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In the matter of:)	
)	Final Decision and Order
Fort Sill Apache Tribe of Oklahoma)	
Appeal of NOV- 09-35)	May 5, 2015
)	
)	

DECISION AND ORDER

1. The Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2701 *et seq.*, permits a tribe to operate Class II gaming only on Indian lands as defined by IGRA. 25 U.S.C. § 2710(b).
2. IGRA defines Indian lands to mean (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 an 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).
3. IGRA prohibits gaming on Indian lands acquired in trust for the benefit of a tribe after October 17, 1988, unless one of a number of exceptions applies. 25 U.S.C. § 2719.

4. The Tribe is a federally recognized Indian tribe with its headquarters in Apache, Oklahoma.
5. On June 26, 2002, the United States acquired the Akela Flats property, located in Deming, New Mexico, in trust for the benefit of the Tribe. From that date forward, the Akela Flats property qualified as Indian lands under IGRA, thereby giving the NIGC jurisdiction over any gaming activities there.
6. On or about April 9, 2009, the Tribe opened a gaming facility and conducted gaming activities on its Akela Flats property.
7. On July 21, 2009, the NIGC Chairman issued NOV-09-35 to the Tribe for gaming on Indian lands not eligible for gaming under the IGRA.
8. Based on the record before the Commission and the briefs filed by each party to this appeal, we uphold Notice of Violation NOV-09-35.

PROCEDURAL BACKGROUND

The record indicates that the Fort Sill Apache Tribe has been working toward a goal of gaming on its Akela Flats property for quite some time. The Tribe's original fee-to-trust application for Akela Flats, submitted in 1998, evidenced a clear intent that the Tribe wished to conduct gaming activities on the land. Resolution FSABC-98-26, Business Committee of the Fort Sill Apache Tribe of Oklahoma (Feb. 14, 1998) (requesting trust acquisition of Akela Flats for gaming purposes); Letter from Donald E. Whitener, Acting Area Director of the Bureau of Indian Affairs ("BIA") Albuquerque Area Office, to Ruey R. Darrow, Chairwoman of the Fort Sill Apache Tribe, Re: Fort Sill Apache Tribe's application to transfer land into trust for gaming purposes (Jan. 27, 1999).

Unfortunately for the Tribe, the legal landscape has not offered a clear path toward that goal. Under 25 U.S.C. § 2719, gaming is prohibited on lands acquired into trust after October 17, 1988 unless the land qualifies for one of the statutory exceptions contained within that section. Under the original trust application, the Tribe pursued the exception commonly known as a two-part determination, 25 U.S.C. § 2719(b)(1)(A), which requires the Secretary of the Interior to determine that the proposed gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community, but only if the governor of the state in which the gaming activity is to be conducted concurs in that determination. *See* Letter from Donald E. Whitener, Acting Area Director of the BIA Albuquerque Area Office, to Ruey R. Darrow, Chairwoman of the Fort Sill Apache Tribe, Re: Fort Sill Apache Tribe's application to transfer land into trust for gaming purposes (Feb. 4, 1999). The Governor of New Mexico, however, made it clear that he would not concur with any such

determination, effectively blocking that option for the Tribe. *See* Letter from Gary E. Johnson, Governor of New Mexico, to Robert Baracker, Area Director of the BIA Albuquerque Area Office, Re: Acquisition of New Mexico Land by Fort Sill Apache Tribe of Oklahoma for Off-Reservation Gaming Activities (April 1, 1999).

In response, the Tribe adopted a resolution to remove gaming as an intended use of the property, declaring instead that the purpose of the trust acquisition would now be to “engage in business opportunities to assist their repatriation of their Sacred Lands in New Mexico” Resolution FSABC 99-14, Business Committee of the Fort Sill Apache Tribe of Oklahoma (April 20, 1999); *see also* Letter from Omar C. Bradley, Acting Area Director of the BIA Albuquerque Area Office, to Gary Johnson, Governor of New Mexico (Aug. 11, 1999).

As a result of the resolution, the DOI processed the trust application without an IGRA analysis, relying on the Tribe’s stated intent that the site would not be used for gaming purposes. Letter from Ethel J. Abeita, Acting Regional Director, BIA Southwest Region, to Ruey R. Darrow, Chairwoman of the Fort Sill Apache Tribe (July 23, 2001). On June 26, 2002, the Akela Flats property was accepted into trust for the benefit of the Tribe. Warranty Deed between Ft. Sill Apache Tribe (grantor) and the United States of America, in trust for the Ft. Sill Apache Tribe (grantee) (app’vd June 26, 2002).

On April 7, 2006, the Tribe informed the BIA that it intended to conduct gaming on its Akela Flats trust property. Letter from Jeff Houser, Chairman of the Ft. Sill Apache Tribe, to Larry Morrin, Regional Director of the BIA Southwest Regional Office (April 7, 2006). In order to accomplish this purpose, the Tribe indicated that it would seek a

Secretarial two-part determination and restored lands exception under IGRA Section 20, 25 U.S.C. § 2719. *Id.*

On December 6, 2007, the Tribe issued a license for a gaming facility to be opened at Akela Flats. *See* Fort Sill Apache Gaming Commission Operators Gaming License (Dec. 6, 2007). This license was signed by Benedict Kawaykla, Gaming Commission Chairman, and Jeff Houser, Tribal Chairman. *Id.*

The NIGC became aware of the Tribe's plan to open a gaming facility in New Mexico on or around January 10, 2008. *See* E-mail from Phil Hogen to Penny J. Coleman, Esther Dittler, Cesar Valdez, Ken Billingsley, Tim E. Harper (Jan. 10, 2008). On January 18, 2008, the NIGC wrote to the Tribe and requested certain information about the site, including "[t]he Tribe's legal analysis supporting why the property qualifies as 'Indian lands' see 25 U.S.C. § 2703(4), and why gaming is not prohibited on the site by IGRA's general prohibition against gaming on 'after-acquired' lands." Letter from Esther Dittler, NIGC Staff Attorney, to Jeff Houser, Chairman of the Ft. Sill Apache Tribe (Jan. 18, 2008).

On February 1, 2008, the Fort Sill Apache Gaming Commission wrote to the NIGC, stating that it "asked the Tribe to not present the requested information [to the NIGC] until the Tribal Gaming Commission has made a determination on the Indian Lands question and Section 2719 questions." Letter from Benedict Kawaykla, Chairman of the Fort Sill Apache Gaming Commission, to Philip Hogen, Chairman of the NIGC (Feb. 1, 2008).

On February 6, 2008, representatives of the Tribe met in Washington, D.C. with the NIGC. *See* Letter from Penny J. Coleman, Acting General Counsel of the NIGC, to

Jeff Houser, Chairman of the Ft. Sill Apache Tribe (Feb. 7, 2008). During that meeting, the NIGC reiterated its request for information regarding the site's gaming eligibility. *Id.*

On February 15, 2008, the NIGC again requested that the Tribe provide information and documentation supporting its claim that the Tribe's Akela Flats property was Indian lands upon which it may lawfully game under 25 U.S.C. §§ 2703(4) and 2719. Letter from Esther Dittler, NIGC Staff Attorney, to Phillip Thompson, Counsel for Ft. Sill Apache Tribe (Feb. 15, 2008).

On February 22, 2008, the NIGC received an unsigned document titled *Memorandum in Support of Fort Sill Apache Tribal Gaming Commission Luna County, New Mexico Gaming License* ("Tribal Gaming Commission Memo"). Although it is not clear from its face whether the Tribal Gaming Commission Memo is a final document adopted by the Fort Sill Apache Gaming Commission, the Tribe's Initial Brief discusses the Tribal Gaming Commission Memo as an official action of the Tribal Gaming Commission. Tribe's Initial Brief at 24-26. In its memorandum, the Tribal Gaming Commission sets forth a history of the Tribe, citing to the findings of fact contained in several Indian Claims Commission decisions from 1968-1977, as well as a history of the Tribe's trust acquisition in New Mexico. Tribal Gaming Commission Memo at 2-6. The Tribal Gaming Commission then sets forth a legal analysis, concluding that Akela Flats property qualifies for two of the exceptions in IGRA that allow gaming on newly acquired trust lands: the last recognized reservation exception and the restored lands exception. *Id.* at 8-18.

On February 27, 2008, the NIGC's Acting General Counsel sent a letter to the Tribe stating her preliminary view that the Akela Flats property on which the Tribe was

then constructing a gaming casino was not gaming eligible. Letter from Penny J. Coleman, Acting General Counsel of the NIGC, to Jeff Houser, Chairman of the Fort Sill Apache Tribe (Feb. 27, 2008). Ms. Coleman's letter stated: "While I have not finished my review, I believed it necessary to advise you of my initial views so that the Tribe can consider whether it wishes to risk enforcement action by the Chairman of the National Indian Gaming Commission." *Id.* She concluded her letter by strongly encouraging the Tribe not to open the gaming facility that was under construction without a Secretarial two-part determination. *Id.*

By letter dated March 7, 2008, received March 10, 2008, the Tribe submitted an amended gaming ordinance to the NIGC specifying the Akela Flats property as a gaming site. Letter from Jeff Houser, Chairman of the Fort Sill Apache Tribe, to Philip Hogen, Chairman of the NIGC, Re: Fort Sill Apache Tribe Amended Gaming Ordinance (March 7, 2008). This action was taken in consultation with the NIGC's Office of General Counsel, presumably so the Tribe could obtain a reviewable decision of the NIGC Chairman outside of an enforcement context. *See* Letter from Phillip E. Thompson, to Penny Coleman, Acting General Counsel for the NIGC (Feb. 28, 2008). As part of the ordinance review and in further development of its legal analysis, the NIGC Office of General Counsel again asked the Tribe to supply more information in support of the Tribe's position, this time with specific requests for information tailored to the various elements of the required analysis. Letter from Esther Dittler, NIGC Staff Attorney, to Phillip E. Thompson (March 26, 2008).

The Tribe responded with legal analysis and supporting materials. Letter from Phillip E. Thompson, Attorney for Fort Sill Apache Tribe, to Esther Dittler, NIGC Staff

Attorney (April 7, 2008). But instead of waiting to receive a decision on its site-specific gaming ordinance, the Tribe withdrew its ordinance from review. Letter from Jeff Houser, Chairman of the Fort Sill Apache Tribe, to Philip Hogen, Chairman of the NIGC (May 19, 2008).

On the very same day that the Tribe withdrew its ordinance submission, the NIGC Office of General Counsel finalized an opinion to the NIGC Chairman stating that the Tribe's Akela Flats property did not qualify for gaming under IGRA because of the general prohibition against gaming on newly acquired trust land and the lack of an applicable exception. Memorandum from Penny J. Coleman, NIGC Acting General Counsel, to Philip N. Hogen, NIGC Chairman (May 19, 2008) ("May 2008 Opinion"). But because the Tribe withdrew the subject gaming ordinance, neither the Chairman nor the Commission had the opportunity at that point in the proceedings to take any formal agency action.

On July 31, 2008, the Tribe filed a supplement to a motion in an existing case before the United States District Court for the Western District of Oklahoma to which the Commission was not a party. In that filing, the Tribe claimed that the May 2008 Opinion breached a settlement agreement the Tribe had entered into with the United States. Supplemental Brief in Support of Motion by Fort Sill Apache Tribe of Oklahoma for Enforcement of Agreement of Compromise and Settlement, *Comanche Nation v. United States*, No. CIV 05-328-F (W.D. Okla. July 31, 2008).

The court in *Comanche Nation* held a hearing and determined that the May 2008 Opinion did not violate the settlement agreement because it was not a final agency action. Order, *Comanche Nation v. United States*, No. CIV 05-328-F (W.D. Okla. Oct. 7, 2008).

On or about April 9, 2009, the Tribe opened a gaming facility and conducted gaming activities on its Akela Flats property. *See* Declaration of Ronald Ray, NIGC Senior Field Investigator, Exhibit 4 (July 16, 2009). Gaming activities observed by NIGC enforcement staff consisted of paper bingo games. *See* Declaration of Ken Billingsley, Region Director for the Phoenix Region of the NIGC (June 10, 2009); Declaration of Ronald Ray, NIGC Senior Field Investigator (July 16, 2009).

On April 30, 2009, the NIGC Office of General Counsel issued a supplement to the May 2008 Opinion in order to address whether anything in the *Comanche Nation* settlement agreement required a change in the original legal analysis. Memorandum from Penny J. Coleman, NIGC Acting General Counsel, to Philip N. Hogen, NIGC Chairman (April 30, 2009) (“April 2009 Opinion”). The April 2009 Opinion concluded that even considering the agreed-upon facts in the *Comanche Nation* settlement agreement, the Akela Flats property still did not qualify for gaming under IGRA.

On July 21, 2009, the NIGC Chairman adopted the Office of General Counsel’s opinions and issued NOV-09-35 to the Tribe for gaming on Indian lands not eligible for gaming under the IGRA. The Tribe filed a timely appeal. Letter from Jeff Houser, Chairman of the Fort Sill Apache Tribe, to the National Indian Gaming Commission (Aug. 20, 2009). The Tribe also waived its right to a hearing before a presiding official, electing instead to allow this matter to proceed directly to the full Commission for a decision on the parties’ briefs. Letter from Jeff Houser, Chairman of the Fort Sill Apache Tribe, to Jo-Ann Shyloski and Melissa Schlichting, NIGC (Sept. 9, 2009).

Governor Bill Richardson and the State of New Mexico (collectively “the State”) petitioned to intervene in the appeal. The State of New Mexico’s and Governor Bill

Richardson's Petition to Intervene in Fort Sill Apache Tribe's Appeal From Commissioner Hogen's Notice of Violation Filed Herein on August 20, 2009, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Aug. 31, 2009). The Tribe objected to the State's participation as a party. Fort Sill Apache Tribe's Opposition to State of New Mexico and Governor Bill Richardson's [sic] Petition to Intervene, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Oct. 19, 2009); Fort Sill Apache Tribe's Reply to the State of New Mexico's Response to the Tribe's Opposition to State of New Mexico and Governor Bill Richardson's [sic] Petition to Intervene, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Nov. 2, 2009). After reviewing the Parties' briefings on the intervention, the Commission granted the State's petition. Letter from Michael Gross, Appellate Counsel for the Commission, to Jeff Houser, Chairman of the Fort Sill Apache Tribe and C. Shannon Bacon, Special Assistant Attorney General for State of New Mexico, Re: Ft. Sill appeal of NOV 09-35, motion to intervene and briefing schedule (Sept. 18, 2009); Order on Reconsideration Granting State's Petition to Intervene, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Nov. 20, 2009).

The Commission set forth a briefing schedule and amended it several times to grant the parties' requests for extensions. Letter from Michael Gross, Appellate Counsel for the Commission, to Jeff Houser, Chairman of the Fort Sill Apache Tribe and C. Shannon Bacon, Special Assistant Attorney General for State of New Mexico, Re: Ft. Sill appeal of NOV 09-35, motion to intervene and briefing schedule (Sept. 18, 2009); Order on Procedural Motions, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Oct. 8, 2009); Order on Motion for Modification of Briefing Schedule, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Nov. 24, 2009); Order on Third Request for

Modification of Briefing Schedule, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Jan. 15, 2010); Letter from Michael Gross, Appellate Counsel for the Commission, to C. Shannon Bacon, Special Assistant Attorney General for State of New Mexico, Re: Ft. Sill Apache Tribe of Oklahoma, Appeal of NOV-09-35, Request for an extension of time (Feb. 12, 2010).

On January 25, 2010, the Tribe submitted an initial brief with supporting materials. Initial Brief of Fort Sill Apache Tribe of Oklahoma on Appeal from NOV-09-35 (Jan. 25, 2010) (“Tribe’s Initial Brief”). The NIGC Chairman elected to forego submission of a brief. Chairman’s Response to the Fort Sill Apache Tribe of Oklahoma’s Substitute Initial Brief (Feb. 22, 2010). The State submitted a response brief. The State of New Mexico and Governor Bill Richardson’s Response to Fort Sill Apache Tribe of Oklahoma’s Initial Brief Regarding the Appeal from NOV-09-35 (April 2, 2010). The Tribe submitted a reply to the State’s brief. Reply Brief of Fort Sill Apache Tribe of Oklahoma to Response of State of New Mexico (May 3, 2010). On September 29, 2010, the Tribe filed a motion to stay the proceeding for 120 days so that the Tribe could introduce additional evidence into the record. Motion to Stay Proceedings to Allow Introduction of Additional Evidence; And to Permit Department of Interior to Consider Additional Material Bearing Upon Application of Post 1988 Exceptions To Tribal Trust Lands (September 29, 2010). The Tribe’s Motion was granted on October 6, 2010. Order in Response to Motion to Stay (October 6, 2010). On January 5, 2011, the Tribe filed its supplemental information with the Commission, Ft. Sill Apache Tribe: Akela Flats Supplemental Information (January 5, 2011), the State of New Mexico filed its response on July 6, 2011, State of New Mexico’s Response to Fort Sill Apache Tribe: Akela Flats

Supplemental Information, and the Tribe filed its reply on August 26, 2011, thus completing the scheduled briefings. Memorandum in reply to State of NM's response to Ft. Sill Apache Tribe: Akela Flats Supplemental Information (August 26, 2011).

We acknowledge that four years is outside the normal range of time for deciding appeals before the Commission. This matter, though, asserted a number of grounds for appeal and raised particularly complex issues to resolve. The Commission has thoroughly reviewed all the materials, and this matter is now ready for the Commission's decision.

HISTORICAL BACKGROUND

Over the course of this matter, the Tribe has submitted several documents laying out the history of the Fort Sill Apache Tribe of Oklahoma. The Tribe's ancestors, the Chiricahua and Warm Spring Apache Tribes (hereafter referred to collectively as "the Chiricahua Apache"), once occupied a large area of the southwest United States, including the area that would become known as Akela Flats. Eventually, the United States attempted to move the Tribe onto reservations. While some moved onto the reservations peaceably, others resisted, including the renowned Apache warrior Geronimo. Tribe's Initial Brief at 5; Memorandum in Support of Fort Sill Apache Tribal Gaming Commission Luna County, New Mexico Gaming License at 2 (Feb. 22, 2008) ("Tribal Gaming Comm'n Memo").

After many years of fighting, Geronimo and his followers eventually surrendered in 1886. The United States government then decided that in response to Geronimo's resistance, every Chiricahua Apache man, woman, and child would be taken from the Southwest, moved to military forts in the southeastern United States, and made prisoners of war—including men who had served the U.S. military as scouts against Geronimo.

The Chiricahua Apache were initially placed in military prisons in Florida, where many died due to deplorable conditions and hostile climate. Those that remained were moved to Mobile, Alabama, and finally to Fort Sill, Oklahoma, where they were held until 1913. In total, the entire Chiricahua Apache people endured 27 years of imprisonment. Tribe's Initial Brief at 8.

Upon release, many of the Chiricahua Apache returned to New Mexico, where they enrolled with the Mescalero Apache Tribe. But 76 Chiricahua Apache people remained in Oklahoma and organized as the Fort Sill Apache Tribe. *Tribal Gaming Comm'n Memo* at 2-3.

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. The United States government has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date. Agreement of Compromise and Settlement Recitals ¶ 7(j), *Comanche Nation v. United States*, No. CIV-05-328 (W.D. Okla. March 8, 2007).

DISCUSSION

The abbreviated historical account set forth above of course barely touches on the history of the Fort Sill Apache people. The Tribe has faced much adversity at the hands of the U.S. government. This Commission would like nothing more than to reverse that trend and help the Tribe re-establish an economic presence in its ancestral homelands through a gaming operation. We are, however, bound by the strictures of IGRA and

federal regulations. As difficult as this case is, and as sympathetic as we are, the record before us does not provided sufficient grounds to reverse the notice of violation.

The Tribe raises several arguments in its briefs. We will address each in turn and explain why none provide a basis to vacate the NOV.

I. THE TRIBE'S PROCEDURAL RIGHTS HAVE NOT BEEN VIOLATED.

The Tribe argues that the NIGC's investigation and appeal procedure was arbitrary and capricious and violated the Tribe's due process and sovereign rights. Tribe's Initial Brief at 2, 17-22. The record is clear, though, that the Tribe's due process and sovereign rights have been maintained at every step of this process.

The NIGC Chairman is authorized by IGRA to exercise enforcement powers to ensure that gaming on Indian lands is not conducted in violation of the IGRA, NIGC regulations, or a tribe's own approved gaming ordinance. 25 U.S.C. §§ 2713(a), 2719(a). It is well settled that when acting pursuant to its statute, an administrative agency is "free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties." *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).

Before taking an enforcement action, the Chairman must investigate potential violations to ensure that there are grounds for doing so. In this case, the investigation of the Akela Flats facility was a necessary element of the Chairman's duty under IGRA and did not violate the Tribe's due process or sovereign rights. Before the present NOV was issued, NIGC investigators carried out a brief investigation at Akela Flats simply to ascertain and document whether the Tribe was conducting gaming on the parcel. The investigation involved nothing more than a short visit by NIGC investigators to confirm

that the Tribe was indeed gaming at its Akela Flats facility. *See* Declaration of Ken Billingsley, Region Director for the Phoenix Region of the NIGC (June 10, 2009); Declaration of Ronald Ray, NIGC Senior Field Investigator (July 16, 2009). It was not disruptive or overreaching and made no demands of the Tribe.

In addition, the record shows that the Tribe had ample opportunity to be involved and be heard during the development of the NIGC Office of General Counsel's two lands opinions. *See generally*, Procedural Background, *supra*. In fact, the record shows that the Office of General Counsel made repeated requests for the Tribe to support its position that the Akela Flats property was gaming eligible. Letter from Esther Dittler, NIGC Staff Attorney, to Jeff Houser, Chairman of the Ft. Sill Apache Tribe (Jan. 18, 2008); Letter from Penny J. Coleman, Acting General Counsel of the NIGC, to Jeff Houser, Chairman of the Ft. Sill Apache Tribe (Feb. 7, 2008); Letter from Esther Dittler, NIGC Staff Attorney, to Phillip Thompson, Counsel for Ft. Sill Apache Tribe (Feb. 15, 2008); Letter from Esther Dittler, NIGC Staff Attorney, to Phillip E. Thompson (March 26, 2008). Pursuant to those repeated requests, the Tribe eventually did submit its legal analysis and supporting materials. Tribal Gaming Commission Memo; Letter from Phillip E. Thompson, Attorney for Fort Sill Apache Tribe, to Esther Dittler, NIGC Staff Attorney (April 7, 2008). It is apparent that the Tribe was given ample opportunity to be heard during the development of the legal opinions and the NOV.

In addition to allegations of arbitrary and capricious treatment throughout the NOV process, the Tribe claims that its due process rights have been violated through the appeal process. We disagree. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254 (1970). The Tribe has been

given, and has exercised, that opportunity before this Commission. Rather than pursue a hearing before a presiding official, the Tribe voluntarily opted to have the matter decided by the Commission on written submissions, as permitted by NIGC regulations, 25 C.F.R. § 577.3. Letter from Jeff Houser, Chairman of the Fort Sill Apache Tribe, to Jo-Ann Shyloski and Melissa Schlichting, NIGC (Sept. 9, 2009).

The Commission set a reasonable briefing schedule and, at the Tribe's request, granted multiple extensions on filing deadlines and allowed the Tribe time to submit additional information after the initial briefing schedule was complete. Letter from Michael Gross, Appellate Counsel for the Commission, to Jeff Houser, Chairman of the Fort Sill Apache Tribe and C. Shannon Bacon, Special Assistant Attorney General for State of New Mexico, Re: Ft. Sill appeal of NOV 09-35, motion to intervene and briefing schedule (Sept. 18, 2009); Order on Procedural Motions, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Oct. 8, 2009); Order on Motion for Modification of Briefing Schedule, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Nov. 24, 2009); Order on Third Request for Modification of Briefing Schedule, *In re Fort Sill Apache Tribe of Okla. NOV-09-35* (NIGC Jan. 15, 2010). The Tribe submitted two briefs on appeal with multiple supporting documents. Initial Brief of Fort Sill Apache Tribe of Oklahoma on Appeal from NOV-09-35 (Jan. 25, 2010); Reply Brief of Fort Sill Apache Tribe of Oklahoma to Response of State of New Mexico (May 3, 2010). Those briefs, along with information and analysis already in the administrative record, were thoroughly reviewed by this Commission as part of our decision. Therefore, the Tribe was granted the opportunity to be heard and its due process rights have been protected, notwithstanding the Tribe's claims to the contrary.

Finally, the Tribe claims that the involvement of multiple attorneys representing the Chairman and the Commission confused the NOV and appellate processes. Tribe's Initial Brief at 18-19. As the Tribe itself admits, the matter of attorney reporting structure does not prove arbitrary and capricious treatment. Tribe's Initial Brief at 19. The NIGC has been involved in this matter for a long time, and it should not be surprising to see new attorneys being substituted for those who leave the NIGC or must be reassigned for other reasons. Moreover, the NIGC ensures that the attorneys assigned to the Commission during an administrative appeal are different than the attorneys who were assigned to the matter through the NOV process and who represent the Chairman on appeal. This is done in order to protect the respondent's right to a fair and impartial appeal. The involvement of multiple attorneys may make communication with the NIGC's Office of General Counsel more complicated, but it is done for good reason and certainly is not grounds for vacating an NOV.

II. THE COMMISSION IS NOT OBLIGATED TO DEFER TO THE TRIBE'S INDIAN LANDS DETERMINATION.

The Tribe next claims that the NIGC does not have the authority to overrule the Fort Sill Apache Tribal Gaming Commission's Indian lands determination as set forth in the February 22, 2008 Tribal Gaming Commission Memorandum. Tribe's Initial Brief at 23. That authority, according to the Tribe, is restricted by the requirements of IGRA, a memorandum of agreement between the NIGC and the Department of the Interior ("DOI"), and *Colorado River Indian Tribes v. NIGC*, 383 F. Supp. 2d 123 (D.D.C. 2005), *aff'd*, 466 F.3d 134 (D.C. Cir. 2006) ("*CRIT*"). The Tribe's claims notwithstanding, the NIGC has the authority to enforce Section 2719 of IGRA, and in so doing, the Chairman need not defer to the Tribe's interpretation of the federal statute.

The Tribe claims that *CRIT* prohibits the NIGC from relying on its own Indian lands determination because, according to *CRIT*, NIGC enforcement powers must derive from specific authority granted by IGRA. Tribe's Initial Brief at 28. The Chairman was not allowed to make an Indian lands determination, according to the Tribe, because he is not specifically authorized to do so by IGRA.

The Tribe's argument misapprehends the agency action in this case. The Indian lands opinions were not agency actions, but rather necessary elements of an enforcement action for violation of a specific statutory prohibition involving the status of Indian lands. The NIGC Chairman is explicitly given the authority to take enforcement actions for violations of IGRA. 25 U.S.C. § 2713. Before the NOV can issue, though, the Chairman must verify that the NIGC has jurisdiction, which is limited to Indian lands, and that a violation has occurred, thus requiring an analysis of the potential Section 2719 exceptions. Therefore, the authority to make that determination is derived from the Chairman's specific authority to enforce IGRA, including Section 2719, and is perfectly consistent with the holding in *CRIT*.

The Tribe also argues that IGRA gives the Tribal Gaming Commission the exclusive authority to determine the Indian lands status of the Tribe's potential gaming sites. Tribe's Initial Brief at 23. The Tribe argues that the decision was made pursuant to § 2710(a) of IGRA, which states: "Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a). This, according to the Tribe, means that the Tribal Gaming Commission has the exclusive authority to decide the land's gaming eligibility. We disagree.

While it is true that IGRA recognizes and confirms tribal jurisdiction over Class II gaming on Indian lands, it also states that such jurisdiction “shall be subject to the provisions of this chapter.” 25 U.S.C. § 2710(a)(2). IGRA established the NIGC as the federal regulatory agency to oversee Indian gaming and provided the Chairman with authority to enforce its provisions, subject only to administrative appeal to the full Commission and judicial review in federal court. 25 U.S.C. §§ 2713, 2714. The Tribe’s jurisdiction is therefore subject to the NIGC’s regulatory authority to enforce IGRA, including IGRA’s prohibition against gaming on lands acquired after October 17, 1988. 25 U.S.C. § 2719(a). The NIGC has solicited and considered the Tribe’s legal views, but nothing in IGRA mandates that the NIGC must now defer to the Tribe’s interpretation of the statute.

Nor do we agree with the Tribe that the memorandum of agreement entered into by the NIGC and the Department of the Interior (“DOI”) on January 14, 2009 (“MOA”) restricts the Chairman from making an Indian lands determination in the context of an action to enforce 25 U.S.C. § 2719. The Tribe rests its argument primarily on Paragraph 1 of the MOA, which states that “whether a tribe meets one of the exceptions in 25 U.S.C. § 2719 . . . is a decision made by the Secretary when he or she decides to take land into trust or restricted fee for gaming.” Tribe’s Initial Brief at 31-32 (quoting MOA ¶ 1). The Tribe reads this to mean that any decision about whether Akela Flats qualifies as “restored lands” rests entirely within the jurisdiction of DOI. But by its terms, the language in question applies to decisions of the Secretary to take land into trust for gaming, and it is inapplicable here.

With the Akela Flats trust acquisition, the Tribe removed gaming as a potential use of the property. Resolution FSABC 99-14, Business Committee of the Fort Sill Apache Tribe of Oklahoma (April 20, 1999); *see also* Letter from Omar C. Bradley, Acting Area Director of the BIA Albuquerque Area Office, to Gary Johnson, Governor of New Mexico (Aug. 11, 1999). Therefore, the Secretary had no occasion to decide whether the Ft. Sill Apache Tribe and the Akela Flats property met any exceptions to Section 2719 when the land was taken into trust. Rather, because the Tribe began gaming on a parcel that had already been acquired into trust for non-gaming purposes, the matter falls under the NIGC's enforcement jurisdiction.

Paragraph 3 of the MOA directs whether the NIGC Office of General Counsel or the DOI's Office of the Solicitor, Division of Indian Affairs ("DIA") will draft the legal land opinions under certain scenarios, but it does not prohibit the NIGC Chairman from seeking legal advice from the Office of General Counsel to determine, in an enforcement context, whether there has been a violation of 25 U.S.C. § 2719 on existing trust lands.

More to the point, Paragraph 4 of the MOA states: "Regardless of whether the DIA or OGC is drafting the opinion, prior to the opinion (or drafts) being released to entities other than the DOI and the NIGC, the Solicitor must concur in any opinion that provides legal advice relating to:

- The definition of "Indian lands;"
- The exceptions in 25 U.S.C. § 2719; or
- A tribe's jurisdiction over Indian lands, or the boundaries of a tribe's reservation."

Because the Office of General Counsel's two opinions in this matter provided legal advice relating to the exceptions in 25 U.S.C. § 2719, Paragraph 4 of the MOA required the Solicitor's concurrence, which the NIGC obtained. *See* Letter from Scott Keep, Acting Associate Solicitor, DOI Office of the Solicitor, to Penny Coleman, NIGC Acting General Counsel (May 15, 2008); Letter from Arthur E. Gary, DOI Acting Solicitor, to Penny Coleman, NIGC Acting General Counsel (April 23, 2009).

The Tribe makes a related argument when it claims that the DOI has already determined the status of the Akela Flats property and the NIGC is bound by that decision. Reply Brief of the Fort Sill Apache Tribe of Oklahoma to Response of State of New Mexico at 2 (May 3, 2010) ("Reply Brief"). The Tribe argues that any further administrative proceedings before the Commission are therefore superfluous. *Id.* However, the Tribe does not withdraw its appeal.

The "determination" the Tribe is referring to is a letter from Pilar Thomas, DOI Deputy Solicitor – Indian Affairs, who wrote in response to the Tribe's request that the Secretary review the NIGC Indian lands opinions for consistency with the *Comanche Nation* settlement agreement. In the response, Ms. Thomas noted that because the Tribe raised legal questions, she was responding on the Secretary's behalf, but that she was declining to re-evaluate the status of the Akela Flats property. Letter from Pilar Thomas, DOI Deputy Solicitor – Indian Affairs, to Jeff Houser, Chairman of the Fort Sill Apache Tribe (March 5, 2010). This, according to the Tribe, constitutes a final land determination from the Secretary that is binding on the NIGC. Reply Brief at 2. The Tribe, however, misconstrues the letter and its legal significance.

The Deputy Solicitor's letter is not a final lands determination. In fact, it is not even a legal opinion. It simply declines the Tribe's request to issue one and restates the DOI's earlier concurrence with the NIGC's Indian lands opinions. In short, there is no decision in the letter to which the Commission could be bound.

III. PART 292 DOES NOT APPLY TO THE ACTION HERE

The Tribe next contends that the DOI's regulations at 25 C.F.R. Part 292 do not apply to the Akela Flats property. Tribe's Initial Brief at 28. The Tribe claims that because the Part 292 regulations went into effect after the *Comanche Nation* settlement agreement was signed, our application of the Part 292 regulations to the Akela Flats parcel is retroactive and impermissible. In the alternative, the Tribe claims that the regulations themselves contain an exemption that prohibits their application to the Tribe's land at Akela Flats. We reject the Tribe's first argument that the regulations are retroactive as applied to the Tribe's gaming at Akela Flats, but agree that the regulation contains an exemption as to the Akela Flats parcel.

A retroactive law attaches new legal consequences to events completed before its enactment. *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994). In *Landgraf*, the Supreme Court stated that a law is not to be deemed retroactive if it merely unsettles expectations or imposes burdens on past conduct. *Id.* at n.21. In its explanation, the Court included an example that strikes close to home: "a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards." *Id.* But such a law, according to the Court, is not retroactive. *Id.*

The Part 292 regulations do not ban gambling. But they do affect the federal government's analysis of whether a tribe may conduct gambling activities on land taken

into trust after October 17, 1988. By their terms, with two grandfathering exceptions discussed below, the Part 292 regulations “apply to final agency action taken after the effective date of these regulations” 25 C.F.R. § 292.26(b). The Part 292 regulations went into effect on August 25, 2008. 73 Fed. Reg. 35,579 (June 24, 2008). The Tribe opened its gaming operation on or about April 9, 2009, and the Chairman issued NOV-09-35 on July 21, 2009. Technically, the *final agency action* in this case is this Commission’s decision on appeal, which theoretically could create a dilemma if we were reviewing an action that occurred before the effective date of the regulations. Fortunately, we are not troubled by the prospect of a retroactive application of the rule because the Tribe had not yet conducted any gaming activities on Akela Flats when the regulations took effect.

The Tribe argues that the timing of the settlement agreement in *Comanche Nation* is the operative date in question. Tribe’s Initial Brief at 28. For that to be true, the settlement agreement must have vested the Tribe with the right to conduct gaming at Akela Flats. But the settlement agreement does not make that promise. Nor does the settlement agreement say that Akela Flats (or any parcel for that matter) qualifies for any exception in 25 U.S.C. § 2719. At most, the settlement agreement sets forth several facts concerning the Tribe’s history that might otherwise be subject to some debate. Arguably, those facts may have fit better into a legal analysis under the landscape that existed pursuant to the statute and case law before the Part 292 regulations went into effect. But even assuming that to be true, it is not enough to show retroactivity. At most the regulations may have unsettled the Tribe’s expectations regarding the gaming eligibility

of Akela Flats. But that, according to the Supreme Court, does not amount to a retroactive application of the rule.

We also find that the regulations' grandfathering provisions at 25 C.F.R. § 292.26(a) does not offer the Tribe an exemption that allows gaming. That exemption states that the regulations "do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations." 25 C.F.R. § 292.26(a). In this case, however, there was no final agency decision from either DOI or NIGC pursuant to Section 2719 issued prior to the effective date of the regulations. The Tribe had at least two opportunities to obtain a final agency action pursuant to Section 2719 before Part 292 went into effect. It could have kept gaming as an intended use of the property during the trust acquisition process, which would have caused the Secretary to make a decision concerning gaming eligibility in 2002. Alternatively, the Tribe could have kept its site-specific ordinance with the NIGC Chairman for a decision in May 2008 – three months before the DOI's regulations went into effect. But the Tribe chose to forego those options and began gaming on the parcel without the benefit of a prior federal agency determination concerning gaming eligibility of the lands. No such prior agency determination was required, but the lack of a final agency action applying Section 2719 makes the grandfathering provision in 25 C.F.R. § 292.25(a) unavailable.

We do, however, find that the regulations do not apply to the Akela Flats parcel due to the grandfathering provision in 25 C.F.R. § 292.26(b), which states that the regulations do not apply when the DOI or the NIGC has issued an Indian lands opinion prior to the effective date of the regulations. The NIGC's May 2008 Opinion was issued prior to the effective date of the regulations, and, therefore, the regulations do not apply.

This in itself does not mean, however, that the Chairman erred in issuing the NOV at issue here. The purpose of § 292.26(b) is to protect tribes that may have relied on a positive Indian lands opinion issued under the legal landscape that existed prior to the Part 292 regulations. The preamble to the final rule explains that under 5 292.26(b), “the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if these regulations now have created a conflict.” The preamble further explains that the “regulations will not affect the Department's ability to qualify, modify or withdraw its prior legal opinions.” 73 Fed. Reg. at 29,372. Here the May 2008 Opinion concluded that the land is not eligible for gaming. As such, the Tribe has no positive opinion on which to rely. Moreover, because the Chair’s decision to issue the NOV was based, in part, on the May 2008 opinion, the reliance on the Part 292 regulations in the April 2009 Opinion, and the Chairman’s partial reliance on that Opinion, is not grounds for overturning the NOV.

IV. THE AKELA FLATS PROPERTY DOES NOT QUALIFY FOR ANY EXCEPTIONS TO THE GENERAL PROHIBITION AGAINST GAMING ON NEWLY ACQUIRED LANDS.

The Commission wishes to reiterate that we appreciate the history of hardship and suffering endured by the Ft. Sill Apache’s ancestors, as well as the fact that such history now puts the present-day Tribe in a difficult position vis-à-vis its desire to operate a gaming facility in New Mexico. Though we are sympathetic to the Tribe and its attempts to expand its economic development opportunities, we concur with and adopt the reasoning and conclusions of the May 2008 Opinion. In doing so, however, we wish to reiterate that we are not commenting upon, or passing judgment on, the Tribe’s ties to its ancestral homelands in New Mexico, nor are we ruling on the status of the Tribe’s Akela

Flats property as Indian lands. We do not take today's decision lightly, and although we understand that this decision has real consequences for the Tribe's economic development on the parcel, our decision is limited to the land's eligibility for gaming under IGRA. With that in mind, we uphold NOV 09-35, and we add only the following.

With several important exceptions, IGRA prohibits tribes from gaming on lands acquired by the Secretary in trust for the benefit of the tribe after October 17, 1988—the date of IGRA's enactment. 25 U.S.C. § 2719(a). The Fort Sill Apache Tribe does not dispute the fact that it conducted gaming on lands taken into trust for its benefit after October 17, 1988. But the Tribe argues that it meets four of the statutory exceptions. Specifically, the Tribe argues that the Akela Flats property qualifies as: A) restored lands for a restored tribe, B) land taken into trust as part of a settlement of a land claim, C) the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgement process, and D) the last recognized reservation within the state or states within which the Tribe is presently located. Tribe's Initial Brief at 33-47.

A. Restored Lands for a Restored Tribe

IGRA allows gaming on newly acquired trust lands if those lands were taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). To qualify for the exception, a tribe must demonstrate that it was at one time federally recognized, that it lost its government-to-government relationship, that it was restored to federal recognition, and that the land on which it wants to game was taken into trust as part of the restoration of lands for the restored tribe. *Id.*; 25 C.F.R. § 292.7; *Grand Traverse Band of Ottawa and Chippewa*

Indians v. Office of the U.S. Attorney for the W.D. Mich., 369 F.3d 960, 967 (6th Cir. 2004) (“*Grand Traverse*”).

The May 2008 Opinion concluded that the Tribe’s evidence failed to support its claim that the imprisonment of its ancestors as prisoners of war amounted to a termination of the government-to-government relationship. May 2008 Opinion at 16-17. The Department of the Interior’s Solicitor’s office concurred in that opinion. Over the course of this appeal, though, the Tribe offered additional evidence to support its argument that the tribe was terminated by its years of imprisonment. We have reviewed this material and acknowledge that it chronicles a sorrowful time during which the Tribe was unable to exercise the full extent of its rights as a government. Unfortunately, though, even if this additional evidence did lead us to find that the imprisonment by the United States was a de facto termination of the tribe, it does not change the overall determination that the land does not meet the restored lands exception.

As set forth above, in addition to showing the loss and restoration of federal recognition, the Tribe must also show that the land was taken into trust as part of that restoration. To do so, Courts look to three factors: the factual circumstances of the acquisition, the location of the acquisition, and the temporal relationship of the acquisition to the tribal restoration. The May 2008 Opinion thoroughly discussed these factors and concluded that they did not fully support the Tribe’s claim to restored lands. May 2008 Opinion at 18-27. On review of the additional material supplied by the Tribe on appeal, we concur with that finding.

The April 2009 Opinion reached this conclusion under DOI’s Part 292 regulations and in consideration of the historical facts as set forth in the *Comanche Nation* settlement

agreement. Although as discussed above, the regulations should not have been applied to the Akela Flats parcel, such application does not warrant overturning the NOV as the May 2008 opinion's analysis of the "restored lands exception" used the test set forth in *Grand Traverse*.

B. Settlement of a Land Claim

IGRA also allows gaming on newly acquired trust lands "taken into trust as part of . . . a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i); 25 C.F.R. § 292.5. The Tribe argues that this exception applies by virtue of the settlement agreement reached in the *Comanche Nation* litigation. Tribe's Initial Brief at 42.

The May 2008 Opinion, however, noted that the Akela Flats property was not taken into trust as part of the *Comanche Nation* settlement. May 2008 Opinion at 2 n.1. Rather, the opinion notes that the Akela Flats property was taken into trust on June 26, 2002, several years prior to the execution of the *Comanche Nation* settlement agreement. *Id.* We hereby adopt the reasoning and conclusion in the May 2008 opinion that: "The settlement of a land claim exception requires that land be taken into trust as part of a settlement of a land claim. As the [Akela Flats] land was taken into trust prior to the date the settlement was executed, this exception is not applicable." *Id.* Because the Akela Flats property was not taken into trust under any settlement, it cannot qualify for this exception.

C. Initial Reservation

The third Section 2719 exception raised by the Tribe permits gaming on newly acquired trust land that was taken into trust as part of "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); 25 C.F.R. § 292.6; Tribe’s Initial Brief at 42-45.

The May 2008 Opinion addresses this issue, and we adopt its reasoning and conclusion. May 2008 Opinion at 27-30. Briefly, the May 2008 Opinion states that the exception requires three elements: 1) the land must be designated as a reservation, 2) the reservation must be the Tribe’s initial reservation, and 3) the Tribe must have been acknowledged by the Secretary under the federal acknowledgement process set forth in 25 C.F.R. part 83. *Id.* The May 2008 Opinion concludes that because the Akela Flats trust land has not been proclaimed a formal reservation and because the Tribe was not acknowledged through the Federal acknowledgement process under 25 C.F.R. part 83, the Akela Flats land does not qualify for the initial reservation exception.

Since this matter was appealed, though, and after briefing was complete, the Secretary of the Interior proclaimed the Akela Flats Parcel as reservation land for the Tribe. 76 Fed. Reg. 72969. Accordingly, the overlying issue of whether the land is reservation land has been made moot. There is no longer any dispute that Akela Flats is a reservation under 25 U.S.C. § 467.

The Tribe also argues, though, that the term *Federal acknowledgment process* in IGRA’s initial reservation exception should include the process by which the Commissioner of Indian Affairs approved the Ft. Sill Apache Tribe’s constitution in 1976, thereby recognizing the Tribe. Tribe’s Initial Brief at 43-45. The May 2008 Opinion considered and rejected this argument, and we find nothing in the record on appeal that would compel us to overrule that determination. We therefore, affirm the

Chairman's decision that the Akela Flats property does not qualify for the initial reservation exception.

D. Last Recognized Reservation

The final IGRA exception claimed by the Tribe allows gaming on newly acquired trust lands where a tribe had no reservation as of October 17, 1988 and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2)(B); Tribe's Initial Brief at 45-46; Tribal Gaming Commission Memo at 9-12 (Feb. 22, 2008).

The May 2008 Opinion concluded that the Akela Flats parcel does not qualify as the Tribe's last recognized reservation because the Tribe was not presently located in New Mexico and because the Tribe failed to demonstrate that Akela Flats was within any recognized reservation, much less the Tribe's last recognized reservation. We adopt the reasoning and conclusions found therein with the following notations. First, we note that our analysis of the last recognized reservation exception has evolved since the NOV was issued to the Tribe. Prior to DOI's adoption of the Part 292 regulations, the NIGC used the analysis laid out in the case *Wyandotte Nation v. National Indian Gaming Commission*, 437 F. Supp. 2d 1193 (D. Kan. 2006), which found that a Tribe is "presently located" where a Tribe has its "population center and major governmental presence." With the Part 292 regulations, though, those determining factors were made less stringent, and a tribe must now show that it is "located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental

presence and tribal population.” 25 C.F.R. § 292.4(b). Thus, the plain language of the regulation dictates that a tribe may demonstrate that it is “presently located” in a state or states by showing a governmental presence and tribal population there. There is no longer a need to show a “major” governmental presence” or a “population center.” *See* Letter from Eric N. Shepard, NIGC Acting General Counsel, to Steven R. Ward (November 21, 2014).

As discussed earlier in this opinion, though, we cannot apply the Part 292 regulations to the Akela Flats parcel, but must instead analyze the exception pursuant to the pre-Part 292 *Wyandotte* test.

Furthermore, on administrative appeal of an NOV for illegal gaming activities, the question of whether the Tribe qualifies for any Section 2719 exception must be answered as of the time of the gaming activities that were subject to the NOV—in this case April 2009. Since the May 2008 Opinion was written almost a year prior to the gaming activity at issue here, we reviewed the Tribe’s submissions on appeal to determine whether the Tribe introduced any evidence of relocation actions taking place between May 2008 and April 2009 that would have added support to the Tribe’s claim of being presently located in New Mexico. We find that the Tribe’s submissions on administrative appeal failed to overcome the conclusion reached in the May 2008 Opinion and that as of April 2009, the Tribe still was not located in New Mexico for purposes of Section 2719(a)(2)(B).

Regardless of whether we use the *Wyandotte* analysis, though, or the Part 292 regulations, the ultimate outcome is unchanged due to the fact that the Akela Flats Parcel is not within the bounds of the Tribes last recognized reservation in New Mexico. As the

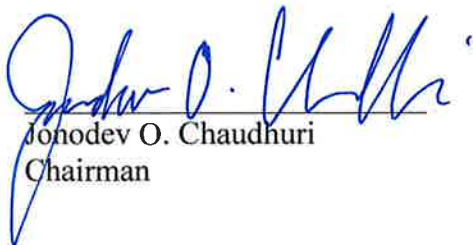
May 2008 Opinion discusses, although the Akela Flats parcel is within the Tribe's ancestral homelands, the Tribe has not demonstrated that Akela Flats is within the bounds of the Tribe's last reservation.

In its briefs, the Tribe cites to definitions of "reservation" found in other statutes and regulations, and argues that the Akela Flats parcel is on land that could have met any of those definitions. The Commission does not administer the statutes and regulations cited to by the Tribe, and would not presume to interpret the definitions found therein. We note, however, that other than simply stating that the Tribe's land in New Mexico would meet any of these definitions of reservation, the Tribe offers no analysis as to whether the varying definitions of *reservation* as found in other laws and regulations can or should be applied in the context of IGRA. We therefore uphold the Chairman's decision that the Akela Flats parcel does not meet IGRA's "last recognized reservation exception" to the prohibition against gaming on land taken into trust after October 17, 1988.

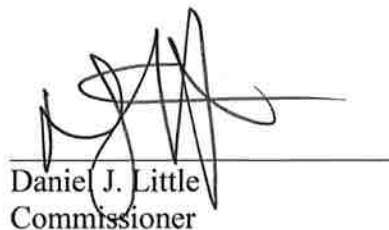
CONCLUSION

Given all of the foregoing, NOV-09-35 is upheld and made final for the Commission.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION on this 5th day of May, 2015.



Jonodev O. Chaudhuri
Chairman



Daniel J. Little
Commissioner

Certificate of Service

I hereby certify that on May 6, 2015, I served the foregoing Final Decision and Order In the Matter of Fort Sill Apache Tribe of Oklahoma Appeal of NOV-09-05 by facsimile and certified mail on:

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I hereby certify that on May 6, 2015, I served the foregoing Final Decision and Order by hand delivery on:

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I hereby certify that on May 6, 2015, I served the foregoing Final Decision and Order by e-mail delivery on:

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Michael C. Hoenig
NIGC Associate General Counsel