



January 25, 2017

Earl Howe III, Chairman
Ponca Tribe of Oklahoma
20 White Eagle Drive
Ponca City, OK 75601

Re: Ponca Tribe of Oklahoma – Indian Lands Opinion

Dear Chairman Howe:

This letter responds to your September 9, 2014 request for a legal opinion on whether newly acquired lands, Trust Parcel #B-813-2011-2540, meets or will meet one of the Indian Gaming Regulatory Act exceptions to the prohibition of gaming on trust lands acquired after 1988.

To assist with our analysis the Tribe provided the following materials: (1) the complaint filed in the Western District of Oklahoma on December 29, 2006; (2) the joint stipulation of settlement agreement and proposed order filed in the Western District of Oklahoma on October 15, 2010; and (3) the order regarding joint stipulation of settlement filed in the Western District of Oklahoma on October 20, 2010.

Further information was required to perform a thorough analysis. We requested documentation from the Bureau of Indian Affairs Pawnee Agency in Pawnee, Oklahoma.

After review, it is my opinion that Trust Parcel #B-813-2011-2540 is eligible for gaming pursuant to IGRA. The parcel is *Indian lands* as defined by IGRA, is within the Tribe's jurisdiction, and meets IGRA's settlement of a land claim exception to the general prohibition against gaming on land taken into trust after October 17, 1988.¹

Background

In 2006 the Ponca Tribe of Oklahoma filed a lawsuit² against the United States in the U.S. District Court for the Western District of Oklahoma. The purpose of litigation was to obtain an accounting of the federal government's management of Tribal trust assets, including property, under authorities such as: treaties, statutes, regulations, orders, or other directives. The suit invoked a right to an accounting as a beneficiary of the U.S.'s trusteeship.³

¹ 25 U.S.C. § 2719(b)(1)(B)(i). The opinion was forwarded to the Solicitor's office and concurs with the opinion. Letter from Eric N. Shepard, Associate Solicitor – Indian Affairs, to Michael Hoenig, General Counsel – NIGC (January 19, 2017)(on file at NIGC).

² Complaint, Ponca Tribe of Indians of Oklahoma v. United States, No. 06-01439 (W.D. Okla. Dec. 29, 2006).

³ *Id.* ¶ 1.

The Tribe asserted it never received an accounting of its trust assets held by the United States, and therefore could not state the damages incurred due to the federal government's mismanagement or waste of the Tribe's trust assets.⁴ The failure of accounting included an accounting for lands that may not have been allotted under Congress's application of prior allotment acts to the Ponca Tribe,⁵ and title which may have remained with the Tribe.⁶ The Tribe also asserted a diminution or loss of its property through pollution.⁷ The Tribe's causes of action included a Fifth Amendment taking claim under the United States Constitution for deprivation of its interests in its trust assets, which include "interests in lands, resources and funds that are held, and managed by the USA, or have been subject to the USA's trusteeship in the relatively recent past. Those interests were obtained variously by treaty, other agreements, or by congressional or administrative action."⁸ The Tribe based its claims⁹ under the Administrative Procedures Act¹⁰ and the American Indian Trust Fund Management Reform Act of 1994.¹¹ The Tribe also requested the court "order the USA to make whole, restore, replenish, reconstitute or repair the trust property wasted, lost or unaccounted for when the required accounting is completed."¹²

On October 20, 2010, the district court adopted the Joint Stipulation of Settlement submitted by the parties.¹³ The Order states that it is the:

final settlement of all claims, causes of action, obligations, or liabilities that Plaintiff has asserted or could have asserted . . . either in any administrative action or in a case in the United States District Courts or the United States Court of Federal Claims, relating in any way to any of the following issues:

...

b. Defendants' alleged mismanagement of Plaintiff's non-monetary trust assets or resources, including but not limited to any claim or allegation that:

...

- i. Defendants failed to make Plaintiff's non-monetary trust assets or resources productive;
- ii. Defendants failed to obtain an appropriate return on, or appropriate consideration for, Plaintiff's non-monetary trust assets or resources;
- iii. Defendants failed to record or collect, fully or timely, or at all, rents, fees, or royalties, or other payments for the transfer, sale, encumbrance, or use of Plaintiff's non-monetary trust assets or resources;

⁴ *Id.* ¶ 2.

⁵ See 33 Stat 189, 217-281, Sec. 8 (1904).

⁶ Complaint, *supra* note 2, ¶ 32.

⁷ *Id.* ¶ 33.

⁸ *Id.* ¶ 52.

⁹ *Id.* ¶¶ 54-83.

¹⁰ 5 U.S.C. § 702.

¹¹ Pub. Law No. 103-412, 108 Stat. 4239 (codified in scattered sections of 25 U.S.C.).

¹² Complaint, *supra* note 2, at 20.

¹³ Order Regarding Joint Stipulation of Settlement, Ponca Tribe of Indians of Oklahoma v. United States, No. 06-1439 (W.D. Okla. Oct. 20, 2010).

- iv. Defendants failed to preserve, protect, safeguard, or maintain Plaintiff's non-monetary trust assets or resources;
- v. Defendants permitted the misuse or overuse of Plaintiff's nonmonetary trust assets or resources;
- vi. Defendants failed to manage Plaintiff's non-monetary trust assets or resources appropriately;
- vii. Defendants failed to enforce the terms of any permits, leases, or contracts for the transfer, sale, encumbrance, or use of Plaintiff's non-monetary assets or resources;
- viii. Defendants failed to prevent trespass on Plaintiff's non-monetary trust assets or resources;

...

- x. Defendants transferred, sold, encumbered, allotted, managed, or used Plaintiff's non-monetary trust assets or resources (including but not limited to any of Plaintiff's lands or minerals), improperly or inappropriately;

¹⁴
...

In the settlement agreement the U.S. agreed to pay \$1,030,000 to the Tribe.¹⁵ Of that, \$345,000.00 was to be held in trust with the U.S. Treasury for the sole purpose of purchasing land.¹⁶ The remaining \$685,000.00 could be expended at the Tribe's discretion.¹⁷

Utilizing the judgement award from the 2010 settlement, the Tribe purchased 100.040 acres of land in Noble County, Oklahoma, on January 16, 2014.¹⁸ The U.S. Department of Interior, Bureau of Indian Affairs, Land Titles and Records Office (LTRO) recorded the deed, therefore taking the land into trust on April 4, 2014.¹⁹ The LTRO recognizes the land purchased under document number 039784.²⁰ This is the land on which the Tribe wishes to conduct gaming.

¹⁴ *Id.* at 1-3.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 10.

¹⁸ U.S. Department of the Interior, Bureau of Indian Affairs, Title Status Report 1 (2014); U.S. Department of the Interior, Bureau of Indian Affairs, Tract History Report 1 (2014); Tribal Resolution, Ponca Tribe of Oklahoma, Resolution No. 32-05032011 (May 3, 2011).; Dept. of Interior Public Voucher for Purchases and Services Other Than Personal, Purchase of Land (May 4, 2011); Bureau of Indian Affairs Transaction Sheet, Land Purchase (May 9, 2011).

¹⁹ U.S. Department of the Interior, Bureau of Indian Affairs, Land Titles and Records Office – Southern Plains, Deed (2014).

²⁰ *Id.*

Applicable Law

IGRA permits an Indian tribe to “engage in, or license and regulate, gaming on Indian lands within such tribe’s jurisdiction.”²¹ The Act defines Indian lands to include land held in trust by the United States for a tribe over which that tribe exercises government authority.²²

NIGC regulations further clarify the definition of “Indian lands,” as:

- (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.²³

However, IGRA also prohibits gaming on lands acquired in trust after October 17, 1988, unless the land meets one of the statutory exceptions to the general prohibition.²⁴ Relevant to our discussion here, IGRA excepts land taken into trust as part of a settlement of a land claim from the prohibition.²⁵

In 2008, the Department of Interior developed regulations articulating standards for interpreting the exceptions to the general prohibition on after-acquired trust lands.²⁶ For the settlement of a land claim exception, gaming may occur if the land at issue is:

- (b) Acquired under a settlement of a land claim that:
 - (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land.²⁷

²¹ 25 U.S.C. § 2710(b)(1).

²² 25 U.S.C. § 2703(4).

²³ 25 C.F.R. § 502.12.

²⁴ 25 U.S.C. § 2719.

²⁵ 25 U.S.C. § 2719(b)(1)(B)(i).

²⁶ Gaming on Trust Lands Acquired After October 17, 1988; Final Rule, 73 Fed. Reg. 29354-29380 (May 20, 2008)(codified at 25 C.F.R. part 292).

²⁷ 25 C.F.R. § 292.5(b)(1).

The preamble to the final rule provides “when a particular land claim otherwise meets the definition, whether for example the legal basis involves the impairment of title or other real property interest such as a lease, and the relief includes the return of land, conveyance of replacement land, or money for the purchase of other real property, the land claim may meet the requirements of this section as long as it is either subject to Congressional enactment or returns to the tribe all of the lands claimed by the tribe.”²⁸

Interior’s regulations also defined *land claim*:

any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that

- (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
- (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public or governmental); and
- (3) Either accrued on or before October 17, 1988, or involves land held in trust or restricted fee for the tribe prior to October 17, 1988.²⁹

Analysis

To determine if Trust Parcel #B-813-2011-2540 is land eligible for gaming under IGRA, we first determine if it is *Indian lands* within the definition of IGRA. If it is, and because the parcel was taken into trust after the enactment of IGRA, we then must determine whether one of the exceptions to IGRA’s after-acquired prohibition applies.

Indian Lands

I. Trust Parcel #B-813-2011-2540 Qualifies as “Indian lands” under IGRA

IGRA defines Indian lands to include trust land over which a tribe exercises governmental power.³⁰ In other words, to determine if land qualifies as *Indian lands* we ask: whether title to the land is held in trust by the United States for the benefit of the Tribe; and if so whether the Tribe exercises governmental power over the land.³¹

²⁸ 73 Fed. Reg. 29354, 29359 (May 20, 2008)(addressing a comment suggesting that specific relief must be included in a claim to fall within the exception, the Department stated, “the regulations cannot dictate the terms of a settlement or the relief a tribe may seek”).

²⁹ 25 C.F.R. § 292.2.

³⁰ 25 U.S.C. § 2703(4).

³¹ 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12.

A. *Trust Parcel #B-813-2011-2540 is trust land*

The Ponca parcel is held in trust by the U.S. for the benefit of the Tribe³² and was taken into trust by the Department of Interior April 4, 2014.³³

B. *The Tribe exercises governmental power over Trust Parcel #B-813-2011-2540*

For trust land to be considered *Indian lands* under IGRA, we next examine whether the Tribe exercises governmental power over the land.³⁴ But before doing so, a tribe must possess jurisdiction over the land.³⁵

I. *Jurisdiction*

Tribes are presumed to have jurisdiction over their members and lands. The United States Supreme Court, in *Merrion v. Jicarilla Apache Tribe*, held that Indian tribes are “invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.”³⁶ There are no treaties or statutes applicable here that would limit the Tribe’s jurisdiction.

³² U.S. Department of the Interior, Bureau of Indian Affairs, Land Titles and Records Office – Southern Plains, Deed (2014).

³³ U.S. Department of the Interior, Bureau of Indian Affairs, Title Status Report 1 (2014); U.S. Department of the Interior, Bureau of Indian Affairs, Tract History Report 1 (2014).

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

³⁵ See 25 U.S.C. §§ 2710(b)(1), 2710(d)(3)(A) (“an Indian tribe may engage in, or license and regulate class II [and III] gaming on Indian lands within such tribe’s jurisdiction”); *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (“before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land”); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (“In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]”); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

³⁶ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); see also *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

Moreover, it is well established that a tribe retains primary criminal jurisdiction over the land it inhabits if the land qualifies as “Indian country,”³⁷ and trust land, such as the Parcel at issue here, qualifies as one type of Indian country.³⁸ Because neither IGRA nor the NIGC regulations spells out what constitutes a tribe’s jurisdiction over its lands, the NIGC has frequently used the “Indian country” statutory test, codified at 18 U.S.C. § 1151, as guidance when evaluating whether a tribe has jurisdiction over its Indian lands under IGRA.³⁹

Accordingly, because the land is trust land, the Tribe possesses jurisdiction over the Parcel and, therefore, has jurisdiction to exercise governmental power over the Parcel, as required by IGRA’s Indian lands’ definition.⁴⁰

2. Governmental Power

Having determined the Tribe has jurisdiction over the parcel, we now look to find if it exercises governmental power over the land.⁴¹ A tribe may exercise governmental power in a variety of manners. For this reason, the NIGC has not formulated a uniform definition of the “exercise of governmental power,” but instead decides whether it is present on a case-by-case analysis, based upon the circumstances.⁴²

Governmental power may involve “the presence of concrete manifestations of . . . authority.”⁴³ Examples of governmental power include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs.⁴⁴

³⁷ “Indian country” is a statutory jurisdictional test for determining federal criminal jurisdiction over Indian lands, and is defined in 18 U.S.C. § 1151 as: “(a) all land within the limits of any Indian reservation . . .; (b) all dependent Indian communities . . .; and (c) all Indian allotments, the Indian titles to which have not been extinguished.”

³⁸ See *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (“[r]eservation’s status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151”); see also Cohen, *Handbook of Federal Indian Law*, § 3.04[2][c], 192-93 (2012) (noting that the Supreme Court has held “that tribal trust land is the equivalent of a reservation and thus Indian Country”).

³⁹ See, e.g., NIGC’s *Pinoleville Band of Pomo Indians Opinion*, Sept. 24, 2015, pp. 11-12; NIGC’s *Quapaw Tribe of Indians of Oklahoma Opinion*, Nov. 21, 2014, p. 6; NIGC’s *Table Mountain Rancheria Opinion*, Sept. 6, 2006, pp. 4-5.

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

⁴¹ See 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b)(1); see also, *Narragansett Indian Tribe*, 19 F.3d at 703.

⁴² *National Indian Gaming Commission: Definitions under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

⁴³ *Narragansett Indian Tribe*, 19 F.3d at 701, 703 (First Circuit guidance on finding an exercise of governmental power).

⁴⁴ *Id.*

The Tribe provided several examples of its exercise of governmental power over Trust Parcel #B-813-2011-2540: 1) the Tribe re-fenced the land; 2) the Tribe entered into a cooperative agreement/declaration with the City of Perry, Oklahoma, in support of the Tribe's jurisdiction over the land; 3) the state of Oklahoma requested and entered into a cooperative agreement with the Tribe so that the two governments may work cooperatively regarding burn bans.⁴⁵

Based on the above examples the Tribe manifests its governmental authority on the land, and exercises governmental power over Trust Parcel #B-813-2011-2540. Accordingly, the trust lands, comprising Trust Parcel #B-813-2011-2540, qualify as *Indian lands* within the meaning of IGRA and NIGC regulations.⁴⁶

Now that the land is established as *Indian lands*, the next step is to determine if the land is eligible for gaming under IGRA.

Exception to General Prohibition on Acquired Lands after October 17, 1988

As discussed above, IGRA prohibits gaming on newly acquired lands after October 17, 1988, unless an exception applies.⁴⁷ Although the Tribe's land is located in Oklahoma, the parcel does not fall within the boundaries of the Tribe's former reservation⁴⁸ nor is it contiguous to other land held in trust for the Tribe.⁴⁹ I therefore look to the exceptions to the prohibition – specifically, the settlement of a land claim exception.⁵⁰

I. Trust Parcel #B-813-2011-2540 Satisfies IGRA's Settlement of a Land Claim Exception

IGRA permits a tribe to game on land taken into trust after October 17, 1988, if the land was taken into trust as part of the settlement of a land claim.⁵¹ This requires the settlement: 1) be executed by the parties, which includes the United States, 2) returns to the tribe all or part of the land claimed by the tribe, and 3) resolves or extinguishes with finality the claims regarding the returned land.⁵² Trust Parcel #B-813-2011-2540 was taken into trust as part of a settlement of a land claim and meets IGRA's exception.

⁴⁵ Letter from Deanna Hartley-Kelso, Legal Counsel to the Ponca Tribe of Indians of Oklahoma, to Mary Modrich-Alvarado, NIGC staff attorney (July 27, 2016)(on file with the NIGC).

⁴⁶ 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12.

⁴⁷ 25 U.S.C. § 2719.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 25 U.S.C. § 2719(b)(a)(B)(i).

⁵¹ 25 U.S.C. § 2719(b)(1)(B)(i).

⁵² 25 C.F.R. § 292.5(b)(1).

A. Land Claim

Preliminarily, we must determine if the Tribe's claim is a *land claim* under IGRA. Interior regulations define *land claim* as, relevant to our discussion here, "any claim by a tribe concerning the impairment of title or other real property interest or loss of possession" that "arises under... federal common law," is "in conflict" with the claimed interest, and either "accrued on or before" IGRA's enactment.⁵³

The Tribe's 2006 complaint bases its request for an accounting of its trust assets, including non-monetary assets, on, among other things, a loss of property or use of property⁵⁴ and loss of the Tribe's ability to use or benefit from the natural resources appurtenant to the lands.⁵⁵ The claim is thus based on loss of possession and impairment of title and thereby satisfies the first prong of the Interior's *land claim* definition. The Tribe's claims arise under federal common law,⁵⁶ federal statutes, specifically the Administrative Procedures Act and the American Indian Trust Fund Management Reform Act of 1994,⁵⁷ and the U.S. Constitution;⁵⁸ thus satisfying the second requirement of the definition of *land claim*. The Tribe claims the loss of property conflicts with their treaty rights, rights of possession, and rights to an accounting.⁵⁹ And finally, the claims – some based on Congress's 1904 decision to allot Ponca lands⁶⁰ and others based on lands acquired through treaty or treaty litigation⁶¹ – accrued well before IGRA's enactment. Accordingly, Ponca's 2006 complaint meets the regulatory definition of a *land claim*.

⁵³ 25 C.F.R. § 292.2.

⁵⁴ Complaint, *supra* note 2, ¶¶ 32, 33, 52.

⁵⁵ *Id.*

⁵⁶ *Id.* ¶¶ 54-69; *See also, Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, No. CIV-06-1436-C, 2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008) *abrogated on other grounds by Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012)(where Tribe demanded accounting of certain non-monetary assets held by the U.S., the court said, "arguments regarding the lack of a discrete duty lacks merit . . . the obligations of the United States to the Indian tribes in general, and Plaintiff in particular, are well established. It is clear that the United States acts as a trustee for Plaintiff and that at least some of the corpus of the trust is non-monetary. Whether the duty to account for the non-monetary assets held in trust arises from statute or common law, it does exist").

⁵⁷ Complaint, *supra* note 2, ¶¶ 54-83.

⁵⁸ *Id.* ¶ 52.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶¶ 31-32.

⁶¹ *Id.* ¶ 1, 17, 18, 19.

B. 2010 Settlement Order is an IGRA Settlement of a Land Claim

For Trust Parcel #B-813-2011-2540 to be eligible for gaming under the settlement of a land claim exception it must have been taken into trust as part of a land claim settlement.⁶² This requires the land be acquired under a land claim 1) executed by the parties, which includes the United States, 2) that returns to the tribe all or part of the land claimed by the tribe, and 3) that resolves or extinguishes with finality the claims regarding the returned land.⁶³ The Ponca's 2006 complaint set forth a *land claim*. In 2010, the Western U.S. District Court of Oklahoma issued an order settling Ponca's claims against the United States. We must determine if this 2010 order meets the regulatory requirements.

DOI's first criterion states that settlement of a land claim must be executed by the parties, including the United States.⁶⁴ In this instance, both parties, the Tribe and the United States, submitted a joint stipulation of settlement and proposed order to the court.⁶⁵ Both parties executed the agreement, thereby consenting to its terms. The court then issued its Order Regarding Joint Stipulation of Settlement, approving and entering the parties' joint stipulation.⁶⁶ The "...Joint Stipulation of Settlement is the result of compromise and settlement between the parties."⁶⁷ The Ponca settlement meets the first requirement.

The second condition requires that land must be returned to the tribe.⁶⁸ The Department's preamble to its final rule provides guidance, emphasizing that a settlement of a land claim exception does not necessarily require an award of land⁶⁹ because "the regulations cannot dictate ... the relief a tribe may seek."⁷⁰ This position aligns with the court in *Wyandotte Nation v. Nat'l. Indian Gaming Comm'n.*⁷¹ There, the court admonished the NIGC for focusing its *lands claim* analysis – made before Interior provided guidance with its regulations – on "the remedy sought by a tribe rather than the substantive claim itself."⁷² In *Wyandotte*, the Tribe purchased the land in question with funds obtained from an Indian Claims Commission settlement, which the court found to meet IGRA's settlement of a land claim exception.⁷³

⁶² 25 U.S.C. § 2719(b)(1)(b)(i).

⁶³ 25 C.F.R. § 292.5(b)(1).

⁶⁴ 25 C.F.R. § 292.5(b)(1).

⁶⁵ Order Regarding Joint Stipulation of Settlement, *supra* note 13.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1.

⁶⁸ 25 C.F.R. § 292.5(b)(1).

⁶⁹ 73 Fed. Reg. 29354, 29359 (May 20, 2008)(addressing a suggestion that a settlement require a return of or acquisition of land to which a tribe has a historical connection: "the regulations cannot dictate the terms of a settlement") and (addressing a comment suggesting that specific relief must be included in a claim to fall within the exception, the Department stated, "the regulations cannot dictate the terms of a settlement").

⁷⁰ *Id.* (addressing a comment suggesting that specific relief must be included in a claim to fall within the exception).

⁷¹ 437 F. Supp. 2d 1193 (D. Kan. 2006).

⁷² *Id.* at 1209 ("The plain meaning of 'land claim' does not limit such claim to one for the return of land, but, rather, includes an assertion of an existing right to the land." *Id.* at 1208.).

⁷³ *Id.* at 1196.

Similar to the tribe in *Wyandotte*, here, the Ponca 2010 settlement order may not have supplied specific lands to the Tribe, but it indeed provided \$345,000 to be used in the purchase of land to replace the loss of lands asserted in the claim.⁷⁴ In total the court ordered the U.S. to pay over one million dollars to settle “all claims, causes of action, obligations, or liabilities that Plaintiff has asserted or could have asserted.”⁷⁵ Under the settlement terms the United States paid the Tribe one million thirty thousand dollars (\$1,030,000.00).⁷⁶ Of this award \$345,000 was mandated to be used for the purchase of land and the remaining award (\$685,000) to be used at the Tribe’s discretion.⁷⁷ These claims include all the iterations of loss of land the Tribe asserted,⁷⁸ including claims that, “Defendants transferred, sold, encumbered, allotted, managed, or used Plaintiff’s non-monetary trust assets or resources (including but not limited to any of Plaintiff’s lands or minerals), improperly or inappropriately.”⁷⁹ This settlement was intended to compensate the tribe for its loss of land, in essence, returning the land. Thereby, the Ponca settlement meets the regulation’s second requirement.

The final criterion is that the settlement resolves or extinguishes with finality the claims regarding the returned land.⁸⁰ The 2010 settlement order is a “full, complete, and final settlement of all claims, causes of action, obligations, or liabilities [the Tribe] has asserted or could have asserted.”⁸¹ As stated above, the order outlines with specificity all the land claims or loss of property the parties settled.⁸² In consideration for the payment of money, Tribe releases the U.S. from “all claims, causes of action, obligations, or liabilities [the Tribe] has asserted or could have asserted” as set forth earlier in the order, including all land claims.⁸³ Further, the order encompasses the parties’ agreement to dismiss the case.⁸⁴ The terms of the 2010 settlement make clear that it is a resolution and extinguishment with finality of all the Tribe’s land claims.

Having met all the above conditions, the Tribe’s 2010 settlement order is a settlement of a land claim under IGRA. Thus, the purchase of Trust Parcel #B-813-2011-2540 with judgment funds from this settlement qualifies the parcel as eligible for gaming under IGRA’s settlement of a land claim exception.⁸⁵

⁷⁴ Order Regarding Joint Stipulation of Settlement, *supra* note 13, at 11-12.

⁷⁵ *Id.* at 1-2.

⁷⁶ *Id.* ¶ 2.

⁷⁷ *Id.* ¶ 5.

⁷⁸ *Id.* at 2-4.

⁷⁹ *Id.* at 4.

⁸⁰ 25 C.F.R. § 292.5(b)(1).

⁸¹ Order Regarding Joint Stipulation of Settlement, *supra* note 13, at 1-2.

⁸² *Id.* at 2-4.

⁸³ *Id.* at 4-5.

⁸⁴ *Id.* at 12-13.

⁸⁵ 25 U.S.C. § 2719 (b)(1)(i).

Conclusion

For the above reasons, it is my opinion that Trust Parcel #B-813-2011-2540 is Indian lands within the Tribe's jurisdiction and qualifies for the settlement of a land claim exception to the general prohibition against gaming on land taken into trust after October 17, 1988.

Please be advised this legal opinion is advisory in nature only and that it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel at a later date. Moreover, this advisory legal opinion is not binding upon the NIGC Chairman, who may opt to exercise his prosecutorial discretion to disregard the opinion, or the NIGC Commission, which is free to disagree with the opinion in any action that comes before it. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court.

If you have any further questions, you may contact Mary Modrich-Alvarado, Staff Attorney, at (202) 632-7003.

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael Hoenig
General Counsel