



May 14, 2019

Via First Class Mail and Email

James R. Floyd
Principal Chief
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447-0580
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RE: Muscogee (Creek) Nation – Industrial Park Indian Lands Opinion

Dear Principal Chief Floyd:

By letter dated April 23, 2018, you requested on behalf of the Muscogee (Creek) Nation an Indian lands opinion from the National Indian Gaming Commission's Office of General Counsel regarding a parcel of property referred to as the "Industrial Park."¹ You enclosed a Warranty Deed and an aerial map of the parcel. The Nation also supplied photographs of signs that surround the parcel and identify the parcel as the Nation's sovereign lands.² NIGC staff also requested information about the Industrial Park from the Bureau of Indian Affairs, Eastern Oklahoma Region, which supplied a letter, maps, and a title status report.³

As explained below, it is my opinion that the Industrial Park parcel is Indian lands within the Nation's jurisdiction and is eligible for gaming under the Indian Gaming Regulatory Act.⁴ Although taken into trust after October 17, 1988, the Industrial Park parcel is eligible for gaming because it is located within the boundaries of the Nation's current or former reservation.⁵

Background

The Industrial Park parcel has the following legal description:

¹ Letter from James R. Floyd, Muscogee (Creek) Nation Principal Chief, to Jonodev O. Chaudhuri, NIGC Chair (Apr. 23, 2018).

² See Email from Yonne Tiger, Attorney for Muscogee (Creek) Nation, to Suzanne Nunn, NIGC Staff Attorney (July 25, 2018) (attachments included four pictures of signs around the perimeter of the Industrial Park property).

³ See Letter from Eddie Streater, Reg'l Dir., E. Okla. Region, Bureau of Indian Affairs ("BIA"), to Steve Iverson, NIGC Staff Attorney (June 5, 2018)(on file with NIGC).

⁴ 25 U.S.C. § 2703(4).

⁵ See 25 U.S.C. § 2719(a)(1), (a)(2)(i-ii).

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Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 30, Township 14 North, Range 13 East of the Indian Meridian, Okmulgee County, State of Oklahoma, according to the U.S. Government Survey thereof, SURFACE ONLY, consisting of 39.5 acres more or less;

LESS AND EXCEPT a strip, piece or parcel of land lying in the SE/4SE/4 of Section 30, said parcel of land being described by metes and bounds as follows: Beginning in the SE corner of said SE/4SE/4, thence West along the South line of said SE/4SE/4, a distance of 100 feet; thence North 0°09' a distance of 1320.3 feet to a point on the North line of said SE/4SE/4, thence East along said North line a distance of 100 feet to the NE corner of said SE/4SE/4, thence South along the East line of said SE/4SE/4 a distance of 1320.3 feet to point of beginning, and

LESS AND EXCEPT a tract beginning at the Southwest Corner of the North Half of the Southeast Quarter (N/2SE/4) of Section 30, thence South 3.1 feet; thence East to a point on the West right-of-way line of U.S. Highway 75, 10.9 feet South of the South boundary line of the North Half of the Southeast Quarter (N/2SE/4); thence North a distance of 10.9 feet along the West right-of-way line of the U.S. Highway 75 to the intersection of the South boundary line of the North Half of the Southeast Quarter (N/2SE/4) and the West right-of-way line of U.S. Highway 75; thence West to the Southwest corner of the North Half of the Southeast Quarter (N/2SE/4) of Section 30, the point of beginning, all in Section 30, Township 14 North, Range 13 East, Okmulgee County, State of Oklahoma.⁶

The Okmulgee Agency Superintendent, on behalf of the United States, accepted the parcel in trust for the Nation on May 1, 2009.⁷

The exterior boundaries of the last territory established by treaty for the Muscogee (Creek) Nation are described in the Treaty with the Creeks from 1833,⁸ subject to the reduction described in the Treaty with the Creeks from 1866.⁹ In 1866, the Creek Nation signed its last treaty with the United States government and ceded the western half of its territory to the United States for the settlement of other tribes in Oklahoma.¹⁰ The remainder of the Nation's territory – “the eastern half” – includes all of Creek, Hughes, Okfuskee, and Okmulgee Counties, along with portions of Mayes, McIntosh, Muskogee, Okfuskee, Rogers, Seminole, Tulsa, and Wagoner Counties in Oklahoma.¹¹ The Industrial Park parcel is located in Okmulgee County.

⁶ Warranty Deed (May 1, 2009).

⁷ *Id.*; see also Letter from Eddie Streater, Reg'l Dir., E. Okla. Region, BIA, to Steve Iverson, NIGC Staff Attorney (June 5, 2018).

⁸ Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417, 1833 WL 4533.

⁹ Treaty with the Creeks, art. III, June 14, 1866, 14 Stat. 785, 1866 WL 18777.

¹⁰ *Id.*

¹¹ See Charles Robert Goins & Danney Goble, HISTORICAL ATLAS OF OKLAHOMA, 99 (Univ. of Okla. Press, 4th ed. 2006) (depicting the Oklahoma Indian Territory circa 1889); see also Muscogee (Creek) Nation, Eleven County Tribal Jurisdiction Map (Jan. 2012), available at http://mcngis.com/images/stories/maps/MCN_JURISDICTION_2016.pdf.

Applicable Law

IGRA permits an Indian tribe to “engage in, or license and regulate, gaming on Indian lands within such Tribe’s jurisdiction.”¹² The Act defines “Indian lands” as:

- (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.¹³

NIGC regulations, interpreting IGRA, provide 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.¹⁴

IGRA generally prohibits gaming on lands taken into trust by the Secretary of the Interior for the benefit of an Indian tribe after October 17, 1988.¹⁵ IGRA identifies specific exceptions to this general prohibition.¹⁶ One exception is if the land is located within or contiguous to the boundaries of a tribe’s reservation as it existed on October 17, 1988.¹⁷ Another exception is if the Indian tribe had no reservation as of October 17, 1988, the land is located in Oklahoma, and either the land is within the boundaries of the tribe’s former reservation, as defined by the Secretary, or the land is contiguous to other land that is held in trust or restricted status for the tribe in Oklahoma.¹⁸

Analysis

To determine whether the Industrial Park parcel is eligible for gaming under IGRA, we must first examine whether it is Indian lands as defined by IGRA. Second, the Indian lands must be within the Nation’s jurisdiction. Then, because the Industrial Park parcel was taken into trust

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

¹³ 25 U.S.C. § 2703(4).

¹⁴ 25 C.F.R. § 502.12.

¹⁵ 25 U.S.C. § 2719(a).

¹⁶ 25 U.S.C. § 2719(a)(1-2), (b)(1-3).

¹⁷ 25 U.S.C. § 2719(a)(1); *see also* 25 C.F.R. § 292.4(a) (stating the Department of the Interior’s regulations for newly acquired lands under the exceptions in 25 U.S.C. § 2719(a)).

¹⁸ 25 U.S.C. § 2719(a)(2); *see also* 25 C.F.R. § 292.4(b).

by the United States on behalf of the Nation in 2009, after the IGRA was enacted, it must satisfy an exception to IGRA's after acquired prohibition.

A. Indian Lands:

1. The Industrial Park parcel is Indian lands because it is within the boundaries of the Nation's reservation.

Recently, the Tenth Circuit Court of Appeals decided the case of *Murphy v. Royal*.¹⁹ The Tenth Circuit held the historic Creek Reservation was not disestablished by federal legislation and federal agency actions, therefore land within McIntosh County was considered Indian country and the State of Oklahoma lacked criminal jurisdiction to prosecute a member of the Nation.²⁰ Accordingly, the "former" or "historic" modifiers commonly applied to the Nation's reservation or territory may no longer be appropriate. We recognize, however, that Oklahoma filed a petition for Certiorari with the United States Supreme Court challenging this ruling, and the United States has filed an Amicus brief taking the position that the ruling in *Murphy* should be reversed.²¹ The United States Supreme Court has granted the State of Oklahoma's petition for certiorari.²² The parties have filed their responsive briefs and oral argument has been scheduled for November 27, 2018.

If *Murphy* is affirmed, the Industrial Park is within the limits of the Nation's reservation.²³ The BIA Eastern Region Office confirmed this in its June 5, 2018 letter, stating, "[t]he 'Industrial Park' is located within the boundaries of the current or former reservation of the Muscogee (Creek) Nation."²⁴ The Industrial Park would then qualify as "all lands within the limits of any Indian reservation."²⁵

2. If not within the Nation's reservation, the Industrial Park parcel is Indian lands because it is held in trust and the Nation exercises governmental power over the parcel.

Even if *Murphy* is reversed, though, the Industrial Park parcel is still Indian lands because it is held in trust by the United States for the benefit of the Nation and the Nation exercises governmental power over the parcel.²⁶ The parcel was taken into trust on May 1, 2009. As for government power, a tribe must first possess jurisdiction over the land before it can exercise

¹⁹ 875 F.3d 896 (10th Cir. 2017), *cert granted*, 138 S. Ct. 2026 (U.S. May 21, 2018) (No. 17-1107). The case is now captioned *Carpenter v. Murphy* after a party substitution.

²⁰ 875 F.3d at 948-966.

²¹ See Brief for the United States as Amicus Curiae Supporting Petitioner, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018) 2018 WL 3642789.

²² *Carpenter v. Murphy*, 138 S. Ct. 2026 (U.S. May 21, 2018) (No. 17-1107).

²³ See 25 U.S.C. § 2703(4)(A).

²⁴ Letter from Eddie Streater, Reg'l Dir., E. Okla. Region, BIA, to Steve Iverson, NIGC Staff Attorney (June 5, 2018).

²⁵ See 25 U.S.C. § 2703(4)(A).

²⁶ See 25 U.S.C. § 2703(4)(B).

governmental power.²⁷ An Indian tribe possesses jurisdiction “over both [its] members and [its] territory.”²⁸ “Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”²⁹ Reservation land is one type of Indian country.³⁰ Additionally, land owned by the federal government in trust for an Indian tribe is Indian country.³¹ Here, the Nation possess jurisdiction over the Industrial Park parcel because it was taken into trust for the Nation in 2009, as demonstrated by the Warranty Deed.³²

Once jurisdiction is established, there are many ways and circumstances in which a tribe might exercise governmental power over its land. For this reason, NIGC has not formulated a uniform definition of “exercise of governmental power,” but instead decides whether it is present in each case based on all circumstances.³³ The First Circuit Court of Appeals found that satisfying the governmental power requirement depends “upon the presence of concrete manifestations of [governmental] authority.”³⁴ It later reaffirmed it “is, not the achievement of

²⁷ 25 U.S.C. § 2710(b)(1) (stating, “An Indian tribe may engage in, or license and regulate, class II gaming on Indians lands with such tribe’s jurisdiction,” if the tribe meets other criteria.), 2710(d)(1)(A)(i) (stating, “Class III gaming activities shall be lawful on Indian lands only if such activities are –(A) authorized by an ordinance or resolution that -- (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands ” and meets other criteria), 2710(d)(3)(A) (stating, “Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities”); see also *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-03 (1st Cir. 1994) (citing Sections 2710(d)(3)(A) and 2710(b)(1) of IGRA as creating IGRA’s jurisdictional requirement), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. Nat’l Indian Gaming Comm’n*, 158 F.3d 1335 (D.C. Cir. 1998).

²⁸ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (concluding a tribe’s authority to tax non-Indians who conducted business on the tribe’s reservation did not simply derive from the tribe’s power to exclude, but was an inherent power necessary to tribal self-government and territorial management).

²⁹ *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998) (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)); see also *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep’t. of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 n.5 (10th Cir. 2009) (stating, “While court jurisdiction is complex, as a general matter, Indian tribes exercise court jurisdiction over Indian country—reservations, dependent Indian communities, and Indian allotments.” (citations omitted)).

³⁰ See 18 U.S.C. § 1151(a).

³¹ See *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

³² Warranty Deed (May 1, 2009).

³³ See National Indian Gaming Commission, Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12,382, 12,388 (Apr. 9, 1992).

³⁴ *Rhode Island*, 19 F.3d 685, 703 (1st Cir. 1994); see also *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 528 (D.S.D. 1993) *aff’d* 3 F.3d 273 (8th Cir. 1994) (examining the following attributes to determine whether a tribe exercised governmental power over its trust lands: “(1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.”).

full-fledged self-governance, but merely movement in that direction” that is necessary to demonstrate governmental power.³⁵

When evaluating other cases, the NIGC has considered: (1) tribal development of the land, including signage, fencing, roads, utilities, housing, offices, and retail spaces;³⁶ (2) tribal supervision of the land, including law enforcement, monitoring for trespassers, maintenance, environmental regulation, and historic preservation;³⁷ (3) governmental agreements pertaining to the land, including memoranda of understanding with local governments, utility agreements, and Housing and Urban Development funded housing services;³⁸ (4) tribal constitutions and ordinances extending jurisdiction to the lands and controlling the use of the land, including hunting, fishing, and gaming;³⁹ and (5) providing tribal governmental services or programs, including healthcare, residential, cultural, and educational services on the land.⁴⁰

Here, the Nation has shown concrete manifestations of its exercise of governmental power over the Industrial Park. The Nation posted signs around the perimeter of the property which advise the public that the parcel is under the Nation’s jurisdiction and subject to the Nation’s laws.⁴¹ Additionally, the Nation has adopted a criminal trespass ordinance which is enforced by its Lighthouse Tribal Police Department,⁴² who also patrol the Industrial Park parcel. On broader terms, the Nation’s Constitution also affirms that the “political jurisdiction of the Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America.”⁴³

³⁵ *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 626 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 639, (2018), and *cert. denied sub nom. Town of Aquinnah, Mass. v. Wampanoag Tribe of Gay Head (Aquinnah)*, 138 S. Ct. 639 (2018).

³⁶ See Letter from Michael Hoenig, NIGC General Counsel, to Michael Hunter, Coyote Valley Band of Pomo Indians of California Chairman, p. 10 (Oct. 30, 2017), available at https://www.nigc.gov/images/uploads/indianlands/2017.10.30_lltr_re_Coyote_Valley_Band_of_Pomo_Indians_ILO_Pine_Crest_Parcel_to_Tribe_Chairman_from_NIGC_GC.pdf (hereinafter “Coyote Valley Band ILO”); Memorandum from NIGC Acting General Counsel to Montie Deer, NIGC Chair, p.7 (Aug. 5, 2002), available at <https://www.nigc.gov/images/uploads/indianlands/2002.08.05%20Bear%20River%20Band%20ILO.pdf> (hereinafter “Bear River Band ILO”); and Memorandum from Jo-Ann Shyloski, NIGC Senior Attorney, to Philip Hogen, NIGC Chair, p. 6 (Nov. 15, 2005), available at https://www.nigc.gov/images/uploads/indianlands/01_kiowatribefinalldsopn.pdf (hereinafter “Kiowa ILO”).

³⁷ See Coyote Valley Band ILO at p. 10; Bear River Band ILO at p.7; Kiowa ILO at p. 6; and Memorandum from John Hay, NIGC Staff Attorney, to Philip Hogen, NIGC Chair, p. 6 (Sept. 6, 2006), available at <https://www.nigc.gov/images/uploads/indianlands/big sandy rancheria flo.pdf> (hereinafter “Big Sandy Rancheria ILO”).

³⁸ See Coyote Valley Band ILO at p. 10; and Bear River Band ILO at p.7.

³⁹ See Coyote Valley Band ILO at p. 10; Bear River Band ILO p.7; Kiowa ILO at p. 6; and Big Sandy Rancheria ILO at pp. 5-6.

⁴⁰ See Coyote Valley Band ILO at p. 10; Bear River Band ILO, p.7; and Big Sandy Rancheria ILO at pp. 5-6.

⁴¹ Photographs of the Industrial Park Parcel (on file with NIGC). The signs state, “Entering sovereign lands of the Muscogee (Creek) Nation[.] This federal jurisdiction is governed by the Nation and laws are enforced by the Nation.”

⁴² MUSCOGEE (CREEK) NATION TRIBAL CODE, Title 14 (Crimes and Punishments), § 2-406 (“Criminal Trespass”), available at <http://www.creeksupremecourt.com/wp-content/uploads/title14.pdf>.

⁴³ MUSCOGEE (CREEK) NATION CONSTITUTION, art. I, § 2 (1979), available at <http://www.creeksupremecourt.com/mcn-constitution>.

The Industrial Park, within Okmulgee County, is within the geographic boundaries of the Nation's territory as of 1900.⁴⁴ The Nation clearly exercises governmental power over the Industrial Park parcel.

Based on the above examples, the Nation clearly demonstrates concrete manifestations of governmental authority over lands under its jurisdiction, including the Industrial Park parcel. Therefore, regardless of the outcome of *Murphy*, the Industrial Park parcel is Indian lands pursuant to IGRA as either land within the Nation's reservation or trust land over which the Nation exercises governmental authority.

B. The Nation has jurisdiction over the Industrial Park parcel.

Whether the Industrial Park parcel is within the Nation's reservation or land held in trust over which the Nation exercises governmental authority, the parcel is within the Nation's jurisdiction as required by 25 U.S.C. § 2710.⁴⁵ As stated above, "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."⁴⁶ Reservation land is one type of Indian country,⁴⁷ and land owned by the federal government in trust for an Indian tribe is another form of Indian country.⁴⁸ Accordingly, for purposes of Section 2710, the Nation is the tribe that has jurisdiction over the Industrial Park parcel because the parcel is within the Nation's reservation⁴⁹ or because the parcel is held in trust for the Nation,⁵⁰ as opposed to another tribe.

C. The Industrial Park parcel is eligible for gaming under 25 U.S.C. § 2719.

Lastly, the Industrial Park parcel is eligible for gaming because it qualifies for an exception to IGRA's general prohibition of gaming on lands taken into trust after October 17,

⁴⁴ See Letter from Eddie Streater, Reg'l Dir., E. Okla. Region, BIA, to Steve Iverson, NIGC Staff Attorney (June 5, 2018) (stating, "The 'Industrial Park' is located within the boundaries of the current or former reservation of the Muscogee (Creek) Nation.").

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

⁴⁶ *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)); see also *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't. of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 n.5 (10th Cir. 2009) (stating, "While court jurisdiction is complex, as a general matter, Indian tribes exercise court jurisdiction over Indian country—reservations, dependent Indian communities, and Indian allotments." (citations omitted)).

⁴⁷ See 18 U.S.C. § 1151(a).

⁴⁸ See *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

⁴⁹ See e.g., Letter from Michael Hoenig, NIGC General Counsel, to Leona L. Williams, Pinoleville Pomo Nation Chairperson, pp. 11-12 (Sept. 28, 2015) available at https://www.nigc.gov/images/uploads/indianlands/20150928_Pinoleville_Pomo_Nation_Indian_Lands_Opinion.pdf (concluding that a tribe had jurisdiction over a parcel for purposes of 25 U.S.C. § 2710 because the land was located within the tribe's reservation).

⁵⁰ See e.g., Letter from Penny Coleman, NIGC Acting General Counsel, to A.D. Ellis, Muscogee (Creek) Nation Principal Chief, p. 4 (Apr. 23, 2008) available at <https://www.nigc.gov/images/uploads/indianlands/Holdenville%20Site%20Land%20Opinion%204%2023%2008.pdf> (concluding that a parcel held in trust for the Nation constituted Indian country and the Nation was presumed to have jurisdiction over it).

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1988. The Industrial Park parcel is either within the Nation's reservation as it existed on October 17, 1988 (if *Murphy* is affirmed),⁵¹ or the Industrial Park parcel is located within Oklahoma and within the Nation's former reservation (if *Murphy* is reversed).⁵² Under either exception, the Industrial Park parcel is eligible for gaming under IGRA.

Conclusion

It is my opinion that the Industrial Park parcel is Indian lands within the Nation's jurisdiction and is eligible for gaming under IGRA because it qualifies for the current or former reservation exceptions to the general prohibition against gaming on land taken into trust after October 17, 1988. The Department of Interior, Office of the Solicitor, concurs with this opinion.⁵³

Please be advised that 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 Chair, who may opt to exercise his or her prosecutorial discretion to disregard the opinion, or the full National Indian Gaming 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 questions, please feel free to contact Steve Iverson at (202) 632-7003 or steven_iverson@nigc.gov.

Sincerely,



Michael Hoenig
General Counsel

cc: Chris Ray, Chairman of Gaming Operations Authority Board (coachcra@gmail.com)
Yonne Tiger, Attorney (ytiger@campbelltiger.com)

⁵¹ 25 U.S.C. § 2719(a)(1).

⁵² 25 U.S.C. § 2719(a)(2).

⁵³ Letter from Eric Shepard, Associate Solicitor – Indian Affairs, Office of the Solicitor, Department of the Interior to Michael Hoenig, NIGC General Counsel (May 6, 2019).