MEMORANDUM

TO: Tracie Stevens, Chairwoman

FROM: Lawrence S. Roberts, General Counsel LR
Jo-Ann M. Shyloski, Associate General Counsel JMS
Dawn Sturdevant Baum, Staff Attorney DSB

DATE: May 24, 2012

RE: Kialegee Tribal Town: Proposed Gaming Site in Broken Arrow, Oklahoma

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This memorandum concludes a legal review of whether a gaming facility proposed by the Kialegee Tribal Town (Kialegee or Tribe) is on Indian lands eligible for gaming as defined by the Indian Gaming Regulatory Act (IGRA) and applicable regulations. As further explained below, it is our opinion that the proposed new facility in Broken Arrow, Oklahoma (Proposed Site) does not qualify as Kialegee's Indian lands eligible for gaming because Kialegee has not established that it has legal jurisdiction over the Proposed Site for purposes of IGRA. The Department of the Interior (DOI), Office of the Solicitor, concurs with this opinion.

I. Background

The Kialegee Tribal Town is a federally recognized tribe with headquarters in Wetumka, Oklahoma. On April 29, 2011, Kialegee sent the NIGC notice of the Tribe's intent to license a new facility on the Proposed Site.[1] The Proposed Site is currently held in restricted status by two citizens of the Muscogee (Creek) Nation, Marcella Burgess Giles and Wynema Burgess Capps, each having right to an undivided one-half interest in the property. The Office of the Field Solicitor in Tulsa has determined that each of the

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[1] The Proposed Site is located on South 129th East Avenue between the Creek Turnpike and East 111th Street South. A legal description of the property is attached to the memorandum.

two landowners holds their undivided half interest in the Proposed Site half in restricted fee and half in fee simple.[2]

The Tribe initially requested NIGC Office of General Counsel review of various ground leases and related subleases of the Proposed Site between the owners, the Tribe, and a developer.[3] The Tribe sought an opinion on whether the leases constituted a management contract that required the NIGC Chair's review and approval. During the review, Kialegee submitted a memorandum setting forth its basis for legal jurisdiction over the Proposed Site.

Kialegee subsequently withdrew its request to the Office of General Counsel, and the owners of the Proposed Site filed a petition on January 27, 2011, for approval of the Prime Ground Lease in Oklahoma State Court under the Stigler Act, 61 Stat. 731 (1947). On August 17, 2011, the Court issued an order withholding approval of the lease. The Court declined "to determine "whether the Kialegee Tribal Town . . . exercises jurisdiction over a Creek allotment." The Court further opined that "an individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease." Ultimately, the Court withheld approval of the lease "without prejudice to Petitioner's ability to present the said Lease to the Secretary of the Interior for approval." The landowners have not submitted any of their leases to the Department of Interior for approval.[4]

NIGC has repeatedly requested that the Tribe submit any additional materials to support its basis for legal jurisdiction over the Proposed Site. On March 7, 2012, the Tribe provided a Joint Venture Agreement between the Tribe, the landowners, and developers with a cover letter and attachments. On May 4, 2012, the Tribe indicated its intention to withdraw its ownership interest from that Joint Venture and to license and regulate the

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[2] May 18, 2011 Memo from Field Solicitor, Tulsa, to Acting Regional Director, Eastern Oklahoma Region, BIA, attached to May 25, 2011 Letter from Acting Regional Director, Eastern Oklahoma Region to NIGC Staff Attorney, concluding the parcel is one-half restricted and one-half unrestricted fee land and located within the boundaries of the former reservation of the Muscogee (Creek) Nation as defined by the Treaty of 1833, 7 Stat. 417, and the Treaty of 1866, 14 Stat. 785.

[3] Throughout the course of dealings on this matter, the Tribe, the landowners, the developers, and the attorneys for each of those parties have submitted documents and made statements in concert with one another and with implied, if not explicit, consent to speak on behalf of one another. Each party is aware of this practice and has made no objection to it. Because of such consent, this opinion will treat documents submitted by any one of the aforementioned parties as being submitted on behalf of the group or on behalf of any one of the parties.

[4] On March 7, 2012, the Tribe submitted copies of a Joint Venture Operating Agreement (Agreement) dated April 5, 2011, along with a cover letter asserting that the Agreement does not encumber any land and therefore does not need approval by the Secretary of the Interior. After reviewing the Joint Venture Operating Agreement, the NIGC Chief of Staff issued a letter to the Tribe on April 26, 2012, expressing concern that the Agreement violates IGRA. The letter informed the Tribe that if it proceeded with gaming under the Agreement, that the Chief of Staff would recommend an enforcement action to the Chairwoman. On March 7, 2012, NIGC provided copies of the Agreement and related materials to the Solicitor's Office. The Solicitor's Office has concluded that the Agreement and related materials do not constitute a lease requiring approval of the Bureau of Indian Affairs because the Agreement does not encumber the property.

Joint Venture to conduct gaming as an individually owned gaming operation under IGRA, 25 U.S.C. § 2710(b)(4)(A).

A. Legal History of the Creek Nation.

An overview of the legal history of the Creek Nation is necessary to understand legal jurisdiction over the Proposed Site and the relationship of the Muscogee (Creek) Nation to Kialegee. "The Creek Nation has always been a confederacy of tribal towns." *Harjo v. Kleppe*, 420 F.Supp. 1110, 1118 (D.D.C. 1976). "Prior to 1707, the Creek Nation occupied a large territory in what is now the States of Georgia, Alabama, and Florida. Between 1707 and 1773, tracts of this territory were ceded to Great Britain and the American colonies. Treaty cessions to the newly independent United States began in 1790. The United States entered into thirteen treaties with the Creek Nation before 1833. Under the Creek Removal Treaty of March 24, 1832, 7 Stat. 366, [a] portion of the Creek Nation . . . was removed to an area in the present State of Oklahoma." *Muscogee (Creek) Nation v. BIA*, 13 IBIA 211 at 2-3 (1985). The historic Creek Nation that signed treaties prior to 1833 now exists as the Poarch Band of Creek Indians in Alabama, the Muscogee (Creek) Nation in Oklahoma, and recognized tribal towns. *See* May 19, 2008 Letter from NIGC Chairman to Poarch Band of Creek Indians Chairman, p. 12.

The Tenth Circuit analyzed the legal history of the Muscogee (Creek) Nation, explaining that in 1832 "the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River." *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 971 (10th Cir. 1987). In subsequent years, federal treaties and federal legislation pertaining to the Creek Reservation in Oklahoma were exclusively with the Muscogee (Creek) Nation, not the tribal towns. "In a subsequent treaty regarding these lands, the United States agreed to grant 'a patent, in fee simple, to the Creek nation.'" *Id.* at 971. In 1866, the Creek Nation entered into another treaty with the United States, which "provided that the 'reduced . . . reservation' retained by the Creeks was 'forever set apart as a home for the Creek Nation.'" *Id.* at 974. The Tenth Circuit held that "original treaty lands still held by the Creek Nation" were "the purest form of Indian Country[.]" *Id.* at 976. Thus, the Tenth Circuit was clear that the Oklahoma lands held in fee by the Muscogee (Creek) Nation had been held by the Muscogee (Creek) Nation since its removal to Oklahoma.

Harjo v. Kleppe, 420 F.Supp. 1110 (D.D.C. 1976), also provides a comprehensive legal history of the Muscogee (Creek) Nation.[5] Many of the court's findings, included below, are relevant to the jurisdiction question here.

> On October 12, 1867, the Creeks adopted a constitution and a code of laws for the 'Muskogee Nation.' The constitution was modeled on American federalism, with executive, legislative, and judicial branches. Legislative power was lodged in a National Council, a bi-cameral body in which each

[5] The D.C. Circuit affirmed, noting that "the district court undertook an extended, studious, and excellent analysis of the effect of federal treaties and statutes on the government of the Creek Nation." *Harjo v. Andrus*, 581 F.2d 949, 951 (D.C. Cir. 1978).

> tribal town or "Talwa" was entitled to one delegate in the House of Kings and one in the House of Warriors, plus an additional delegate in the House of Warriors for every two hundred people.

Id. at 1120. The 1867 Constitution of the Muskogee Nation divided the Nation's territory into six districts. The National Council chose a judge for each district and the Principal Chief appointed, with the consent of the National Council, a prosecuting attorney for each district. Article IV of 1867 Muskogee Constitution. Pursuant to the Muskogee Constitution, the National Council established a comprehensive framework of civil and criminal laws. Under the laws of the Muskogee Nation, gambling was a misdemeanor. *See Constitution and Laws of the Muskogee Nation* § 159, as compiled and codified by A.P. McKellop, Muskogee, Indian Territory (1893).

Over the following decades, non-Indian settlement within the Oklahoma territory grew. As the court explained,

> By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. . . . [O]n March 3, 1893, . . . Congress created a commission to negotiate with the Five [Civilized] Tribes [of Oklahoma] for the extinction of their communal titles and the eventual creation of a state. . . . During the next several years the Commission attempted to negotiate the dissolution of the tribes, but had minimal success . . .. [O]n June 28, 1898 Congress enacted the Curtis Act, which provided for forced allotments and the eventual termination of the tribal tenure without the Indians' consent. The Act incorporated the provisions of the tentative agreements with each of the . . . tribes, providing that if the agreement with any tribe was ratified by the tribe the provisions of the agreement would substitute for the more drastic allotment provisions of the Act. The Creeks did in fact reject their agreement, and the Curtis Act went into effect in their territory.

Harjo v. Kleppe, 420 F.Supp. at 1122. Section 30 of the Act provided for the allotment of "lands owned by the Muscogee or Creek Indians in the Indian Territory to each citizen of said nation[.]" Act of June 28, 1898, 30 Stat. 495. The Act provided for the "principal chief of the Muscogee or Creek Nation . . . to deliver . . . a patent, conveying . . . all the right, title, and interest of the said nation in and to the land[.]" *Id.*

> The provisions of the Curtis Act were so drastic from the Creek point of view that they soon consented to a new agreement to supersede the one contained in section 30 of [the Curtis] Act[.] The new agreement was ratified by the tribe, and by the Congress in the Act of March 1, 1901, 31 Stat. 861.

Harjo v. Kleppe, 420 F.Supp. at 1124.

The Act of March 1, 1901, as amended, provided for allotment of "all lands *belonging to the Creek tribe of Indians* in Indian Territory, except town sites . . ." 32 Stat. 500 (emphasis added). The Act further recognized "that until such time as the Creek national government was in fact dissolved, it would continue to function under the 1867 Constitution, as modified by this act and prior agreements." *Id.* at 1124. As the court explained,

> [T]he act's allotment scheme provided for commissions to carry out the appraisal and allotment of land, and that sale of town lots. The Principal Chief was to appoint certain members of the commissions or committees . . . [and] the deeds conveying the individual allotments to members of the tribe were to be signed and delivered by the Principal Chief on forms provided by the Secretary. . . . In sum, then, under the agreement the Creek government through its National Council retained its general authority for dealing with tribal affairs[.]

Id. at 1126.

The district court further analyzed the federal legislation after the Act of 1901 through the present, finding that Congress "has explicitly recognized and preserved the authority of the national legislature and the basic form of government established by the 1867 constitution." *Id.* at 1143. The D.C. Circuit affirmed the district court's conclusion that "although a great deal of legislation had been passed involving the tribe and its government, 'the basic legal framework governing the management of Creek tribal affairs, financial and otherwise, is the Creek Constitution of 1867.'" *Harjo v. Andrus,* 581 F.2d 949, 951 (D.C. Cir. 1978). The D.C. Circuit affirmed the district court's order providing for a "referendum among all Creek adults on certain issues raised by a recently drafted proposed constitution for the tribe" and that the results be incorporated into a new constitution for the Creek Nation.

In 1979, the Muscogee (Creek) Nation adopted a Constitution which was approved by the Department of the Interior in accordance with the Oklahoma Indian Welfare Act, Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. 501 *et seq*. Section 2 of the Nation's approved Constitution provides in relevant part 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[.]"

B. Legal History of the Kialegee Tribal Town.

The D.C. Circuit also explained that "[t]he Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or Talwa, each with their own political organization and leadership. . . . Originally, there were four 'mother' towns, but the number was expanded by a transfer of town fires until, by the time of the adoption of the 1867 Constitution, there were approximately forty-four Talwa in existence. Tribal towns can also merge or dissolve, and there is at present some doubt as

to the exact number of towns that are politically and socially active." *Harjo v Andrus*, 581 F.2d at 951 n.7. Under the 1867 Muskogee Nation's Constitution, each tribal town was entitled to delegates in the National Council. 1867 Muskogee Nation Constitution, Art. I, § 2-3, *see also Harjo v. Kleppe*, 420 F.Supp. at 1120.

In 1936, Congress passed the Oklahoma Indian Welfare Act (OIWA), 49 Stat. 1967. Section three of OIWA allowed "any recognized tribe or band of Indians residing in Oklahoma . . . to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." In 1937, the Acting Solicitor for Interior concluded that the Creek Tribal Towns could organize as bands within the meaning of Section 3 of OIWA, separate and distinct from the Muscogee (Creek) Nation. The Acting Solicitor stated that "the Creek towns can lay a substantial claim to the right to be considered as recognized bands" within the meaning of OIWA, explaining:

> That the Indians themselves recognized the existence of the Creek tribal towns i[s] clear from an examination of the constitution and laws of the Muscogee Nation. While providing that representation in the National Council shall be by towns, nowhere does it define the towns. In fact the Compiled Statutes of the Muscogee Nation nowhere provide for defining the boundaries of the towns. In other words, the towns are recognized as having an existence not derived from the constitution of the Muskogee Nation but in fact antedating and continuing alongside the constitution. Further evidence of this is provided . . . by other statutes ratifying agreements of consolidation between towns and ratifying adoptions into town membership.

Memorandum to the Commissioner of Indian Affairs from Acting Solicitor Frederic L. Kirgis, p. 4 (July 15, 1937) (internal citations omitted). The Acting Solicitor opined that "it [was] possible to conclude that the towns are actually bands with a recognized existence." *Id.*, p. 5 (July 15, 1937).

Three of the Creek Tribal Towns reorganized under OIWA, including Kialegee, which did so by ratifying a constitution in 1941. *Kialegee Constitution*, 1941. Unlike the Muscogee (Creek) Nation Constitution, the Kialegee's Constitution does not contain any provision setting forth the geographical jurisdiction of the Kialegee Tribal Town. *See id.*[6]

[6] Prior to their organization under the Oklahoma Indian Welfare Act, the tribal towns were described by the Tenth Circuit as political subdivisions of the Creek Nation. *United States v. Mid-Continent Petroleum Corp*, 67 F.2d 37, 48 (10th Cir. 1933).

II. Discussion

IGRA provides that an Indian tribe may engage in gaming under IGRA only on "Indian lands" that are "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1), (d)(1). IGRA defines *Indian lands* as:

> (A) all lands within the limits of any Indian reservation; and
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> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The NIGC's regulations further clarify the definition by providing that:

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

25 C.F.R. § 502.12.

A. Indian Reservation

The Kialegee Tribe does not claim to have an existing reservation. Rather, it asserts that the Proposed Site "is located within the former reservation of the Creek Nation Confederacy as the boundaries existed prior to allotment." *See Jurisdiction Brief* at 8. The Department of the Interior states that the Proposed Site is located within the former reservation of the Muscogee (Creek) Nation. *See* May 18, 2011 Memorandum from Field Solicitor, Tulsa, to Acting Regional Director, Eastern Oklahoma Region, BIA, pp. 2 and 7; May 25, 2011 Letter from Acting Regional Director, Eastern Oklahoma Region to NIGC Staff Attorney ("[A] tract of land located in the NE1/4 of the NE1/4 of Section 32, Township 18 North, Range 14 East of the Indian Meridian, Tulsa County, Oklahoma" is "located within that area of land constituting the former, historic reservation of the Muscogee (Creek) Nation."). Further, former NIGC Acting General Counsel Penny Coleman opined that certain Muscogee (Creek) Nation trust lands were eligible for gaming because they were located "within the Nation's former reservation boundaries[.]" *See* January 6, 2009 Letters from Acting General Counsel Penny Coleman

to Principal Chief A.D. Ellis regarding Twin Hills and Kellyville sites. Accordingly, the proposed site does not constitute "Indian lands" pursuant to 25 U.S.C. § 2703(4)(A).[7]

B. Restricted Fee Land

"Indian lands" includes lands "held by any . . . individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). Kialegee suggests that the Proposed Site is fully restricted fee land and therefore qualifies as Indian lands pursuant to 25 U.S.C. § 2703(4)(B). *Jurisdiction Brief* at 1 and 9. The Office of the Solicitor states that "an undivided one-half (½) interest in the [Proposed Site] is restricted in accordance with the Act of August 4, 1947, 61 Stat. 731, in the hands of the current owners: Marcella Burgess Giles, 5/8 Creek . . . and Wynema Burgess Capps, 5/8 Creek[.] The remaining undivided one-half (½) interest is held by Ms. Giles and Ms. Capps in unrestricted fee simple." May 18, 2011 Memo from Field Solicitor, Tulsa, to Acting Regional Director, Eastern Oklahoma Region, BIA, page 2 (attached to May 25, 2011 Letter from Acting Regional Director, Eastern Oklahoma Region to NIGC Staff Attorney). Ms. Giles and Ms. Capps are enrolled citizens of the Muscogee (Creek) Nation. *Jurisdiction Brief* at 1.

Whether the parcel is fully restricted or an undivided one-half (½) interest of the parcel is restricted, the Proposed Site satisfies the first requirement of 25 U.S.C. § 2703(4)(B) because the parcel (both surface and subsurface) is held by individual Indians subject to a restriction against alienation. The Proposed Site falls within IGRA's plain language, which defines "Indian lands" to include any lands "subject to restriction by the United States against alienation." There is no indication in IGRA or its legislative history that Congress intended to limit "Indian lands" to only fully restricted parcels.[8]

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[7] Notwithstanding these references to the Creek Nation's territory as a 'former reservation' for purposes of IGRA, this memorandum expresses no opinion on whether the Muscogee (Creek) Nation still holds certain lands that are considered to be an informal reservation under other statutes. We note that the Tenth Circuit in *Indian Country, U.S.A. v. Oklahoma,* expressly declined to decide whether the exterior boundaries of the 1866 Creek Nation treaty territory have been disestablished. 829 F.2d 967 (10th Cir. 1987). In that case, the court examined whether the parcel at issue constituted "Indian Country" and determined that the land was "part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)." *Id.* at 976.

[8] Congress was certainly aware that parcels subject to a restriction against alienation may include undivided interests held in fee. *La Motte v. United States*, 254 U.S. 570, 580-81 (1921) (affirming injunction of unapproved leases for allotments wherein undivided interests held in fee and restricted status). When Congress intends to limit the scope of "Indian lands" it does so expressly. *See* 16 U.S.C. § 470bb ("'Indian lands' means lands of . . . Indian individuals . . . subject to a restriction against alienation . . . except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual."). Further, to the extent that the phrase "subject to restriction by the United States against alienation" is ambiguous, it should be liberally construed with "doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003); *Cobell v. Norton*, 240 F.3d 1081, 1101, 1103 (D.C. Cir. 2001). IGRA was enacted "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

We note that *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005), *cert. denied*, 123 S. Ct. 1795 (2003), held that an allotment was not "Indian country" under 18 U.S.C. § 1151(c) because the surface estate was wholly unrestricted and only 1/12th of the mineral interest remained restricted. A federal court reviewed the state court's ruling and found that it was not contrary to Federal law. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). The court reasoned that the particular parcel did not constitute Indian country because the Major Crimes Act concerned crimes that would occur on the surface of the land, not on the mineral interest of an Indian allotment and that the Indian country "characteristics [were] extinguished through conveyances to non-Indians[.]" *Id.* at 1292.

The Proposed Site is demonstrably different from the allotment at issue in *Murphy*. Here, an undivided one-half (½) surface and subsurface interest of the Proposed Site is subject to federal restriction. Further, no interest in the Proposed Site has ever been conveyed to non-Indians since allotment. As explained by the Department of the Interior, the Proposed Site has continuously been held by Creek citizens from the time of allotment to the present.[9] *See* May 18, 2011 Memorandum from Field Solicitor, Tulsa, to Acting Regional Director, Eastern Oklahoma Region, BIA, pp. 2-6 (attached to May 25, 2011 Letter from Acting Regional Director, Eastern Oklahoma Region to NIGC Staff Attorney). In this respect, the Proposed Site is somewhat similar to fractionated trust allotments on which the Quinault Tribe and Iowa Tribe of Oklahoma have been authorized to conduct gaming. The trust allotment on which the Quinault Tribe conducts gaming was continuously held by Indians with all but one of the eleven heirs holding interests in the parcel being enrolled Quinault tribal members. *See* September 25, 1996 Memorandum from Robert T. Anderson, Associate Solicitor, Division of Indian Affairs to Director, Indian Gaming Management Staff Regarding Sampson Johns Allotment as "Indian Land" under IGRA. The allotments on which the Iowa Tribe of Oklahoma is authorized to conduct gaming were originally allotted to Iowa tribal members with members of other tribes inheriting interests in the allotments. *See* January 7, 2010 Memorandum from Jeffrey Nelson, Senior Attorney, NIGC Office of General Counsel to George T. Skibine, Acting Chairman, National Indian Gaming Commission. While the trust parcels are not held in trust for a single tribe or tribal member, the parcels nonetheless qualify as "Indian lands" under IGRA.

Finally, the Department of the Interior treats the Proposed Site as restricted land for purposes of its federal supervision. For example, the BIA includes this parcel in its inventory of lands under its federal supervision and tracks its ownership status. Generally, the BIA regulates surface permitting, surface leasing, timber sales, and encumbrances on inherited restricted fee allotments of the Five Civilized Tribes, which include allotments of Muscogee Creek Nation citizens such as the parcel at issue. 25

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[9] A ½ undivided interest in the Proposed Site became unrestricted through a conveyance from a Creek citizen to his brother. *See* May 18, 2011 Memorandum from Field Solicitor, Tulsa, to Acting Regional Director, Eastern Oklahoma Region, BIA, pp. 3-5, (attached to May 25, 2011 Letter from Acting Regional Director, Eastern Oklahoma Region to NIGC Staff Attorney).

U.S.C. §§ 323, 324, 393a, 394, 395, 406, 415, 466, and 483a; 25 C.F.R. Parts 162, 163, 166, and 169; and 25 C.F.R. § 152.34. The Office of the Special Trustee supervises funds derived from the sale or lease of such lands. 25 C.F.R. § 115.702. Finally, the Tulsa Field Solicitor is charged with, and has exercised, certain statutory responsibilities in connection with conveyances of such lands under the Stigler Act, 61 Stat. 731. *In the Matter of the Approval of the Prime Ground Lease Agreement of Marcella s. Giles and Wynema L. Capps, Lessors,* No. FB-2011-1 (Dist. Ct. Tulsa County, Okla. Aug. 17, 2011); *see also Walker v. United States*, 663 F. Supp. 258, 267 (N. D. Okla. 1987).

C. The Indian Tribe Must Have Legal Jurisdiction and Exercise Governmental Power Over the Land.

In order for a restricted allotment to constitute "Indian lands," the second requirement of 25 U.S.C. § 2703(4)(B) must be satisfied -- the Tribe must exercise governmental power over the restricted allotment. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). 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." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). 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. 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1) (emphasis added). The 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. *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) (*Miami I*) ("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"). Therefore, whether Kialegee possesses legal jurisdiction over the Proposed Site is a threshold question prior to considering whether Kialegee exercises government power over the Proposed Site.

Generally speaking, an Indian tribe possesses legal jurisdiction "over both their members and their territory." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations'"). It is well settled that a tribe retains primary jurisdiction over its "Indian country." *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); *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.").

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 . . .." 18 U.S.C. § 1151. "This definition applies to questions of both criminal and civil jurisdiction." *Cabazon*, 480 U.S. at 253 n.5. The Office of General Counsel has opined that "[t]he context of IGRA's prescriptions as to jurisdiction—that land be within 'such tribe's jurisdiction' and ordinances adopted by 'the Indian tribe having jurisdiction over such lands'—indicates that Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land." *See* March 14, 2005 Memorandum from NIGC Attorney to NIGC Acting General Counsel re: White Earth Band of Chippewa Indians, p. 10; June 30, 2005 Letter from Acting General Counsel to Judith Kammins Albietz, Attorney for Buena Vista Rancheria of Me-Wuk Indians, p. 12; September 27, 2005 Letter from Acting General Counsel to Pyramid Lake Paiute Tribe Chairwoman, p. 5. Thus, the question is whether the Proposed Site is "Indian country" within the jurisdiction of the Kialegee Tribal Town.

Kialegee argues that it shares jurisdiction over the Proposed Site with Muscogee (Creek) Nation and other Creek Tribal Towns because it is a successor-in-interest to the Historic Creek Nation. *Jurisdiction Brief* at 8-12. Kialegee asserts that 25 U.S.C. § 476(f) "mandates that all federally recognized political successors to the Creek Nation Confederacy be treated equally." *Jurisdiction Brief* at 12.

The legal history of the Muscogee (Creek) Nation and the Creek tribal towns demonstrates that as a matter of federal law and pursuant to their respective constitutions, the Muscogee (Creek) Nation has legal jurisdiction over the Proposed Site. Prior to allotment, federal treaties vested title in the land to the Muscogee (Creek) Nation. Treaty of 1833, 7 Stat. 417, Art. II-IV ("The United States will grant a patent in fee simple to the Creek nation of Indians for the land assigned said nation by this treaty or convention . . . and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them. . . . It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation..."); Treaty of 1856, 11 Stat. 699, Art. II, IV, XV; Treaty of 1866, 14 Stat. 785, Art. XII and XIV (reaffirming prior treaty provisions not inconsistent with the 1866 Treaty). The courts have affirmed that title to these lands vested in the Muscogee (Creek) Nation. *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 971, 974 (10th Cir. 1987).

Consistent with this recognized title, a subsequent federal treaty conveyed title to part of the reservation from the Muskogee (Creek) Nation to the United States. Treaty of 1866, 14 Stat. 785, Art. III ("In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United

States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation.") Later, federal law provided for allotments within the Creek Reservation to be made by the Principal Chief of the Muskogee (Creek) Nation. Act of March 1, 1901, 31 Stat. 861, §§ 3, 23 ("All lands of said tribe . . . shall be allotted among the citizens of the tribe by said commission . . .. Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment."); *see also Harjo v. Kleppe*, 420 F. Supp. 1110, 1125 (D.D.C. 1976). The Muskogee (Creek) Nation continued to be the subject of federal legislation. Act of 1970, 84 Stat. 1091.

As shown above, every federal treaty or law relating to the Proposed Site recognizes the Muscogee (Creek) Nation's authority. This is not to say that the Muscogee (Creek) Nation has exclusive jurisdiction over all Indian lands within the former reservation. The Thlopthlocco Creek Tribal Town holds 19 parcels of trust land within the former Creek Reservation.[10] Likewise, if land were taken into trust for the Kialegee Tribal Town within the former Creek Reservation, the Kialegee Tribal Town would have exclusive jurisdiction over such land.

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[10] It appears that the Department of the Interior had originally contemplated that the reorganized Tribal Towns would be assigned separate parcels under the OIWA. *Alabama-Quassarte Tribal Town v. United States*, 2010 U.S. Dist. LEXIS 100450 at *7 (E.D. Okla., September 21, 2010)(finding correspondence from Interior reflects an intent by DOI to purchase land for use of the Alabama-Quassarte Tribal Town and that the DOI's Land Field Agent's recommendation was "to provide these lands to 'the landless Indians of the Alabama-Quassarte Tribal Town.'"); *Muscogee (Creek) Nation v. Muskogee Area Director*, 35 IBIA 27 (2000) (finding that "[t]he materials before the Board indicate that the lands in the Hanna Project were initially intended to benefit the Kialegee Tribal Town, and that the lands in the Wetumka Project were initially intended to benefit the Alabama-Quassarte Tribal Town," but that title to all of the lands at issue was taken in trust for the Creek Nation until Interior assigned the land to a tribe or band under OIWA). One Tribal Town, the Thlopthlocco Tribal Town, has trust land within the boundaries of the former Creek reservation. *Crowe & Dunlevy, P.C., v. Stidham*, 640 F.3d 1140, 1143 (10th Cir. 2011). As to those trust lands, it is clear that the United States has set them aside for that specific tribe, confirming jurisdiction in that tribe suitable for purposes of gaming regulation as contemplated by the Secretary. *See* June 24, 2009 Decision of the Assistant Secretary—Indian Affairs in United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region at 6; September 10, 2010 Decision of the Assistant Secretary—Indian Affairs in United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region at 3 n.1.

The title history of the Proposed Site further demonstrates Muscogee (Creek) Nation jurisdiction and an absence of Kialegee jurisdiction. The Proposed Site is part of a larger Indian allotment that was allotted in 1903 pursuant to federal law from the Creek Nation to Tyler Burgess, a member of the Lockapoka Tribal Town[11] and also a citizen of the Muscogee (Creek) Nation. *See Allotment Deed* (August 6, 1903) and *Creek Nation Census Card No. 1320.*

The Proposed Site is within the territory described in federal treaties with the Muscogee (Creek) Nation and in both the 1867 Muskogee Nation Constitution and laws and the present Constitution of the Muscogee (Creek) Nation approved by the Department of the Interior. *See* 1867 Constitution, Art. IV, § 1 ("The Muskogee Nation shall be divided into six (6) districts, and each district shall be furnished with a judge, a prosecuting attorney and a company of light horsemen."); 1979 Constitution, Art I, § 2 ("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[.]). Both Constitutions, including the 1979 Secretarial approved Constitution, encompass the Proposed Site within its territory. Finally, the Proposed Site is currently held by Muscogee (Creek) Nation members, subject to restrictions against alienation. The Kialegee Tribe has not submitted any evidence that the land was ever owned by a member of the Kialegee Tribal Town or that federal or Muscogee (Creek) law establishes Kialegee jurisdiction over the Proposed Site.

Kialegee asserts that 25 U.S.C. § 476(f) mandates a finding that the "Kialegee has jurisdiction over its predecessor's reservation, including the [Proposed Site]." *Jurisdiction Brief* at 12. The Assistant Secretary - Indian Affairs recently explained that 25 U.S.C. § 476(f) prohibits agencies of the United States from finding that a tribe "lacks territorial jurisdiction while other tribes have territorial jurisdiction." *See* June 24, 2009 Decision of the Assistant Secretary - Indian Affairs in United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region at 6. As discussed above, the specific treaties, federal legislation, approved tribal constitutions and federal court decisions establish and define the rights of both the Kialegee Tribe and the Muscogee (Creek) Nation. This legal analysis does not conclude that Kialegee Tribe lacks the authority to exercise territorial jurisdiction over its tribal lands that every other tribe possesses as a matter of federal law. Rather, consistent with the Assistant Secretary's 2009 decision, the Kialegee Tribe would have "exclusive jurisdiction over land that the United States holds in trust" for the Kialegee Tribe. *Id.* at 7.

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[11] Lockapoka Tribal Town is related to the Tulsa Tribal Town near what is now Tulsa, Oklahoma. Oppler 1937, p. 38. Creek Nation Indian Roll, Card No. 1320, Tyler Burgess (recording Mr. Burgess' enrollment as "Lockapoka" and cross-referencing Lockapoka Pay Roll of 1895). Tyler Burgess's Enrollment Card identified him in Broken Arrow, Oklahoma, to the Southeast of Tulsa, in December 1899. Creek Nation Indian Roll, Card No. 1320, Tyler Burgess.

III. Conclusion

For all of the above reasons, it is our opinion that the Proposed Site is Indian land, but that the Proposed Site is not within the Kialegee Tribal Town's jurisdiction because the Kialegee Tribe has not demonstrated that it has legal jurisdiction. Because it has not demonstrated legal jurisdiction, we need not reach the issue of whether Kialegee exercises government control over the Proposed Site. The DOI, Office of the Solicitor, concurs with this opinion.

Attachment

Kialegee Tribal Town
P.O. Box 332
Wetumka, Oklahoma 74883
Tiger Hobia, Town King
Thomas Givens, 1st Warrior

April 11, 2011

Honorable Tracy Stevens
Chair National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

RE: One Hundred Twenty (120) Day Notice Letter of Intent to Issue a New Facility License

Dear Madam Chair:

I serve as Mekko of the Kialegee Tribal Town (Tribe) and this correspondence is written in that capacity.

The Tribe has determined that it is in the best interest of the Kialegee Tribal Town to pursue a certain economic development venture which will specifically include gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. (IGRA). In that vein, this letter will serve as the Tribe's formal notification to you, pursuant to 25 U.S.C. § 559.2, that the Kialegee Tribal Town intends to license a new gaming facility on restricted land located within the former reservation of the Creek Nation and currently under the governmental control and jurisdiction of the Kialegee Tribal Town.

The Land is a portion of the original allotment of Tyler Burgess, full-blood Creek allottee, Roll #4226 which was allotted to him as restricted fee land on August 6, 1903, pursuant to the Act of Congress of March 1, 1901, "Original Creek Agreement" (31 Stat. 861). The land remains in restricted fee status.

The physical address and legal description of the property are set forth below.

Physical Address: bounded in part by Florence Street (South 111th Street East), Olive Avenue (South 129th East Avenue) and Creek Turnpike, Broken Arrow, Oklahoma

Legal Description

A TRACT OF LAND THAT IS IN THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER (NE/4 NE/4) OF SECTION 32, TOWNSHIP 18 NORTH, RANGE 14 EAST OF THE INDIAN BASE AND MERIDIAN, CITY OF BROKEN

ARROW, TULSA COUNTY, STATE OF OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF THE NORTHEAST QUARTER OF SAID SECTION 32; THENCE S 89° 54' 24" W, ALONG THE NORTH LINE OF THE NORTHEAST QUARTER (NE/4) OF SAID SECTION 32, A DISTANCE OF 675.00 FEET; THENCE S 00° 05' 36" E A DISTANCE OF 565.00 FEET; THENCE S 20° 12' 34" W A DISTANCE OF 559.06 FEET, TO THE NORTH LINE OF A TRACT OF LAND DESCRIBED AS THE THIRD PART OF PARCEL NO. CR336, IN THE DISTRICT COURT FINAL ORDER RECORDED IN BOOK 6269 AT PAGE 228 IN THE OFFICE OF THE TULSA COUNTY CLERK; THENCE S 59° 01' 29" E, ALONG THE NORTH LINE OF SAID PARCEL, A DISTANCE OF 215.55 FEET; THENCE S 79° 35'22" E, CONTINUING ALONG THE NORTH LINE OF SAID PARCEL, A DISTANCE OF 245.38 FEET, TO THE EAST CORNER OF SAID PARCEL; THENCE N 89° 54' 24" E A DISTANCE OF 375.04 FEET, TO THE SOUTHWEST CORNER OF A TRACT OF LAND DESCRIBED AS THE FIRST PART OF PARCEL NO. CR336, IN THE DISTRICT COURT FINAL ORDER RECORDED IN BOOK 6269 AT PAGE 228 IN THE OFFICE OF THE TULSA COUNTY CLERK; THENCE N 03° 54' 11" E, ALONG THE WEST LINE OF SAID PARCEL, A DISTANCE OF 520.42 FEET, TO THE NORTHWEST CORNER OF SAID PARCEL; THENCE S 89° 57' 12" E, ALONG THE NORTH LINE OF SAID PARCEL, A DISTANCE OF 30.00 FEET, TO THE NORTHEAST CORNER OF SAID PARCEL, SAID CORNER BEING A POINT ON THE EAST LINE OF THE NORTHEAST QUARTER (NE/4)OF SAID SECTION 32; THENCE N 00° 02' 48" E, ALONG THE EAST LINE OF THE NORTHEAST QUARTER (NE/4) OF SAID SECTION 32, A DISTANCE OF 726.22 FEET, TO THE NORTHEAST CORNER OF THE NORTHEAST QUARTER (NE/4) OF SAID SECTION 32 AND THE POINT OF BEGINNING.

SAID TRACT CONTAINS 871,207.043 SQUARE FEET / 20.000 ACRES MORE OR LESS. THE BASIS OF BEARINGS FOR THIS LEGAL DESCRIPTION IS THE NORTH LINE OF THE NORTHEAST QUARTER OF SAID SECTION 32, THAT BEING S 89° 54' 24" W.

The allotment owners are Marcela Giles and Wynema Capps who are sisters and direct descendants of Tyler Burgess. The property has been continuously owned by a member of the Burgess family and remains in restricted fee status. A copy of the Deed is attached as Exhibit "A".

Very Truly Yours,

Tiger Hobia, Mekko
Kialegee Tribal Town

attachment