



November 21, 2014

Via First Class Mail & Facsimile

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Re: Trust land in Cherokee County, Kansas – Last Recognized Reservation exemption

Dear Mr. Ward:

On behalf of your client, the Quapaw Tribe of Indians of Oklahoma (“Tribe”), you requested a legal opinion that certain after-acquired trust land located within Cherokee County, Kansas qualifies for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(a)(2)(B), as lands within the Tribe's last recognized reservation within the state or states within which the Tribe is presently located. Specifically, the request involves Section 13 of a tract of trust land known as the “Quapaw Strip.”

As detailed below, this trust land is eligible for gaming under the last recognized reservation exception of IGRA as interpreted by Department of the Interior regulations, 25 C.F.R. § 292.4(b)(2), because the Tribe had no reservation as of October 17, 1988; Section 13 is located in Kansas, a state other than Oklahoma; Kansas is one of the states in which the Tribe is presently located; and Section 13 is within the Tribe’s last recognized reservation in Kansas.

The Department of the Interior Solicitor’s Office has reviewed this legal opinion and concurs with it.<sup>1</sup>

## **Factual & Legal Background**

### **A. The Trust land**

As noted above, the trust land at issue is located in Cherokee County, Kansas along the Oklahoma-Kansas boundary.<sup>2</sup> The Tribe acquired the parcels that make up the Quapaw Strip trust tract, including Section 13, in unrestricted fee in 2006 and 2007 for use as a parking lot and support area for its adjacent Downstream Casino property, which is located in Oklahoma.<sup>3</sup> The

<sup>1</sup> E-mail from Venus Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Eric Shepard, NIGC Acting General Counsel (November 20, 2014).

<sup>2</sup> U.S. Department of Interior, Bureau of Land Management Plat of Dependent Resurvey and Survey (Nov. 19, 2010).

<sup>3</sup> Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 1, 5, and 6.

tract, which consists of approximately 124 acres, was taken into trust by the Department of the Interior in August 2012.<sup>4</sup> The trust deed describes the tract as:

All of U.S. Government Lot 8, in Section 12, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 2010 BLM re-survey....

AND:

All of U.S. Government Lots 4, 5, and 6, in Section 13, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 2010 BLM re-survey. ... EXCEPT ANY PART TAKEN OR DEEDED FOR ROADS, AND SUBJECT TO ANY EASEMENTS OR RESTRICTIONS OF RECORD. Containing 123.79 acres more or less, Surface only.<sup>5</sup>

In 2011, the Department of the Interior Bureau of Land Management confirmed that Section 13 of the Quapaw Strip, containing approximately 100.42 acres, is within the boundaries of the Tribe's former reservation in Kansas.<sup>6</sup>

## **B. Tribe's Last Reservation in Kansas and Oklahoma**

The Tribe was removed from its homeland in Arkansas and ultimately relocated to a reservation that spanned across both of the present day states of Oklahoma and Kansas pursuant to the Treaty with the Quapaw, dated May 13, 1833.<sup>7</sup> In accordance with the treaty, the reservation consisted of 150 sections of land.<sup>8</sup> The portion of the reservation in Kansas consisted of approximately 12 full sections of land and 6 fractional sections of land and included Section 13 at issue here.<sup>9</sup> Because the Kansas portion of the reservation was only approximately one-half mile in width from north to south, it came to be known as the Quapaw Strip.<sup>10</sup> The Tribe ceded

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<sup>4</sup> U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012) (land taken into trust on Aug. 21, 2012).

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Robert A. Casias, U.S. Department of Interior, Bureau of Land Management, Deputy State Director for New Mexico Cadastral Survey/Geographic Sciences to Stephen Ward (Mar. 14, 2011).

<sup>7</sup> Treaty with the Quapaw, 7 Stat. 232, Art. 1 (Nov. 15, 1824) ("The Quapaw Nation of Indians cede to the United States of America, in consideration of the promises and stipulations hereinafter made, all claim or title which they may have to lands in the Territory of Arkansas..."); Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833) ("The United States hereby agree[s] to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the commissioners of Indian affairs west, and which is expressly designed to be (in) lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon...").

<sup>8</sup> Treaty with the Quapaw, 7 Stat. 424, Art. 2, *supra*.

<sup>9</sup> Letter from Robert A. Casias, *supra* at 1.

<sup>10</sup> Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5; Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867) ("The Quapaws cede to the United States that portion of their land lying in the State of Kansas, being a strip of land on the north line of their reservation, about one half mile in width, and containing about twelve

the Kansas portion of the reservation, except for a small tract set aside for a member of the Tribe, to the United States pursuant to a treaty, dated February 23, 1867.<sup>11</sup> In the same treaty, the Tribe ceded approximately 18,500 acres in the western part of the reservation in Oklahoma to the United States.<sup>12</sup>

### Applicable Law

IGRA permits an Indian tribe to “engage in, or license and regulate, gaming on Indian lands within such Tribe’s jurisdiction.”<sup>13</sup> The Act defines “Indian lands” to include:

- (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.<sup>14</sup>

NIGC regulations, interpreting IGRA, provide that “Indian lands” mean:

- (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.<sup>15</sup>

However, IGRA also prohibits gaming on lands acquired into trust after October 17, 1988, unless certain exceptions are met. In the last recognized reservation exception, IGRA states that a tribe may game on after acquired land if:

- (2) the Indian tribe has no reservation on Oct. 17, 1988 and—
  - ...
  - (B) 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.<sup>16</sup>

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sections in all, excepting therefrom one half section to be patented to Samuel G. Vallier, including his improvements. Also the further tract within their present reserve, bounded as follows: Beginning at a point in the Neosho river where the south line of the Quapaw reserve strikes that stream, thence east three miles, thence north to the Kansas boundary line, thence west on said line to the Neosho river, thence down said river to the place of beginning; and the United States will pay to the Quapaws for the half-mile strip lying in Kansas at the rate of one dollar and twenty-five cents per acre ... and the land in Kansas herein ceded shall be open to entry and settlement, the same as other public lands, within sixty days after the completion of the survey thereof.”)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5.

<sup>13</sup> 25 U.S.C. §§ 2710(b)(1), 2710(d)(1)(A)(i), 2710(d)(3)(A).

<sup>14</sup> 25 U.S.C. § 2703(4).

<sup>15</sup> 25 C.F.R. § 502.12.

Further, Department of the Interior regulations implement the last recognized reservation exception in the following way:

(b) If the tribe had no reservation on October 17, 1988, the lands must be []:

...

(2) 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.<sup>17</sup>

## Analysis

To address whether Section 13 of the Quapaw Strip qualifies as gaming eligible land under IGRA, it is necessary to examine whether the land constitutes "Indian lands" as defined by IGRA and NIGC regulations. If it does, then because Section 13 is after-acquired trust land, IGRA and DOI regulations, interpreting Section 20 of IGRA, must be applied to ascertain whether the land satisfies the last recognized reservation exception of IGRA.

### A. Indian Lands

The initial question is whether the land constitutes "Indian lands" within the meaning of IGRA and NIGC regulations. For the Tribe to conduct gaming pursuant to IGRA, such gaming must be conducted on "Indian lands,"<sup>18</sup> defined by the Act as: "all lands within the limits of any Indian reservation and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."<sup>19</sup> NIGC regulations further define "Indian lands" as: "[I]and within the limits of an Indian reservation; or [I]and over which an Indian tribe exercises governmental power and that is either -- (1) [h]eld in trust by the United States for the benefit of any Indian tribe or individual; or (2) [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation."<sup>20</sup>

The land at issue here is not within a present day reservation, but it is land held in trust by the United States for the Tribe.<sup>21</sup> If the land were within a present day reservation, that would be the end of the Indian lands analysis.<sup>22</sup> However, here, Section 13 is trust land.

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<sup>16</sup> 25 U.S.C. § 2719(a)(2)(B).

<sup>17</sup> 25 C.F.R. § 292.4(b)(2).

<sup>18</sup> 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2.

<sup>19</sup> 25 U.S.C. § 2703(4).

<sup>20</sup> 25 C.F.R. § 502.12.

<sup>21</sup> U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).

<sup>22</sup> Memorandum to NIGC Acting General Counsel from Cindy Shaw re: Tribal jurisdiction over gaming fee land on White Earth Reservation (Mar. 14, 2005) ("White Earth legal opinion") ("The land at issue in this matter is fee land within the exterior boundaries of the White Earth reservation. The land thus falls within the 'limits' of the reservation and meets the definition of Indian lands under IGRA, 25 U.S.C. § 2703(4)(A), and NIGC's regulations, 25 C.F.R. §502.12(a).").

## 1. Jurisdiction

In order for trust land to constitute Indian lands, the second requirement of IGRA, 25 U.S.C. § 2703(4)(B), must be satisfied - the Tribe must exercise governmental power over the land.<sup>23</sup> Importantly, the Tenth Circuit requires that “before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land.”<sup>24</sup> The Tenth Circuit’s approach is consistent with IGRA’s other sections providing that “an Indian tribe may engage in, or license and regulate class II [and III] gaming on Indian lands within such tribe’s jurisdiction” if it satisfies other requirements of IGRA.<sup>25</sup> Moreover, courts have uniformly held that tribal jurisdiction is a threshold requirement to the exercise of governmental power as required by IGRA’s definition of Indian lands.<sup>26</sup> Therefore, whether the Tribe possesses jurisdiction over the trust tract is a threshold question prior to considering whether the Tribe exercises government power over it.

The question of the Tribe’s jurisdiction “focuses principally on congressional intent and purpose,”<sup>27</sup> as “an Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute.”<sup>28</sup> Evidence of congressional intent and purpose can be found in the language of the legislation and treaties.<sup>29</sup> “To a lesser extent,” congressional intent may also be found in “events occurring within a reasonable time after passage of these laws and treaties,” including Congress’ own actions as to the land and actions by the Bureau of Indian Affairs and local judicial authorities.<sup>30</sup> In this instance, no federal statutes limit the Tribe’s jurisdiction over the trust tract, which was taken into trust by the Department of the Interior in August 2012 for the benefit of the Tribe.<sup>31</sup>

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<sup>23</sup> 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

<sup>24</sup> *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001).

<sup>25</sup> 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1).

<sup>26</sup> See e.g., *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994), superseded by statute 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) (*Miami II*) (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) (“the NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land”).

<sup>27</sup> *Kansas, supra*, at 1229 (“A proper analysis of whether the tract is “Indian lands” under IGRA begins with the threshold question of the Tribe’s jurisdiction. That inquiry, in turn, focuses principally on congressional intent and purpose...”).

<sup>28</sup> *Id.* quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to ... eliminate tribal rights.”) and *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>29</sup> See, e.g., *id.* at 1229-30.

<sup>30</sup> *Kansas, supra*, at 1229-30.

<sup>31</sup> U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012) (land taken into trust on Aug. 21, 2012).

Moreover, generally, an Indian tribe possesses jurisdiction over “over both their members and their territory.”<sup>32</sup> It is well settled that a tribe retains primary jurisdiction over land that the tribe inhabits if the land qualifies as Indian country.<sup>33</sup> Congress defined the term Indian country 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 ....<sup>34</sup>

“This definition applies to questions of both criminal and civil jurisdiction.”<sup>35</sup>

The Tenth Circuit has held that “[o]fficial designation of reservation status is not necessary for the property to be treated as Indian country under 18 U.S.C. § 1151;” rather, “it is enough that the property has been validly set aside for the use of the Indians, under federal superintendence.”<sup>36</sup> Further, “reservation 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.”<sup>37</sup>

Accordingly, because the trust land was validly set aside for the Tribe and is under the superintendence of the federal government, the tract qualifies as Indian country. And, because the trust land is the Tribe’s Indian country, the Tribe possesses jurisdiction over it.

## 2. Exercise of Governmental Power

In addition to possessing jurisdiction, the Tribe must also exercise governmental power over Section 13 of the Quapaw Strip trust tract to satisfy IGRA’s requirements for “Indian lands.”<sup>38</sup> IGRA is silent regarding how the NIGC should determine whether a tribe exercises

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<sup>32</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); see also *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations’”).

<sup>33</sup> See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (The Supreme Court has stated 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.”); *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (tribe and its members not subject to state tax within Indian country); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, 567 F.3d 1235, 1240 n.5 (10th Cir. 2009) (“[A]s a general matter, Indian tribes exercise court jurisdiction over Indian country – reservations, dependent Indian communities, and Indian allotments”); *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987) (“Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands”).

<sup>34</sup> 18 U.S.C. § 1151.

<sup>35</sup> *Cabazon*, 480 U.S. at 253 n.5.

<sup>36</sup> *United States v. Roberts*, 185 F.3d 1125, 1133, n.4 (10th Cir. 1999); see also *Mustang Production Co. v.*

*Harrison*, 94 F.3d 1382, 1385 (10<sup>th</sup> Cir. 1996), cert. denied *Mustang Fuel Corp. v. Hatch*, 520 U.S. 1139 (1997) (“Indian tribes have jurisdiction over lands that are Indian country, and allotted lands constitute Indian country.”).

<sup>37</sup> *United States v. Roberts*, 185 F.3d at 1130.

<sup>38</sup> See 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b)(1); see also *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

governmental power over its Indian lands. Further, manifestations of governmental power can differ dramatically depending upon the circumstances. Therefore, the NIGC has not formulated a uniform definition of “exercise of governmental power,” but, instead, makes a determination in each instance based upon the circumstances.<sup>39</sup>

Several court cases provide guidance as to what constitutes an exercise of governmental power. For example, the First Circuit Court of Appeals in *Rhode Island v. Narragansett Indian Tribe* held that whether a tribe satisfies this requirement depends “upon the presence of concrete manifestations of [governmental] authority.”<sup>40</sup> Some examples of such manifestations include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs.<sup>41</sup> In addition, the court in *Cheyenne River Sioux Tribe v. State of South Dakota* found that several factors might also be relevant to a determination of whether off-reservation trust lands constitute Indian lands.<sup>42</sup> Those factors are:

- (1) Whether the areas are developed;
- (2) Whether the 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; and
- (5) Other indicia as to who exercises governmental power over those areas.<sup>43</sup>

Here, several actions demonstrate the Tribe’s present exercise of governmental power over the Quapaw Strip trust tract. Specifically, the Tribe has manifested its governmental authority in the following ways:

- (1) The Tribe has a governmental services center on the Quapaw Strip trust tract, which houses: a Tribal Marshals substation; the Quapaw Services Authority, a tribal enterprise that offers services as a construction manager, general contractor, and remediation contractor; the Tribe’s Bison Ranch operations; and the Tribal Secretary-Treasurer’s office, from which she performs much of her official work;<sup>44</sup>
- (2) The Tribe’s Marshals Service patrols the tract and has agreements with a local Kansas law enforcement agency to provide support for its law enforcement services;<sup>45</sup>

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<sup>39</sup> See *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

<sup>40</sup> *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d at 703.

<sup>41</sup> *Id.*

<sup>42</sup> 830 F. Supp. 523 (D.S.D. 1993), *aff’d*, 3 F.3d 273 (8th Cir. 1993).

<sup>43</sup> *Id.* at 528.

<sup>44</sup> Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014); Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 5 & 6.

<sup>45</sup> Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 4; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014); Deputization Agreement between Cherokee County, Kansas Sheriff and the Quapaw Tribal Marshals Service (Dec. 27, 2011).

- (3) The Tribe's Fire and Emergency Medical Services provide services on the tract;<sup>46</sup>
- (4) The Tribe developed and maintains the parking lot and surrounding area of its casino resort on the tract;<sup>47</sup>
- (5) The Tribe constructed and maintains a water distribution and storage system on the tract, including support areas and access roads;<sup>48</sup>
- (6) The Tribe constructed and maintains a wetlands sanctuary and habitat for the broadhead skink on the tract;<sup>49</sup>
- (7) The Tribe tests and monitors the water system and maintains compliance with environmental permits on the tract;<sup>50</sup>
- (8) The Tribe undertakes program obligations associated with a Superfund Memorandum of Agreement with the U.S. Environmental Protection Agency on the tract;<sup>51</sup> and
- (9) The Tribe designed and is in the process of constructing a deep water well on the tract to serve as a source of irrigation water.<sup>52</sup>

The public safety, conservation, law enforcement, and other governmental programs administered by the Tribe on the tract constitute "concrete manifestations of governmental authority." In particular, the actions of the tribal marshals, tribal fire and emergency medical personnel, tribal governmental officer, and tribal environmental department demonstrate the exercise of such authority. Also, the Tribe developed the tract with significant infrastructure, including a water system, a parking lot, an outdoor amphitheater, a wetlands sanctuary, and a habitat for an endangered species.<sup>53</sup> All of the infrastructure is located in Section 13, with the exception of the constructed wetlands that is located in Section 12.<sup>54</sup> In light of the above, the

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<sup>46</sup> Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶ 3; Letter from John Berrey, Chairman Quapaw Tribe of Oklahoma to Tracie Stevens, NIGC Chairwoman (Apr. 30, 2013) at 2.

<sup>47</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 7.

<sup>48</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 3; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 3; Letter from John Berrey to Tracie Stevens, *supra* at 1.

<sup>49</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 7 & 8; Letter from John Berrey to Tracie Stevens, *supra* at 1-2.

<sup>50</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 6.

<sup>51</sup> *Id.* ¶ 10.

<sup>52</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 5.

<sup>53</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 7; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (May 9, 2014) ¶ 4.

<sup>54</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (May 9, 2014) ¶¶ 3-5; Declaration of Trenton R. Stand, Director, Realty & Trust Services Department, Quapaw Tribe (May 12, 2014) ¶ 3.



Tribe exercises governmental power over the Quapaw Strip trust tract. And, the trust tract, including Section 13, constitutes “Indian lands,” as defined by IGRA and NIGC regulations.

## B. Last Recognized Reservation Exception

Because Section 13 of the Quapaw Strip was taken into trust in 2012, for the land to be eligible for gaming it must satisfy one of the exceptions to IGRA’s general prohibition against gaming on lands acquired in trust after October 17, 1988.<sup>55</sup> At issue is whether Section 13 qualifies for IGRA’s last recognized reservation exception, 25 U.S.C. § 2719(a)(2)(B), which allows gaming on Indian after-acquired lands if the Indian tribe had no reservation on 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.”<sup>56</sup>

In this instance, the first part of this exception is met, because the Tribe had no reservation on October 17, 1988. The portion of the Tribe’s reservation in Kansas was ceded to the United States in 1867 via a treaty.<sup>57</sup> In the same treaty, the Tribe ceded approximately 18,500 acres in the western part of the reservation in Oklahoma to the United States.<sup>58</sup> The second part of the exception is also satisfied, because Section 13 of the Quapaw Strip trust tract is in Kansas,<sup>59</sup> a state other than Oklahoma. Although a portion of the reservation had been located in Oklahoma, the exception only requires that the land at issue is not located in Oklahoma. Thus, the only remaining questions are: (1) whether Section 13 is within the state or states in which the Tribe is presently located and (2) whether Section 13 is within the Tribe’s last recognized reservation within such state or states.

### 1. Presently Located – Governmental Presence & Tribal Population

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<sup>55</sup> 25 U.S.C. § 2719; 25 C.F.R. part 292.

<sup>56</sup> 25 U.S.C. § 2719 (a)(2)(B).

<sup>57</sup> Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867) (“The Quapaws cede to the United States that portion of their land lying in the State of Kansas, being a strip of land on the north line of their reservation, about one half mile in width, and containing about twelve sections in all, excepting therefrom one half section to be patented to Samuel G. Vallier, including his improvements.”).

<sup>58</sup> *Id.* (“The Quapaws cede to the United States ... Also the further tract within their present reserve, bounded as follows: Beginning at a point in the Neosho river where the south line of the Quapaw reserve strikes that stream, thence east three miles, thence north to the Kansas boundary line, thence west on said line to the Neosho river, thence down said river to the place of beginning”); Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5; In discussing the Osage Indian reservation, the Tenth Circuit has explained that Congressional policy in the early 1900s was to seek disestablishment of all Oklahoma reservations. *See Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (“The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. ... In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations.”); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 4.07(1)(b) fn. 743 (5th Ed.2012) (recent statutes indicate that Congress considers Oklahoma to be comprised of “former reservations”).

<sup>59</sup> U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).

IGRA does not define “presently located.” However, the Department of the Interior interpreted that phrase as part of its interpretation of the last recognized reservation exception in its Part 292 regulations issued on May 20, 2008. For this exception, the regulations mandate that if the tribe had no reservation on October 17, 1988, the land at issue must be . . . “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.”<sup>60</sup> 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.

Interior’s interpretation of this phrase differs from the only court holding concerning this exception, issued 2 years prior to the regulations, which found that a tribe is presently located where “a tribe has its population center and major governmental presence.”<sup>61</sup> Although in the preamble to the Part 292 regulations Interior did not discuss *Wyandotte Nation v. National Indian Gaming Commission*<sup>62</sup> or explain why it chose the criteria of “governmental presence and tribal population” as opposed to the court’s criteria of “population center and major governmental presence,” those terms are significantly distinct.

Nonetheless, Interior’s interpretation as articulated in this regulation is owed *Chevron* deference.<sup>63</sup> Review by a court of an agency interpretation is a two-step analysis.<sup>64</sup> In *Chevron*’s first step, the court must answer “whether Congress has directly spoken to the precise question at issue.”<sup>65</sup> If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.”<sup>66</sup> If, however, the statute is “silent or ambiguous,” the court must invoke the second step of the *Chevron* analysis and determine whether the agency’s interpretation is “based on a reasonable construction of the statute.”<sup>67</sup> “In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>68</sup> “[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer. . . .”<sup>69</sup> Here, in IGRA, Congress did not define the term “presently located,” and thus the statute is silent on the meaning of it. Further, Interior’s interpretation of the term is reasonable since “presently located” in a state or states may be shown by a tribe’s governmental

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<sup>60</sup> U.S. Department of Interior, *Gaming on Trust Lands Acquired After October 17, 1988*, 73 FR 29354-01.

<sup>61</sup> *Wyandotte Nation v. Nat’l Indian Gaming Comm’n*, 437 F. Supp. 2d 1193, 1206 (Kansas 2006).

<sup>62</sup> *Id.*

<sup>63</sup> *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

<sup>64</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (“[w]hen a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 842-843.

<sup>68</sup> *Id.* at 844.

<sup>69</sup> *Id.*

presence and population. Thus, as one of the agencies charged with administering IGRA, Interior's interpretation of § 2719(a)(2)(B) is entitled to deference under step two of *Chevron*.<sup>70</sup>

Both the plain language of IGRA and the Interior regulation, 25 C.F.R. § 292.4(b)(2), provide that the last recognized reservation exception applies in “the State or States within which the tribe is presently located.”<sup>71</sup> In the *Wyandotte Nation* case, which predates the Part 292 regulations, the court recognized this to be the case in reviewing a NIGC final Commission decision that applied the last recognized reservation exception to the Wyandotte Nation's Shriner Tract in Kansas. In that agency decision, the NIGC viewed “presently located” to mean where a tribe physically resides, and “to determine where this is the NIGC looks to the seat of tribal government and population center.”<sup>72</sup> The court found that “[b]y defining the term ‘presently located’ to mean where a tribe's seat of tribal government is located, the NIGC decision only permits a tribe to qualify for the exception in a single state. This definition contradicts the plain language of the statute, which expressly applies the last reservation exception to ‘State or States’ where the Indian tribe is presently located.”<sup>73</sup>

Thus, a tribe may be “presently located” in “states.”<sup>74</sup>

So, where is the Tribe “presently located?” Given the evidence, the Tribe is “presently located” in both Oklahoma and Kansas, as it has a governmental presence and tribal population in each. This is not surprising given that in the 1800s, the Tribe was ultimately relocated to a reservation that spanned both the present day states of Oklahoma and Kansas.<sup>75</sup> As noted previously, the Kansas portion and significant acreage in the Oklahoma portion of the reservation were ceded to the United States in 1867.<sup>76</sup> And, according to the 10<sup>th</sup> Circuit, in the early 1900s, Congress intended to disestablish all Oklahoma reservations.<sup>77</sup> Today, the Tribe's trust land spans both these states.<sup>78</sup>

#### a. Governmental Presence

In regard to the Tribe's “governmental presence,” governmental functions and services are directed, implemented, and occur both in the Tribe's trust lands in Oklahoma and in Kansas,

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<sup>70</sup> The NIGC and Interior are each charged with specific duties under IGRA. When two or more agencies administer a statute and work together on its interpretation, the interpretation of each agency is granted Chevron deference. *Individual References Servs. Group, Inc. v. Federal Trade Comm'n*, 145 F. Supp. 2d 6, 24 (D.D.C. 2001).

<sup>71</sup> 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).

<sup>72</sup> *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1205 (Kansas 2006).

<sup>73</sup> *Id.* at 1206.

<sup>74</sup> 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).

<sup>75</sup> Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833).

<sup>76</sup> Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork and Roche de Bœuf, and certain Wyandottes, 15 Stat. 513, Art IV (Feb. 23, 1867); Letter from Stephen R. Ward to Eric Shepard, NIGC Acting General Counsel (May 1, 2013) at 5.

<sup>77</sup> *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010).

<sup>78</sup> Letter from John Berrey to Tracie Stevens, *supra* at 1; Aerial photograph of Quapaw Strip tract, 2012 Google Earth;

Declaration of Trenton R. Stand, Director, Realty & Trust Services Department, Quapaw Tribe (May 12, 2014) ¶¶ 2 & 4.

and are provided to tribal members and non-members in both states.<sup>79</sup> The seat of the Tribe's government is in Quapaw, Oklahoma and many of the tribal governmental functions and services are based there, including the offices of the Tribal Administrator, the Tribal Chief Financial Officer, the Tribal Historic Preservation Officer, the Social Services Department, the Enrollment Department, the Realty and Trust Services Department, the Environmental Department, and the Tribal courts.<sup>80</sup> In addition, in Quapaw, Oklahoma, the Tribe has its Indian Child Welfare programs, a library, a pre-school, a childcare center, elder housing, a nutrition center, and a wellness center.<sup>81</sup> Elsewhere in Oklahoma, the Tribe has fire, emergency medical services, and marshals' stations.<sup>82</sup>

As for the Tribe's governmental presence in Kansas, although certain tribal government functions occur from offices located in Oklahoma, it is significant that the Tribal Secretary-Treasurer performs her official work from a tribal governmental office in Kansas.<sup>83</sup> Thus, crucial aspects of the Tribe's government – the review of tribal Business Committee minutes and the work of the treasury – is overseen, directed, and executed from Kansas.<sup>84</sup>

Further, the governmental services center in Kansas houses a substation for the Tribal marshals from which they service tribal members and non-members within the Tribe's trust lands in Oklahoma and Kansas and provide law enforcement assistance to the Cherokee County, Kansas Sheriff.<sup>85</sup> Although the main tribal marshals' station is in Oklahoma, two tribal marshals are assigned to the Kansas substation as their regular duty station.<sup>86</sup> Nevertheless, all 13 tribal marshals regularly work out of the Kansas substation due to the fact that they patrol, handle matters, and respond to calls from across the Tribe's trust lands, which span Oklahoma and Kansas.<sup>87</sup> The work of the tribal marshals at the substation includes preparing reports, interviewing witnesses, speaking with crime victims, holding evidence, and temporarily detaining individuals as well as convening there with the officers from the Cherokee County Sheriff's office for purposes of providing the county law enforcement assistance.<sup>88</sup> Further, the tribal marshals are deputized in Kansas and may handle cases throughout Cherokee County.<sup>89</sup>

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<sup>79</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶¶ 4, 5, & 7; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 4; Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 3 & 4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 2; Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 3 & 4.

<sup>80</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 5.

<sup>81</sup> *Id.*

<sup>82</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶5; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 4; Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 3 & 4.

<sup>83</sup> Declaration of Tamara Smiley Reeves, Secretary-Treasurer, Business Committee, Quapaw Tribe (Jan. 24, 2014) ¶¶ 3, 4 & 6.

<sup>84</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 3.

<sup>85</sup> Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014).

<sup>86</sup> *Id.* ¶ 5.

<sup>87</sup> Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 5; Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶¶ 3 & 4.

<sup>88</sup> Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 5-7.

<sup>89</sup> Letter from John Berrey to Tracie Stevens, *supra* at 2; Deputization Agreement between Cherokee County, Kansas Sheriff and the Quapaw Tribal Marshals Service § 3(D) (Dec. 27, 2011).

In addition, other important governmental functions occur in Kansas. The Tribal Fire and Emergency Medical Services Department provides full service fire and EMS services not only in Oklahoma but also in Kansas to both tribal members and the general public.<sup>90</sup> Moreover, the Department has mutual aid agreements with numerous municipalities in Oklahoma and Kansas, including the municipalities of Baxter Springs, Kansas; Cherokee County, Kansas; and Columbus, Kansas.<sup>91</sup>

The Tribe also engages in environmental programs in Kansas, not only on the Quapaw Strip trust tract but also through a Superfund Memorandum of Agreement with the United States Environmental Protection Agency relating to remedial activities with the Cherokee County Superfund Site in Kansas.<sup>92</sup> Additionally, the Tribal Environmental Department maintains an endangered species habitat and wetlands habitat as well as a water tower, potable water system, and permitted storm water detention area in Kansas on the Quapaw Strip trust tract.<sup>93</sup> Lastly, the Tribal Environmental Department oversees environmental permits pertaining to the tract and designed a deep water well on the tract that the Tribe is in the process of constructing to serve as a source of irrigation water for its lands in Kansas.<sup>94</sup>

Moreover, the Quapaw Services Authority (QSA), a governmental authority of the Tribe and tribal enterprise employing 18 persons: engages in construction management, general contractor services, and environmental remediation services; has its offices in the tribal governmental services center located in Kansas; and conducts business in Kansas and Oklahoma.<sup>95</sup> In Kansas, QSA served as construction manager and general contractor for the construction of 4 greenhouses, which were built to produce vegetables and herbs for the Tribe's restaurants at its resort, and served as construction manager for the drilling of a deep water well on the Quapaw Strip trust tract, which will provide irrigation water for the Tribe's land in Kansas.<sup>96</sup>

Furthermore, the Tribe is a co-founding member of the Shoal Creek Basin Regional Waste Water Authority, chartered under Kansas law, along with three other governmental bodies in Kansas.<sup>97</sup> The Authority is planning new waste water facilities in Cherokee County, Kansas to improve water quality not only in the immediate area but also in the waterways that flow into the

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<sup>90</sup> Declaration of Jeff Reeves, Director, Fire Protection and Emergency Medical Services Department (Apr. 29, 2013) ¶¶ 2 & 3; Letter from John Berrey to Tracie Stevens, *supra* at 2.

<sup>91</sup> *Id.* ¶ 4.

<sup>92</sup> Programmatic Agreement among the United States Environmental Protection Agency, Region 7; Quapaw Tribe; Kansas State Historic Preservation Office; Advisory Council on Historic Preservation regarding the Baxter Springs and Treece Subsites of the Cherokee County, Kansas Superfund Site (Aug. 29, 2011) at I(A); Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 2 & 10.

<sup>93</sup> Letter from John Berrey to Tracie Stevens, *supra* at 1-2; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶¶ 3-4; Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3, 6-8.

<sup>94</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 2, 3 & 5.

<sup>95</sup> Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 2-6.

<sup>96</sup> *Id.* ¶¶ 3 & 4.

<sup>97</sup> Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 9; Letter from John Berrey to Tracie Stevens, *supra* at 2.

Tribe's lands in Oklahoma.<sup>98</sup> The Tribe also is working with Galena, Kansas to construct a new water line in the area to enhance economic development.<sup>99</sup>

Finally, the Tribe has an agreement with the United States Environmental Protection Agency, the Kansas State Historic Preservation Office, and the Advisory Council on Historic Preservation for the protection and preservation of the Tribe's historical and cultural sites within the Quapaw Strip trust tract.<sup>100</sup>

As detailed herein, the Tribe conducts numerous, significant governmental functions, activities, and decision-making in Kansas and Oklahoma that not only effect its trust land and tribal members in those states but also the greater non-member community and non-tribal land in those states. Consequently, the Tribe possesses a governmental presence in Kansas and in Oklahoma.

#### b. Tribal Population

The second prong of the test to establish whether a tribe is presently located within a state or states requires a determination as to whether the tribe has a tribal population there.<sup>101</sup> The Tribe possesses a tribal population in both Kansas and Oklahoma. Specifically, of the Tribe's 4,500 members, 10% live in Kansas (451 tribal members) and approximately half of those – or 5% - live within Cherokee County, Kansas (281 tribal members) where Section 13 is located.<sup>102</sup> 1,857 tribal members live in Oklahoma.<sup>103</sup>

Although the foregoing is enough to show tribal population in Kansas and Oklahoma, it is noteworthy that despite the passage of approximately 150 years since the Kansas portion of the Tribe's reservation was ceded to the United States as well as a significant amount of the Oklahoma portion, a substantial number of tribal members still live within the historic reservation boundaries or in the areas next to it in Kansas and Oklahoma. In particular, 246 tribal members – or approximately 5% - live within the Oklahoma portion of the Tribe's historic reservation and 11 tribal members live within the Kansas portion.<sup>104</sup> Moreover, approximately 20% of tribal members live next to the historic reservation in Ottawa County, Oklahoma (810 tribal members) and, as mentioned above, approximately 5% (270 tribal members) live within Cherokee County, Kansas next to the portion of the historic reservation in Kansas.<sup>105</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Letter from John Berrey to Tracie Stevens, *supra* at 2.

<sup>100</sup> Programmatic Agreement among the United States Environmental Protection Agency, Region 7; Quapaw Tribe; Kansas State Historic Preservation Office; Advisory Council on Historic Preservation regarding the Baxter Springs and Treece Subsites of the Cherokee County, Kansas Superfund Site (Aug. 29, 2011); Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 10.

<sup>101</sup> 25 C.F.R. § 292.4(b)(2).

<sup>102</sup> Declaration of Cathy Daugherty, Director, Enrollment Department, Quapaw Tribe of Oklahoma (Apr. 29, 2013) ¶ 3; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 5; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶¶ 3 & 5.

<sup>103</sup> Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 6; Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶ 3.

<sup>104</sup> Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 5; Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (May 9, 2014) ¶ 4.

<sup>105</sup> Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 4.

As demonstrated above, the Tribe has a governmental presence and tribal population in Oklahoma and Kansas. Therefore, the Tribe is presently located in both states.

## 2. The Tribe's Last Recognized Reservation

The final requirement of the last recognized reservation exception is whether the land at issue is in fact part of the Tribe's last recognized reservation within the state or states within which it is presently located. As explained previously, the Tribe's last original reservation boundaries spanned the present states of Oklahoma and Kansas.<sup>106</sup> The reservation was ultimately ceded by treaty to the United States in 1867.<sup>107</sup> The Department of the Interior Bureau of Land Management has confirmed that Section 13 of the Quapaw Strip trust tract is "within the original boundaries of the Quapaw Reserve in the State of Kansas."<sup>108</sup> As detailed above, the Tribe is presently located in both Oklahoma and Kansas. Thus, Section 13 is part of the Tribe's last recognized reservation within one of the states within which the Tribe is presently located.

### Conclusion

Section 13 of the Quapaw Strip trust tract is eligible for gaming under IGRA as after-acquired trust land that satisfies the last recognized reservation exception of Interior's regulations, § 292.4(b)(2). As detailed above, in accordance with treaties with the United States ceding the Tribe's reservation lands, the Tribe had no reservation as of the enactment of IGRA; Section 13 is located in Kansas, a state other than Oklahoma; the Tribe is presently located in Kansas given its governmental presence and tribal population; and Section 13 is within the Tribe's last recognized reservation, which is within Kansas.

This legal opinion does not constitute final agency action for purposes of review in federal district court. If you have any questions, please contact Jo-Ann M. Shyloski, Of Counsel, at 202-632-7003.

Sincerely,



Eric N. Shepard  
Acting General Counsel

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<sup>106</sup> Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833) ("The United States hereby agree to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the commissioners of Indian affairs west, and which is expressly designed to be (in) lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon...").

<sup>107</sup> See *supra* note 63.

<sup>108</sup> Letter from Robert A. Casias, U.S. Department of Interior, Bureau of Land Management, Deputy State Director for New Mexico Cadastral Survey/Geographic Sciences to Stephen Ward (Mar. 14, 2011).