribe's ancestors, the Chiricahua and Warm Springs Apache, had never been terminated. This assumption formed a basis for the opinion's erroneous conclusion that the Akela Flats property does not qualify for the restored lands exception to the General Prohibition. This assumption is contrary to the specific provisions of the Comanche Settlement Agreement.

78. The May 2008 Opinion also concluded that the Tribe could not meet the requirements of the Initial Reservation Exception to the General Prohibition because Akela Flats was not a reservation and because "the Tribe has failed to demonstrate…that the Tribe was acknowledged through the Federal acknowledgment process." That determination is contradicted by Section 7(j) of the Comanche Settlement Agreement, which provides "the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe."

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

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

80. The Tribe brought the errors and omissions of the May 2008 Opinion to the attention of the *Comanche* court. In an October 1, 2008 hearing, the Court questioned the determination in the May 2008 Opinion that the Chiricahua and Warm Springs Apache Tribes were still recognized. After the hearing the United States filed a Notice of Material Change of Status stating that "in an effort to fully address the legal arguments raised by the Fort Sill Apache in this action, the National Indian Gaming Commission (NIGC), Office of General Counsel has withdrawn its May 19, 2008, legal opinion." By withdrawing the legal opinion the United States prevented the Court from making a finding on the validity of the May 19, 2008 legal opinion.

E. The NIGC Issues Notice of Violation 09-35

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

82. On or about April 30, 2009, the NIGC General Counsel issued a "supplement" to her withdrawn 2008 Opinion (the "2009 Supplement").

83. On July 21, 2009, the NIGC Chairman issued NOV 09-35 and ordered that "the Tribe must immediately cease all gaming operations at Akela Flats." NOV 09-35 adopted and incorporated the withdrawn 2008 NIGC Opinion and the 2009 Supplement:

> Today, I adopt the Office of General Counsel's reasoning and conclusions set forth in its advisory legal opinions, dated May 19, 2008 and April 30, 2009. As a consequence, the Akela Flats parcel, although Indian Lands, is ineligible for gaming under IGRA because it fails to satisfy any exception to the prohibition on gaming on after acquired trust lands.

Ex. 1, NOV-09-35, at 5 §§ I, J.

84. NOV 09-35, and the May 2008 Opinion and 2009 Supplement it adopted and incorporated, unlawfully concluded that the Akela Flats property is subject to the General Prohibition and does not qualify for any exception to the Prohibition.

85. NOV 09-35, and the 2009 Supplement it adopted and incorporated expressly relied on Part 292 in making their findings and, despite their admission that Part 292 is inapplicable, the NIGC nevertheless cites those regulations in the Decision and Order.

F. The NIGC Requires Closure of the Apache Homelands Casino

86. NOV 09-35 stated that "there is no way for the Tribe to cure the alleged violation" and directed the Tribe to "immediately cease all gaming operations at Akela Flats." The NOV also threatened the Tribe with civil fines of up to $25,000 per day if the Apache Homelands Casino remained open. The NOV did not cite or otherwise specifically identify any substantial violation of IGRA.

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

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

89. NIGC regulations in effect at the time (*i.e.*, 2008 and 2009) did not designate gaming on ineligible lands as a "substantial violation" of IGRA and did not permit the NIGC to order the closure of a tribal gaming facility absent a "substantial violation" of IGRA.

90. By denying the Tribe an opportunity to cure the alleged violation and threatening fines that the Tribe could not reasonably be expected to pay, the NIGC effectuated closure of the Apache Homelands Casino without issuing a closure order and without identifying or establishing a "substantial violation" of IGRA.

G. The Tribe's Administrative Appeal

91. The NIGC's arbitrary and capricious actions did not end with its issuance of NOV 09-35. The Tribe timely appealed NOV 09-35 to the full Commission of the NIGC. At the NIGC's suggestion, the Tribe agreed to waive its right to an administrative hearing before a "Presiding Official" in exchange for the NIGC's commitment to an expedited resolution of the administrative appeal based on briefing submitted to the full Commission. The NIGC never expedited the proceeding. On the contrary, although the administrative record for the Tribe's administrative appeal was completed years ago, and despite repeated requests from the Tribe, *the NIGC refused to rule on the appeal for more than 5 years*. Indeed, the NIGC admitted after this action was first filed that it was intentionally withholding a ruling on the Tribe's appeal.

92. The briefing schedule established by the NIGC for the administrative appeal provided that the NIGC Chairman would submit a responsive brief with supporting exhibits. The NIGC never filed a responsive brief in accordance with the September 18, 2009 schedule. On February 22, 2010, the NIGC issued a notice formally declining to provide any substantive information or argument in support of the NOV.

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

94. In October of 2013, after six months had passed with no decision from the NIGC, the Tribe requested a status conference to discuss the Tribe's appeal and the NIGC's timeframe for issuing a decision.

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

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

97. The Tribe was severely prejudiced by the NIGC's inexcusable delay in acting on the appeal. The uncertainty of the status of the Akela Flats gaming operation impeded and curtailed the Tribe's ability to borrow funds and finance its operations. The Tribe's inability to operate the Apache Homelands Casino deprived the Tribe of the financial ability to implement its plans to re-establish New Mexico — including the area of and surrounding Akela Flats — as its governmental and population centers.

98. By the Spring of 2014, the Tribe had tried every means at its disposal to solicit a decision from the NIGC, and it had become painfully clear that the NIGC was not going to issue a decision. The Tribe was left with no choice but to file suit against the NIGC in order to compel agency action required by law. Accordingly, on June 14, 2014, the Tribe commenced this action. Count 1 of the original complaint filed by the Tribe sought injunctive and declaratory relief under 5 U.S.C. § 706(1) to compel agency action unlawfully withheld or unreasonably delayed. Count 2 of the complaint sought relief under 5 U.S.C. § 706(2) to hold unlawful and set aside the

Notice of Violation as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

99. After this action was file, the NIGC announced that it was "poised to issue a final decision in this matter" but was deliberately choosing not to do so. (ECF Doc. 10 at 26; ECF Doc. 18 at 2).

100. Rather than issuing a decision, or moving forward on the merits, the NIGC and Mr. Chaudhuri moved to dismiss the complaint.

101. On May 12, 2015, the Court entered an Order granting in part and denying in part the Defendants' Motion to Dismiss the Complaint and an Opinion explaining the Court's reasoning. The Court found that NIGC is subject to suit because the APA provides an express waiver of sovereign immunity that is applicable here. The Court agreed with the Tribe that it has jurisdiction over Count 1 to compel agency action that had been unreasonably delayed, but found that jurisdiction was lacking over Count 2 until there is final agency action.

102. The Court found that the NIGC had "a mandatory, nondiscretionary duty to issue a decision on an appeal of a notice of a violation by date-certain deadlines." "The Tribe has made a clear claim of 'failure to act.'"

H. The Decision And Order

103. On May 5, 2015, the NIGC finally issued its Decision and Order in the administrative appeal of NOV 09-35. On information and belief, the NIGC would not have issued the Decision and Order without the pressure of this lawsuit. The NIGC did not inform the Court that it had issued the Decision and Order prior to May 12, 2015. Following the issuance of the Decision and Order, the Tribe filed its first amended complaint. (EFC Doc. 30).

104. The Decision and Order admits facts that are critical to the issues raised in this lawsuit. Because the initial determination on gaming eligibility was made in May 2008, the Decision and Order properly found that Part 292 does not apply to the Akela Flats Property. (Ex. 1 at 24-25). With respect to the Initial Reservation Exception, the Decision and Order recognized that since the May 2008 Opinion, Akela Flats has been proclaimed a reservation.

(Ex. 1 at 29). *Sub silentio*, the Decision and Order accepts that Akela Flats is the Tribe's initial reservation under 25 U.S.C. § 467.

105. However, the Decision and Order nonetheless concluded that Akela Flats does not qualify for the Initial Reservation Exception. To reach this conclusion the Decision and Order adopted the reasoning of the May 2008 Opinion, which claimed that the words "Federal acknowledgment process" in 25 U.S.C. 2719(b)(1)(B)(ii) are a "term of art" that excludes all Federal acknowledgment procedures other than Part 83. (Ex. 1 at 29). This conclusion is contradicted by the plain meaning of the statute. On information and belief, the December 9, 2016 letter from DOI to the NIGC addresses this subject in greater detail and with a fuller analysis than the May 2008 Opinion on which the NIGC relied.

106. With respect to the Restored Lands Exception, the Decision and Order rejected the determination in NOV 09-35 that the Tribe's government-to-government relationship had not been terminated. (Ex. 1 at 27). In the Decision and Order, the NIGC admitted that the Tribe could not exercise its right to act as a sovereign government when its members were being held as prisoners of war in Florida, Alabama and Oklahoma. The NIGC thereby conceded that a critical finding in the NOV, that the Tribe had not been terminated, was incorrect and that instead the Tribe had been "de facto terminated."

107. Nonetheless, the NIGC adopted the reasoning of the May 2008 Opinion to find that the land was not taken into trust as part of the Tribe's restoration. (Ex. 1 at 27). The NIGC did not explain why the factual information supplied by the Tribe is inadequate to show that the land was taken into trust as part of the restoration. (Ex. 1 at 27-28.) The Tribe provided evidence to the NIGC showing that the Akela Flats property was acquired in 1998 as part of the restoration process and program. The NIGC, not the Tribe, has the burden of proof; yet the NIGC does not identify the evidence it relied on to rebut the Tribe's evidentiary proof.

108. The NIGC's conclusion that Akela Flats was not taken into trust as part of the restoration was arbitrary, capricious and inconsistent with prior decisions by the agency. In decisions involving other restored tribes, the NIGC has found that restored land meets the

Restored Land Exception despite being acquired decades after restoration, including land acquired 23 years after restoration, 18 years after restoration, 20 years after restoration, 14 years after restoration and 11 years after restoration.[10] As in other cases where the NIGC has found restored lands, the land acquisition here, while it took decades to complete, was part of the Tribe's overall land restoration scheme. It is uncontested that Akela Flats is the ancestral homelands of the Tribe, where its members lived until they were marched off at gunpoint by United States cavalry.

109. As in other cases where the NIGC has found restored lands, the Tribe lacked the financial ability and the opportunity to acquire the land before 1998. As in other cases where the NIGC has found restored lands, the Tribe was not in a position to acquire the land earlier because of the government's historical actions towards the Tribe. The NIGC considered and weighed these factors in many other Restored Lands opinions. Its refusal to do the same here is arbitrary and capricious. In the Decision and Order, the NIGC also fails to address the New Mexico Supreme Court's determination that Fort Sill is presently a New Mexico Tribe.

I. The Final Determination

110. After the Tribe filed its first amended complaint, it presented the DOI and the NIGC with a proposed settlement agreement. Shortly thereafter, the agencies countered with a

[10] See Memorandum to Carl J. Artman, Assistant Secretary — Indian Affairs, from Kaush Arha, Associate Solicitor, Indian Affairs (Nov. 21, 2007), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianland; Letter to Russell Attebery, Chairman, Karuk Tribe of California, from Tracie L. Stevens Chairwoman, NIGC (Apr. 9, 2012), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fKaruk; Letter to Hon. Dennis Martinez, Chairman, Mechoopda Indian Tribe of Chico Rancheria, from Kevin K. Washburn, Assistant Secretary — Indian Affairs (Jan. 24, 2014), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fMechoopdaIndTrbChico; Memorandum to Assistant Secretary — Indian Affairs, from Associate Solicitor, Division of Indian Affairs (Dec. 5, 2011), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f07_confdtbscooslwrumpasuislawindns; Letter to Buford L. Rolin, Chairman, Poarch Band of Creek Indians, from Philip N. Hogen, Chairman, NIGC (May 19, 2008), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fPoarch; see also Memorandum to NIGC Chairman Deer, from NIGC Acting General Counsel (August 5, 2002), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f2002.08.05+Bear+River; Memorandum to Philip N. Hogen, Chairman, NIGC, from John R. Hay, Staff Attorney, NIGC (Oct. 18, 2007), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2fIndian+Land+Determinations%2fmooretown.

proposed agreement to follow a two-step resolution process. First, the DOI would issue a letter providing DOI's position regarding Akela Flats' gaming eligibility under IGRA, analyzing in particular whether the Tribe was acknowledged by the Secretary under the Federal acknowledgment process, and would provide that letter to the NIGC. Second, the NIGC would formally reconsider its Decision and Order in consideration of the letter to be provided by the DOI, and would issue a new Decision and Order incorporating such reconsideration. In return the litigation would be stayed. The parties proceeded on the basis of this agreement, and had numerous meetings, telephone calls and emails based on it. The agreement between the parties ultimately became the subject of a stipulated order, which was reaffirmed by a subsequent stipulated order. (ECF 51, 60).

111. The structure of the agreed-upon process purposefully built in certain procedural protections should the NIGC act unfavorably. Requiring the NIGC to issue a new decision and order in explicit consideration of the DOI's letter meant that the NIGC would base its final determination on current DOI analysis and positions on the Tribe's federal acknowledgment, not on an eight year old, outcome-driven, poorly-reasoned attorney's opinion written to attempt to justify the unlawful shuttering of the Akela Flats gaming facility. Moreover, if the NIGC result was nonetheless unfavorable, the Tribe would have a new decision and order that it could challenge on the basis of a current, informed and in-depth analysis of the Tribe's acknowledgement status. A core consideration for staying the case was that the NIGC's determination following the issuance of the DOI's letter would be public and appealable, however the NIGC might choose to rule. The Tribe's ability to challenge the NIGC's new decision and order was fundamental consideration and a critical component of the agreement between the parties. The Tribe never would have agreed to the resolution process without this core protection.

112. The DOI stated that it believed it would have the Indian Lands opinion letter completed by the end of 2015. The parties formed a binding agreement to follow this resolution process. The DOI advised that it believed it would have its letter complete before the end of

2015. On October 13, 2015, the parties filed a joint motion to stay this litigation to allow the parties to engage in the proposed resolution process. (ECF Doc. 42).

113. The parties subsequently extended the stay on numerous occasions. The extensions of the stay were necessitated by DOI's continuing delays in producing its letter. When the DOI did not complete the letter by year's end, it assured the Tribe that it would be finished by the end of March, 2016. As that deadline loomed, the NIGC and the DOI promised to complete the process by June 1, 2016. In a meeting of counsel on May 20, 2016, the DOI warned that it was going to miss the June 1 deadline, but assured the Tribe that the letter was nearly complete, would definitely be completed in June 2016, and that the NIGC then would complete its reconsideration of its decision in July 2016. But these dates too came and went with no letter.

114. Each time the DOI told the Tribe it was going to miss the next deadline, the Tribe expressed its concern about the broken commitment and the time that was being lost. Each time the DOI responded by apologizing, but explaining that it needed the extra time. The DOI reassured the Tribe that it would not be continuing with the effort if it did not believe the outcome for the Tribe would be favorable.

115. When the inexplicable delays nonetheless persisted through the summer of 2016, the Tribe raised the DOI's failure to issue the letter at a status conference held on August 15, 2016. The Court directed the DOI to issue the letter no later than September 15, 2016. On August 17, 2016, the parties jointly submitted a stipulated order providing that the letter would issue on September 15, 2016.

116. Instead of producing the letter, the Department of Justice waited until September 15 — the day performance was due — and moved to vacate the Court's August 17, 2016 order on the pretext that defendants needed more time and on the spurious argument that by entering the stipulated order, the Court somehow had granted the ultimate merits relief sought in the case. The Tribe requested an emergency conference, which the Court held telephonically on September 18, 2016. The Court declined to vacate the August 17th order, and directed the DOI

to comply with the order in 10 days or provide an explanation, *in camera*. Instead the Department of Justice again waited until the day for compliance, again refused to comply, and again refused to explain why. On September 30, the Court again ordered compliance.

117. During October 2016, the DOI requested that the Tribe provide it with historical records concerning the Tribal Government Development Program and the federal acknowledgment process that had resulted in the Tribe's formal acknowledgement in 1976. Between October 11 and October 28, the Tribe managed (at considerable expense) to locate and provide the DOI with 39 documents from the 1970s that conclusively prove the Tribe was acknowledged through a federal acknowledgment process employed by the DOI at the time.[11] The DOI assured the Tribe that it would review such documents, together with historical documents it had gathered from its own files, as part of its assessment of the Tribe's acknowledgement under IGRA. In light of the DOI's assurances, the Tribe agreed to yet another extension of time for the DOI's production of the letter. (ECF Doc. 58.) An agreed order was jointly submitted requiring the DOI to issue the Indian Lands opinion letter on or before December 1, 2016. (ECF Doc. 60).

118. Yet on November 30, the day before the letter was due, the Department of Justice again filed a motion for more time. Again the Department of Justice would not explain why. (ECF Doc. 62). A hearing was conducted on December 1, 2016. The Court admonished the defendants, warned that contempt would be the penalty if they continued to defy the Court's orders, and reluctantly extended the deadline for issuance of the DOI's letter to December 9, 2016. (ECF Doc. 64). On December 9, 2016, the DOI filed under seal a copy of the Indian Lands opinion letter, prepared by the DOI's Office of the Solicitor, and addressed to the General Counsel of the NIGC. (ECF Doc. 63) The Department of Justice refused to share the letter with the Tribe.

[11] Importantly, the historical documents provided by the Tribe consist entirely of correspondence between the Tribe and federal officials or documents sent between them, all of which were (or should have been) available to the NIGC prior to issuance of the NOV and Decision and Order.

119. On January 12, 2017 the NIGC sent a letter advising that it had carefully considered the DOI's December 9 letter but, without explanation, would not be changing the positions taken in the Decision and Order:

> After careful consideration of the December 9th letter, we have determined there are not grounds, for settlement purposes, for reconsideration of the Commissioner's May 5, 2015 Final Decision and Order. As such, the May 5, 2015 Final Decision and Order in re: Fort Sill Apache Tribe of Oklahoma Appeal of NOV-09-35 stands.

ECF Doc. 67, Ex. 1 (a copy is attached as exhibit 2).

120. In the January 12, 2017 NIGC Final Determination and in subsequent court filings, the Department of Justice tried to claim that the Final Determination was not final agency action. On June 29, 2017, the Court rejected this attempt:

> I believe that the intent and explicit language of my order was to the effect that that would be a new final decision from the agency. That was the [parties'] request to me, all parties. That was the order. That is the result. So to that extent, yes, the tribe[] can amend the complaint to add that final agency decision.

Transcript of Motion Hearing Before the Honorable Rosemary M. Collyer, United States District Judge, at 5:7-12.

VIOLATIONS OF LAW

COUNT 1: THE DECISION AND ORDER IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, NOT IN ACCORDANCE WITH LAW AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE (VIOLATION OF IGRA AND THE APA)

121. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 120 above as if fully restated herein.

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

123. In the Decision and Order, the NIGC purports to find that the Akela Flats property is subject to the General Prohibition and does not qualify for any of the exceptions, including the Initial Reservation Exception and the Restored Lands Exception. By so finding, the Chairman and the NIGC acted arbitrarily and capriciously, for the reasons set forth below, among others.

Initial Reservation Exception

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

125. From in or around August 1973 through August 16, 1976, the Tribe participated in the DOI's Tribal Government Development Program ("TGDP"). The TGDP was a process used by the DOI at the time for re-establishing the formal government-to-government relationship between the United States and Indian tribes.

126. As part of the TGDP, the Tribe corresponded with the DOI regarding the drafting and adoption of an initial Constitution and Bylaws for the Tribe. The Tribe entered into a contract with the DOI allowing for the provision of federal funds to the Tribe to assist in the development of an initial Constitution and Bylaws, and restoration of the government-to-government relationship between the United States and the Tribe. The Tribe established an official Tribal office, consolidated Tribal records, implemented a record-keeping system, and distributed written plans to the Tribe's membership regarding the use of Tribal funds. All of these matters were duly reported and submitted to the DOI pursuant to the TGDP contract. At a plenary meeting the Tribe adopted the initial Constitution and Bylaws of the Tribe, which then were approved by the United States Commissioner of Indian Affairs on or about August 16, 1976. The Tribe also worked with the DOI to develop the first eligible Fort Sill Apache Tribe voter list.

127. In approving the Tribe's Constitution and Bylaws, the Commissioner of Indian Affairs acknowledged the Tribe's federally-recognized status.

128. The Tribe appears on the January 31, 1979 listing of federally-acknowledged tribes that was prepared pursuant to Part 83. 44 Fed. Reg. 7235 (Jan. 31, 1979). Thus even if the Initial Reservation Exception required that the Tribe be acknowledged through the Part 83 process, which it does not, the Tribe *was* so acknowledged because it appears on the Part 83-mandated list of federally-acknowledged tribes.

129. On November 28, 2011, pursuant to its obligations under the Settlement Agreement, the DOI proclaimed the Akela Flats property to be "the Fort Sill Apache Indian reservation for the Fort Sill Apache Tribe of Indians." That proclamation was published in the Federal Register. *See* 76 Fed. Reg. 72969 (Nov. 28, 2011). The Final Decision and Order admits that Akela Flats is the Tribe's initial reservation.

130. In the Settlement Agreement, the United States expressly provided that "the United States ***acknowledged*** the Fort Sill Apache Tribe" (emphasis added).

131. The Final Decision and Order nonetheless concluded that Akela Flats does not qualify for the Initial Reservation Exception because "the Tribe was not acknowledged through the Federal acknowledgment process under 25 C.F.R. part 83." That conclusion is arbitrary, capricious, and contrary to law for each of the reasons set forth below. The Initial Reservation Exception does not specify that the "Federal acknowledgment process" that must be followed is only Part 83. 25 U.S.C. § 2719(b)(1)(B)(ii). The statute does not state, or suggest, that prior processes of acknowledgment are excluded.

132. The NIGC's contrary interpretation is unsupported by the plain statutory language and inconsistent with both the purpose of IGRA and the Indian law canons of construction (which require that ambiguous statutory provisions be construed in the Tribe's favor). Had Congress intended to limit the Initial Reservation exception only to those tribes acknowledged through the Part 83 process, and not tribes that were otherwise acknowledged through a Federal acknowledgment process, Congress would have to expressly stated such a limitation.

133. In return for valuable consideration, in the Comanche Litigation Settlement the United States stated its understanding and gave its solemn and binding agreement that the Tribe is an Indian Tribe acknowledged under the Federal acknowledgment process for purposes of IGRA. The United States and its agencies, commissions, bureaus and officers are bound by the understanding and agreement that the United States unequivocally provided in the Comanche Settlement Agreement. Yet the Decision and Order betray this agreement and conclude to the contrary.

134. The portion of the Decision and Order addressing the Initial Reservation Exception relies on the May 2008 Opinion, which in turn relied on Part 292. As conceded elsewhere in the Decision and Order, Part 292 is inapplicable to this analysis.

135. The MOA requires the NIGC to seek an opinion from the DOI analyzing whether the Tribe is federally acknowledged for purposes of IGRA before the NIGC determines whether the Tribe qualifies for the initial reservation exception. The Indian Lands opinions issued by the DOI prior to the May 5, 2015 Decision and Order did not opine on the issue of federal acknowledgment, but instead concluded that the Tribe did not qualify for the initial reservation exception solely because Akela Flats was not (at that time) the Tribe's initial reservation. As the Decision and Order acknowledges, that reservation status changed in 2011 when the DOI issued a Reservation Proclamation establishing that Akela Flats was a reservation of the Tribe. In the Decision and Order, the NIGC acted arbitrarily and capriciously by determining that Akela Flats nonetheless did not qualify for the initial Reservation exception without first seeking an opinion from the DOI regarding the Tribe's federal acknowledgement status. The DOI opinion required by the resolution process would have rectified that error had the NIGC actually relied upon it. The NIGC did not rely on it, and thus acted arbitrarily and capriciously and not in accordance with its own procedures and the law.

136. NOV 09-35, the May 2008 Opinion, and the Decision and Order improperly allocate to the Tribe (rather than the NIGC) the burden of proving Akela Flats' eligibility for the Initial Reservation Exception. The NIGC bears the burden of proof in all administrative

enforcement actions such as this one. *See, e.g., In the Matter of JPW Consultants* (NIGC 97-4, 98-8) (Nov. 13, 1998); 25 C.F.R. 580.7.

Restored Lands Exception

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

138. The Comanche Settlement Agreement establishes that the Tribe is the successor in interest to the Chiricahua and Warm Springs Apache tribes (both of which dealt with the United States on a government-to-government basis prior to their incarceration as prisoners of war).

139. The Comanche Settlement Agreement also establishes that this government-to-government relationship with the Chiricahua and Warm Springs Apache tribes was terminated.

140. The Decision and Order acknowledges that during the decades when the tribal members were held as prisoners of war, the Tribe was unable to exercise its rights as a sovereign government. The Decision Order further acknowledges the *de facto* termination of the Tribe.

141. The Tribe has a historic connection to the Akela Flats property, as the property lies at the heart of the Tribe's aboriginal territory in New Mexico, as recognized by the Indian Claims Commission. *Fort Sill Apache Tribe, et al. v. United States*, 19 Ind. Cl. Comm. 212 (June 28, 1968).

142. The Tribe has a modern-day connection to the Akela Flats property, despite the dampening effect on tribal development there caused by the NIGC's arbitrary and capricious issuance of the NOV and a half-decade of dilatory administrative review proceedings. In addition, the Tribe was recently acknowledged as a New Mexico tribe by the New Mexico Supreme Court.

143. There is also a temporal connection between the Tribe's restoration to federally recognized status and the trust acquisition of the Akela Flats property. The Comanche

Settlement Agreement, the July 23, 2001 letter wherein the United States approved the acquisition of Akela Flats in trust for the Tribe, and the Tribal Resolution submitted in connection with the Tribe's trust acquisition request all confirm that the property was part of the Tribe's systematic effort to restore the Tribe's aboriginal land base.

144. The Decision and Order, NOV 09-35 and the May 2008 Opinion improperly allocate to the Tribe (rather than the NIGC) the burden of proving Akela Flats' eligibility for the Restored Lands Exception. The NIGC bears the burden of proof in all administrative enforcement actions such as this one. *See, e.g., In the Matter of JPW Consultants* (NIGC 97-4, 98-8) (Nov. 13, 1998); 25 C.F.R. 580.7.

145. The Tribe provided the NIGC with evidence demonstrating that Akela Flats was taken into trust as part of the Tribe's restoration. The NIGC's contrary conclusion represents an arbitrary, capricious, and unjustified departure from agency practice. It is uncontested that Akela Flats is the ancestral homeland of the Tribe. The land acquisition, while it took an extended time to complete, was part of the restoration scheme. The Tribe lacked the financial ability and opportunity to acquire the land before 1998, and was in this dire position because of the historical actions of the United States government. The NIGC has considered and weighed such factors in many other Restored Lands opinions, but inconsistently refused to consider them here. In other cases, the NIGC has found restored land meets the Restored Land Exception where such lands were acquired within time periods analogous to the Tribe's acquisition of Akela Flats, but inconsistently found otherwise here

146. The NIGC's arbitrary and capricious Decision and Order has caused and continues to cause material harm to the Tribe.

COUNT 2: THE NIGC'S ACTIONS TO FORCE CLOSURE OF THE APACHE HOMELANDS CASINO ARE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND NOT IN ACCORDANCE WITH LAW (VIOLATION OF IGRA AND THE APA)

147. The Tribe repeats and incorporates by reference the allegations contained in paragraphs 1 through 146 above as if fully restated herein.

148. When issuing NOV 09-35, the NIGC advised the Tribe that there was "no way for the Tribe to cure" the violations alleged therein. The NIGC also threatened to impose massive fines unless the Apache Homelands Casino was closed.

149. By denying the Tribe an opportunity to cure alleged violations and threatening fines that the Tribe could not reasonably be expected to pay, the NIGC effectively ordered the closure of the Apache Homelands Casino.

150. Regulations in effect at the time prohibited the NIGC from issuing a closure order absent a "substantial violation" of IGRA. The regulations did not specify that the violation alleged in NOV 09-35 — gaming on lands (allegedly) subject to the General Prohibition — was a "substantial violation."

151. Even if the NIGC had the authority to close the Apache Homelands Casino (which the Tribe disputes), the NIGC's actions deprived the Tribe of the due process protections afforded in matters involving a formal closure order including, most importantly, the right to have an administrative appeal resolved within 90 days.

COUNT 3: BREACH OF THE COMANCHE SETTLEMENT AGREEMENT

152. The Tribe repeats and incorporates by reference the allegations contained in paragraphs 1 through 151 above as if fully restated herein.

153. On March 8, 2007, the United States, the Fort Sill Apache Tribe and the Comanche Nation entered into an Agreement of Compromise and Settlement, which we have referred to herein as the Comanche Settlement Agreement.

154. The Comanche Settlement Agreement is binding on any legal or factual determinations made by the United States regarding the Akela Flats land in New Mexico.

155. In agreeing to the Comanche Settlement Agreement, the Fort Sill Apache Tribe gave up valuable jurisdictional and property rights in Oklahoma.

156. These rights were surrendered based on the pledge of the United States government, as part of the Comanche Settlement Agreement, that it understood and agreed to the facts outlined in Section 7 of the Comanche Settlement Agreement, and that it would continue to be bound by those facts.

157. The United States, including the NIGC, breached the Comanche Settlement Agreement by taking positions in the May 2008 Opinion, the 2009 Supplement and NOV 09-35 that directly contradict the agreements made by the United States in Section 7 of the Comanche Settlement Agreement.

158. The United States has continued to breach the Comanche Settlement Agreement. The Decision and Order and Final Determination directly contradict the Comanche Settlement Agreement.

159. The Decision and Order's finding that the Tribe is not "acknowledged by the Secretary under the Federal acknowledgment process" breaches the "understanding and agreement" of the United States in the Comanche Settlement Agreement that on or about "August 16, 1976 the Commissioner of Indian Affairs formally approved the Constitution of the Fort Sill Apache Tribe, **and thereafter the United States acknowledged the Fort Sill Apache Tribe to be a federally recognized Tribe**, *see* 70 Fed. Reg. 71194, and has maintained a formal government-to-government relationship with the Fort Sill Apache Tribe since that date." (Ex. 3 at 7, § 7(j) (emphasis added)). The Final Determination's reaffirmation of the Decision and Order also breaches § 7(j) of the Comanche Settlement Agreement.

160. The DOI breached the Comanche Settlement Agreement because, in communications between the DOI and the NIGC concerning the validity of NOV 09-35, the DOI failed to consider and comply with the impact of its agreements in the Comanche Settlement Agreement on the NIGC's application of the IGRA exceptions to the Akela Flats land.

161. The NIGC breached the Comanche Settlement Agreement because it failed to consider and comply with the United States' agreements in the Comanche Settlement Agreement on the application of the IGRA exceptions to the Akela Flats land.

162. The United States is bound by the Comanche Settlement Agreement to recognize the Tribe as an "Indian tribe acknowledged under the Federal acknowledgment process" as required by 25 U.S.C. 2719(b)(1)(B)(ii).

163. The United States is bound by the Comanche Settlement Agreement to recognize that Akela Flats is land restored to the Tribe as required by 25 U.S.C. 2719(b)(1)(B)(iii).

164. The breaches by the United States of the Comanche Settlement Agreement, entered into by the United States and the DOI, have materially harmed the Tribe.

COUNT 4: THE NIGC'S FINAL DETERMINATION IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, NOT IN ACCORDANCE WITH LAW AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE (VIOLATION OF IGRA AND THE APA)

165. The Tribe repeats and incorporates by reference the allegations contained in paragraphs 1 through 164 above as if fully restated herein.

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

The Final Determination is a New Final Order Subject to Judicial Review

167. On February 17, 2017, the Court found that the Final Determination substantially constituted a Decision and Order of the NIGC incorporating its consideration of a new Indian Lands Opinion issued in December, 2016 by the DOI. On June 29, 2017, the Court held that "the intent and explicit language of my order was to the effect that that would be a new final decision from the agency. That was the [parties'] request to me, all parties. That was the order. That is the result." The Final Determination, therefore, is finally agency action, despite the self-serving protestations drafted into it.

168. The Final Determination is a new final order subject to judicial review. "When the Commission reopens a proceeding for any reason and, after reconsideration, issues a new and

final order setting forth the rights and obligations of the parties, that order— even if it merely reaffirms the rights and obligations set forth in the original order— is reviewable on its merits." *I.C.C. v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 278, 107 S. Ct. 2360, 2365, 96 L. Ed. 2d 222 (1987). "If for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision. The new order is, in other words, final agency action and as such, a new right of action accrues and starts the running of a new limitations period for judicial review." *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997); *see also, e.g., Harris v. F.A.A.*, 353 F.3d 1006, 1011 (D.C. Cir. 2004).

The NIGC Arbitrarily and Capriciously Failed to Consider the Substance of the DOI's Letter

169. The NIGC acted arbitrarily and capriciously, abused its discretion and acted not in accordance with law by "carefully considering" the DOI letter but nonetheless, on information and belief, rejecting the analysis and the substance of the DOI's letter in the Final Determination, without explaining why.

170. From the Fall of 2015 through the Fall of 2016, the Tribe and its counsel met repeatedly with senior officials at the DOI, including the Assistant Secretary—Indian Affairs and senior personnel and lawyers from the DOI's Office of the Solicitor. The DOI officials and personnel at these meetings repeatedly expressed the DOI's commitment to the resolution process. Each time they sought an extension, the DOI assured the Tribe that they would not be seeking additional time if the process was not moving in a direction favorable to the Tribe. Indeed, in October the Assistant Secretary personally requested the Chairman of the Tribe to provide the historical documents about the Tribal Government Development Program in order to assist the DOI in the process, with the implication that such documents would help the DOI establish a position favorable to the Tribe. It is to be assumed that the officials and personnel who made these statements were speaking truthfully and that the statements and assurances were accurate. Therefore it may be inferred, on information and belief, that the reasoning and analysis in the DOI Indian lands opinion letter was favorable with respect to the question of whether the

Tribe was acknowledged by the Secretary under the Federal acknowledgement process for purposes of 25 U.S.C. § 2719(b)(1)(B)(ii).

171. The refusal of the NIGC to reconsider its Decision and Order, which assumes without support that the Tribe is not acknowledged, therefore constitutes agency action, findings and conclusions that are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

The Final Determination Violates the NIGC-DOI MOA

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172. The MOA requires the NIGC to seek an opinion from the DOI analyzing whether the Tribe is federally acknowledged for purposes of IGRA before the NIGC determines whether the Tribe qualifies for the initial reservation exception. The DOI Office of the Solicitor "must concur in any opinion that provides legal advice relating to . . . The exceptions in 25 U.S.C. § 2719 . . . ." Ex. 4 at ¶ 4. The MOA reflects federal statutory law, which provides that the "authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701–2721 of title 25, United States Code, ***was delegated to the Secretary of the Interior on October 17, 1988***." 2002 Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001)(emphasis added).

173. In the Final Determination the NIGC declined to reconsider the Decision and Order, either by concurring with the DOI's opinion or engaging in the agreed dispute resolution process if not concurring, and did not state its reasons in writing. The refusal of the NIGC to follow its own agreed procedure constitutes agency action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

174. On November 28, 2011, the DOI issued the Reservation Proclamation for Akela Flats, the first (and only) reservation proclamation for the Tribe. Although the NIGC acknowledged the Reservation Proclamation in the Decision and Order, it nevertheless continued to rely on the DOI's pre-Reservation Proclamation determination with regard to Akela Flat's qualification for the Initial Reservation Exception. It now has the December 9, 2016 opinion

letter which, for the first time, on information and belief fully addresses whether the Tribe was acknowledged by the Secretary under the Federal acknowledgement process for purposes of 25 U.S.C. § 2719(b)(1)(B)(ii). The NIGC was required to consider the DOI's opinion, concur with it or engage in the dispute resolution process while stating its reasons for not concurring in writing. The refusal of the NIGC to follow its own agreed-upon, usual procedure, and instead to continue to rely on an outdated, pre-2011 DOI opinion, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. The failure of the NIGC, on information and belief, to accept and apply the analysis of the December 9, 2016 DOI Indian Lands Opinion letter, and instead to continue to rely on an outdated, pre-2011 DOI opinion, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

175. The NIGC's refusal to consider the DOI's December 9, 2016 letter, and issue a new decision and order rather than the Final Determination, has precluded the Tribe from adequately challenging the NIGC's position on the Tribe's federal acknowledgment, to the prejudice of the Tribe.

The Final Determination Violates NIGC Due Process Regulations

176. NIGC regulations require that specific due process procedure be followed when reconsidering a previous decision. The NIGC failed to follow these procedures.

177. NIGC regulations specifically provide that a party may file a motion for reconsideration of a final decision on appeal. 25 C.F.R. § 581.6(a). A motion for reconsideration will be granted when:

> (1) New and material evidence is now available that, despite the party's due diligence, was not available when the record closed;
>
> (2) The final decision was based on an erroneous interpretation of law or there has been an intervening change in the controlling law; or
>
> (3) A manifest injustice, clearly apparent or obvious on its face, will occur if the motion for reconsideration is not granted.

25 C.F.R. § 581.6(a)

178. The NIGC is not allowed to issue a blanket denial or grant of a motion for reconsideration without explaining its reasoning. Rather, the Commission "shall issue a brief statement of the reasons for its decision." 25 C.F.R. § 581.6(f).

179. The Commission was required to abide by its regulations regarding reconsideration, and failed to do so when it refused to issue a statement of reasons for its decision as is required by 25 C.F.R. § 581.6(f).

180. In the Final Determination, the NIGC considered extra-record evidence that was not before the Commission when it rendered the May 5, 2015 Decision and Order. After reviewing that extra-record evidence, the NIGC decided to reaffirm the May 5, 2015 Decision and Order. 25 C.F.R. § 581.6(a) requires the Commission to address the new information in its reconsideration.

181. As set forth above, the reasoning of the December 9, 2016 DOI letter is believed to be contrary to the NIGC's May 2015 Decision and Order with respect to federal acknowledgement. Therefore, on information and belief, the Final Determination is based on an erroneous interpretation of the law, which the Commission was required to address under 25 C.F.R § 581.6.

182. The NIGC Regulations and due process require that the NIGC provide the Tribe with any documents the NIGC considered on reconsideration. Thus on an appeal to the Commission the appellant is entitled to "the record on which the Chair relied … within 10 days of filing the notice of appeal." 25 C.F.R. § 585.6.

183. Because it fails to comply with well-established federal law and its own regulations, the Final Determination is arbitrary and capacious and in violation of the APA.

184. The Final Determination reaffirms the reasoning and conclusions of the Decision and Order. Therefore the Final Determination is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law for all the reasons the Decision and Order is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, as set forth above.

185. The NIGC's arbitrary and capricious actions, culminating in the Final Determination, have materially harmed the Tribe.

PRAYER FOR RELIEF

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

1. declare that the Decision and Order of the National Indian Gaming Commission, affirming NOV 09-35, and the Final Determination, are arbitrary, capricious, abuses of discretion, not in accordance with law and unsupported by substantial evidence;

2. reverse the Decision and Order and the Final Determination, vacate NOV 09-35, set aside all actions taken in its enforcement, and order Defendants to take all necessary corrective action to reinstate the Tribe's legal rights;

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

4. enforce the Comanche Settlement Agreement;

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

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

Dated: June 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2017, I served the foregoing Second Amended Complaint and accompanying exhibits by filing the same with the Court's CM/ECF system, which will send notification to all counsel of record in this matter who are registered with the Court's CM/ECF system.

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By: /s/ Kenneth J. Pfaehler
Kenneth J. Pfaehler

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