NATIONAL
INDIAN
GAMING
COMMISSION

September 29, 2000

The Honorable Jim Henson
Chief, United Keetoowah Band of
Cherokee Indians of Oklahoma
P.O. Box 746
Tahlequah, OK 74465

Dear Chief Henson:

As you know, a question has arisen as to whether the land on which the United Keetoowah Band of Cherokee Indians ("UKB") is conducting gaming is Indian lands as defined by the Indian Gaming Regulatory Act ("IGRA") and National Indian Gaming Commission ("NIGC") regulations. Absent such a determination, there is a serious question as to whether the IGRA or state gambling laws apply to the gaming activities conducted on such land. We conclude that the lands on which the UKB is conducting gaming are not Indian lands over which the UKB has jurisdiction. Accordingly, the UKB's gaming activity is not subject to IGRA.

Background

In reaching our conclusion, we reviewed the following circumstances. On March 22, 1995, Chairman Harold Monteau drafted a letter to the tribe in which he approved the UKB's gaming ordinance. In that letter, he indicated the NIGC's understanding that the UKB lacks lands that meet the definition of "Indian lands" under IGRA. A copy of the letter is enclosed.

In our effort to obtain further clarification of the status of UKB's gaming site, the NIGC asked the tribe, on May 25, 2000, to provide a legal basis and explanation regarding whether the land upon which the tribe conducts gaming is "Indian lands" as that phrase is defined in IGRA, 25 U.S.C. § 2703(4), and NIGC regulations, 25 C.F.R. § 502.12.

On June 14, 2000, the tribe responded with a letter including a license for gaming issued by the UKB gaming board and a list of tribes with NIGC-approved gaming ordinances that includes the UKB. In the letter the tribe indicated that a legal opinion regarding the UKB's status as a "dependent Indian community" would be forthcoming.

On July 27, 2000, we received a letter and affidavit of an attorney named Nathan H. Young. In the affidavit, Mr. Young indicated that as First Assistant District Attorney for District 27 of the State of Oklahoma, he issued a legal opinion concluding that the UKB Headquarters and Bingo Hall was Indian country as defined under federal and state law.

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On August 21, 2000, we received a copy of a letter addressed to Assistant Secretary Kevin Gover in which the UKB requests that 2.6 acres currently used as tribal headquarters, membership office, tag office, bingo hall, and administrative programs, along with a small contiguous strip of less than once acre, be placed into trust. The letter included a copy of the UKB's trust land application.

Overview of Applicable Provisions of the Indian Gaming Regulatory Act

An Indian tribe may engage in gaming under IGRA only on "Indian lands within such tribe's jurisdiction," 25 U.S.C. § 2710(b). Moreover, if the proposed lands are trust or restricted lands, rather than land with the limits of an Indian reservation, the tribe may conduct gaming on such lands only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). IGRA explicitly defines "Indian lands" as follows:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the 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).

NIGC regulations have further clarified the Indian lands definition, providing that:

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

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

The dual questions under IGRA of whether a tribe "has jurisdiction" and "exercises governmental power" over land on which the tribe proposes to conduct gaming can arise under a variety of circumstances. *See, e.g., Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-703 (1st Cir. 1994); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1217-18 (D.Kan. 1998)(*Miami II*) (a tribe must have jurisdiction to exercise governmental power); *State ex rel. Graves v. United States*, 86 F. Supp.2d 1094, 1099 (D.Kan. 2000); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan.

1996)(*Miami I*). In this context, the NIGC is charged with the task of ensuring that 1) the tribe has jurisdiction, and 2) if the proposed lands are trust or restricted lands outside the limits of an Indian reservation, that the tribe exercises governmental power over the proposed gaming lands. It is against this analytical framework that we must consider the Tribe's gaming site.

Reservation, Trust and Restricted Lands

Because no statute, executive order, or Secretarial declaration establishes the land on which UKB is gaming as an Indian reservation, we lack any basis for such a finding. Indeed, the Tenth Circuit has already ruled that the same tract of land does not qualify as Indian country.[1] *See Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076-77 (1993), *cert. denied sub nom., United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Comm'n*, 510 U.S. 994 (1993)(holding state tobacco taxes enforceable on tribally-operated smokeshop located on tribal land with restriction against alienation).[2] The Tenth Circuit's determination that the land is not Indian country under 18 U.S.C. § 1151 necessarily includes a determination that the lands do not constitute an Indian reservation. Accordingly we must proceed to the next step, that is, to determine whether the lands are either trust lands or restricted lands, and whether the tribe exercises the requisite "governmental power" over those lands.

The Muskogee Area BIA Realty office provided NIGC a copy of the attached warranty deed. The deed indicates that the Tribe holds these lands in fee simple status. While we understand that the UKB seeks to have these lands placed into trust, these lands are not presently held in trust by the United States for the benefit of the UKB. Therefore, the lands do not meet the test provided in the first part of section 2703(4)(B). In short, these are not trust lands. Accordingly, we must consider whether the lands are subject to restriction by the United States against alienation, and if so, they are lands over which an Indian tribe exercises governmental power.

In *Buzzard*, the Tenth Circuit unequivocally indicated that the lands are subject to a restraint against alienation under both 25 U.S.C § 177 and a Secretarially-approved tribal charter. Accordingly, at first blush, the lands appear to meet the plain language of IGRA in that they are lands that are subject to restriction by the United States against alienation. The question of whether the general restriction on alienation contained in section 177 alone is sufficient to create Indian lands, however, is much more difficult than it appears. It raises the question of whether a restriction is actually "by the United States" if a sovereign Indian tribe has unilaterally taken action to purchase lands. Several courts have expressed discomfort with the notion that an Indian tribe could unilaterally purchase land that effectuates the removal of land from state jurisdiction and places it into federal jurisdiction with no action by either of these sovereigns. In addition, a determination that such lands are "Indian lands" under IGRA might be difficult to reconcile with other provisions of IGRA, namely 25 U.S.C. § 2719.

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[1] Indian country consists of "all land within the limits of any Indian reservation," 18 U.S.C. § 1151(a); "all dependent Indian communities," 18 U.S.C. § 1151(b); and "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. § 1151(c).

[2] In a conversation with Staff Attorney Danna Jackson on September 18, 2000, William Rice, Assistant Chief of the UKB, confirmed that the land subject to the discussion in the *Buzzard* case is the same land upon which UKB's gaming operation is currently located.

In short, the question of whether the lands constitute lands that are subject to a restriction by the United States against alienation is an exceedingly difficult question. Because the Tenth Circuit squarely addressed the next prong of this decision in *Buzzard*, we need not reach this difficult question. Accordingly, we now consider whether the tribe has jurisdiction and exercises governmental power over the lands.

As noted above, the Tribe must establish that it exercises "governmental power" over the parcel it intends to use for gaming purposes. *See* 25 C.F.R. § 502.12(b). Existing "tribal jurisdiction," however, is a threshold requirement to exercising governmental power. *See, e.g., Narragansett Indian Tribe,* 19 F.3d at 701-703 ("In addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]"); *Miami II,* 5 F. Supp.2d at 1217-18 (A tribe must have jurisdiction in order to be able to exercise governmental power); *State ex rel. Graves v. United States*, 86 F. Supp.2d at 1099; *Miami I*, 927 F. Supp. at 1423 ("the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land."). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)); *see also Narragansett Indian Tribe,* 19 F.3d at 701-703. As a threshold matter, we must therefore analyze whether the Tribe possesses jurisdiction over the identified parcel.

As a general matter, tribes are presumed to possess jurisdiction within "Indian country." *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Historically, the term "Indian country" has been used to identify land that, "[g]enerally speaking," is subject to the "primary jurisdiction . . . [of] the Federal Government and the Indian tribe inhabiting it." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). As mentioned above, Indian country consists of "all land within the limits of any Indian reservation," 18 U.S.C. § 1151(a); "all dependent Indian communities," 18 U.S.C. § 1151(b); and "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. § 1151(c). Section 1151 reflects the two criteria the Supreme Court "previously . . . had held necessary for a finding of 'Indian country' . . . first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Venetie*, 522 U.S. at 527. Prior to the enactment of section 1151 in 1948, the Court had already found that reservation lands and allotments satisfied those requirements. *See, e.g., United States v. Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain[] Indian lands set apart for Indians under governmental care"); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). Congress used the term "dependent Indian communities" in Section 1151(b) to codify this Court's understanding, as expressed in *United States v. McGowan*, 302 U.S. 535 (1938), and *United States v. Sandoval*, 231 U.S. 28

(1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. *Venetie*, 522 U.S. at 530; *see, e.g.*, *McGowan*, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); *Sandoval*, 231 U.S. at 45-49 (Pueblo Indian lands).

According to the opinion in *Buzzard*, UKB's gaming site does not qualify as "Indian country," within the meaning of section 1151. *Id.* at 1076-77. In analyzing the "federally set-aside" requirement, the Tenth Circuit held that "[a] restriction against alienation requiring government approval may show a desire to protect the UKB from unfair dispositions of its land, . . . but it does not of itself indicate that the federal government intended the land to be set aside for the UKB's use." *Id.* at 1076 (citation omitted). Moreover, as it relates to the "federal superintendence" requirement, the court ruled:

> The federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land.

Id. Based on the rationale in *Buzzard*, we conclude that UKB's gaming site does not qualify as "Indian country," as the parcel does not possess the two characteristics of Indian country reflected in section 1151.[3] Having concluded that the UKB's lands are not Indian country, we conclude that the United States does not recognize tribal jurisdiction over these lands.

Conclusion

IGRA permits tribes to conduct gaming on Indian lands only if they have jurisdiction over those lands, and only if they can and do use that jurisdiction to exercise governmental power which will enable the tribe, through appropriate ordinances, to satisfy the statute's substantial and detailed requirements for the regulation of gaming. 25 U.S.C. § 2710(b); *see Narragansett Indian Tribe*, 19 F.3d 685; *Miami I*, 927 F. Supp. at 1423 ("Absent jurisdiction, the exercise of governmental power is, at best, ineffective, and at worst, invasion"). Because we have determined that the UKB does not have jurisdiction over the gaming site, we must conclude that the UKB does not have the requisite authority to ensure the appropriate control and management of its gaming operation.[4] After careful review and consideration, I conclude that the lands on

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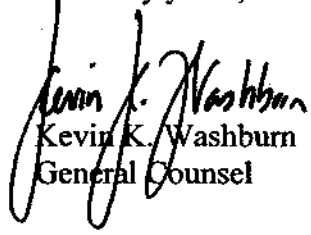
[3] This case is readily distinguishable from *United States v. Roberts*, where the Tenth Circuit held that a tribal complex owned by the United States in trust for the Choctaw Nation pursuant to the Indian Reorganization Act was "Indian Country" for purposes of the Major Crimes Act. 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1960 (2000). The *Roberts* Court concluded that the land at issue, which the United States acquired and holds in trust for the Choctaw Nation, qualifies as Indian country as the parcel possesses the two characteristics of Indian country reflected in section 1151. On the other hand, the land at issue here and considered by the Tenth Circuit in *Buzzard*, is restricted land that does not possess the two characteristics of Indian country reflected in section 1151 and discussed in the Supreme Court's decision in *Venetie*. *See Buzzard*, 992 F.2d at 1076-77, *cert. denied sub nom., United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Comm'n*, 510 U.S. 994 (1993).

[4] Moreover, there is no need to analyze whether UKB exercises governmental power over the proposed gaming lands, as a tribe must have jurisdiction to exercise governmental power. *See Miami II*, 5 F. Supp.2d at 1217-18.

which the UKB is gaming are not Indian lands over which the UKB has jurisdiction. Thus, such activity is not subject to IGRA. I leave the question of whether the land is subject to state gambling laws to the appropriate state officials.

If you should have questions regarding this matter, please contact Staff Attorney Danna Jackson at (202) 632-7003.

Sincerely yours,



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