No. _____

In the Supreme Court of the United States

STATE OF KANSAS AND BOARD OF COUNTY COMMISSIONERS OF CHEROKEE COUNTY, KANSAS,
Petitioners,

v.

NATIONAL INDIAN GAMING COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID R. COOPER
Fisher, Patterson, Sayler & Smith, LLP
3550 S.W. 5th Street
Topeka, KS 66606
(785) 232-7761
dcooper@fisherpatterson.com

Counsel for Petitioner Board of County Commissioners of Cherokee County, Kansas

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. McALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
STEPHEN PHILLIPS
Assistant Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner State of Kansas

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Indian Gaming Regulatory Act ("IGRA") prohibits gaming on Indian lands taken into trust after October 17, 1988, with certain exceptions. 25 U.S.C. § 2719. By regulation, the National Indian Gaming Commission ("NIGC") has implemented a procedure for Indian tribes to request a legal opinion determining whether newly acquired Indian lands meet one of the exceptions under § 2719. 25 C.F.R. § 292.3.

Here, the NIGC issued a legal opinion through its acting general counsel declaring that certain Kansas land owned by the Quapaw Tribe of Indians "is eligible for gaming under the last recognized reservation exception." App. 69. Petitioners sought judicial review of the NIGC's determination under the Administrative Procedure Act ("APA").

The Tenth Circuit concluded that IGRA silently precludes judicial review of NIGC gaming-eligibility legal opinions because such opinions are not included in 25 U.S.C. § 2714, which provides a list of NIGC decisions considered final under the APA. *See* 5 U.S.C. § 701(a)(1). The Court also held that gaming-eligibility legal opinions are not final agency actions under the APA, opining that no legal consequences flow from such decisions, even though NIGC legal opinions regarding gaming-eligibility can pave the way for tribes to game on Indian lands. *See* 5 U.S.C. § 704.

The question presented is:

Whether NIGC legal opinions that determine whether Indian lands are eligible for gaming under IGRA are reviewable final agency actions.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are the State of Kansas and the Board of County Commissioners of Cherokee County, Kansas.

Respondents, who were defendants-appellees below, are the National Indian Gaming Commission ("NIGC"), Jonodev Osceola Chaudhuri, Commissioner of the NIGC, in his official capacity; Daniel J. Little, Associate Commissioner of the NIGC, in his official capacity; Eric N. Shepard, Acting General Counsel of the NIGC, in his official capacity; United States Department of the Interior; Ryan Zinke, Secretary of the United States Department of the Interior, in his official capacity; Kevin K. Washburn, Assistant Secretary for Indian Affairs for the United States Department of the Interior, in his official capacity; John Berrey, as Chairperson of the Quapaw Tribe of Oklahoma Business Committee and Chairperson of the Downstream Development Authority; Thomas Mathews, as Vice-Chairperson of the Quapaw Tribe of Oklahoma Business Committee; Tamara Smiley-Reeves, as Secretary/Treasurer of the Quapaw Tribe of Oklahoma Business Committee, Secretary of the Quapaw Tribe of Oklahoma Development Corporation, and member of the Downstream Development Authority; T.C. Bear, as Member of the Quapaw Tribe of Oklahoma Business Committee and the Quapaw Gaming Authority; Betty Gaedtke, as Member of the Quapaw Tribe of Oklahoma Business Committee; Ranny McWatters, as Member of the Quapaw Tribe of Oklahoma Business Committee and Treasurer of the Downstream Development Authority; Marilyn Rogers, as Member of the Quapaw Tribe of Oklahoma Business

Committee, Quapaw Gaming Authority, and Downstream Development Authority; Trenton Stand, as Member of the Quapaw Gaming Authority; Lori Shafer, as Member of the Quapaw Gaming Authority; Justin Plott, as Member of the Quapaw Gaming Authority; Fran Wood, as Member of the Quapaw Gaming Authority; Larry Ramsey, as Secretary of the Downstream Development Authority; Barbara Kyser-Collier, as Executive Director of the Quapaw Tribe of Oklahoma Tribal Gaming Agency; Erin Shelton, a/k/a Erin Eckart, as Deputy Director of the Quapaw Tribe of Oklahoma Tribal Gaming Agency; Rodney Spriggs, as President of the Quapaw Development Corporation; Art Cousatte, as Vice-President of the Quapaw Development Corporation; Donna Mercer, as Treasurer of the Quapaw Development Corporation; Jerri Montgomery, as Member of the Quapaw Development Corporation; Quapaw Development Corporation; Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah); Quapaw Gaming Authority.[1]

[1] All individual respondents are parties to this proceeding in their official capacities. The names listed are those used in the court below. Any successor in office to the respondents is automatically substituted as a party. Supreme Court Rule 35.3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, TREATIES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The State of Kansas and the Board of County Commissioners of Cherokee County, Kansas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 861 F.3d 1024, and reprinted at App. 1-20.

The District Court's memorandum and order granting respondents' motions to dismiss is reported at 151 F. Supp. 3d 1199, and reprinted at App. 21-67.

The National Indian Gaming Commission's legal opinion was not published. It is available at App. 68-102.

JURISDICTION

The Tenth Circuit issued its opinion on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 701(a) provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 702 provides, in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

25 U.S.C. § 2714 provides:

> Decisions made by the [National Indian Gaming] Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2719(a) provides, in relevant part:

> [G]aming regulated by this chapter shall not be conducted on lands acquired by the Secretary [of the Department of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> * * *
>
> (2) the Indian tribe has no reservation on October 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.

STATEMENT OF THE CASE

A. Statutory Background

The Indian Gaming Regulatory Act ("IGRA") was enacted to provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). That is, "to ensure that each place, facility, or location where class II or III gaming will occur is

located on Indian lands eligible for gaming." 25 C.F.R. § 559.1.

Congress established the National Indian Gaming Commission ("NIGC" or "Commission") within the Department of the Interior to regulate gaming under IGRA. 25 U.S.C. § 2704(a). The Chair of the Commission (or his or her designee), subject to an appeal to the Commission, has the power to order the temporary closure of gaming activities, to levy and collect civil fines, and to approve tribal ordinances or resolutions regulating class II and III gaming, among other powers. 25 U.S.C. § 2705; 25 C.F.R. § 502.1. The Chair is required to appoint a general counsel to the Commission. 25 U.S.C. § 2707(a).

IGRA allows Indian tribes to engage in, or license and regulate, gaming on Indian lands within a tribe's jurisdiction if certain requirements are met. *See* 25 U.S.C. § 2710(b), (d). Indian lands include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). And one of the requirements is that a tribe must obtain approval of a tribal gaming ordinance by the NIGC Chair. *Id.*

The default rule under IGRA is that gaming is prohibited on "lands acquired by the Secretary [of the Department of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). One exception to this rule, known as the last recognized reservation exception, applies where "the Indian tribe has 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." 25 U.S.C. § 2719(a)(2)(B). By regulation, the NIGC implemented a procedure that allows a tribe to request a legal opinion from the NIGC determining whether newly acquired lands meet one of the exceptions to IGRA's general prohibition on gaming on Indian lands placed into trust after October 17, 1988. 25 C.F.R. § 292.3.

In addition to determining whether lands are eligible for gaming under § 2719 and approving tribal gaming ordinances under §§ 2710 and 2712, the NIGC also is tasked with approving gaming management contracts (§§ 2711, 2712), and imposing civil penalties and issuing closure orders for violations of IGRA (§ 2713). Section 2714 provides that "[d]ecisions made by the [NIGC] pursuant to sections 2710 [tribal gaming ordinances], 2711 [management contracts], 2712 [review of existing ordinances and contracts], and 2713 [civil penalties and closure orders] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5."

B. Factual and Procedural Background

1. The Quapaw Tribe of Indians is a federally recognized tribe. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826, 26,830 (May 4, 2016). Under an 1833 treaty with the United States, the Tribe left its land in Arkansas and relocated to a reservation in what is now northeast Oklahoma and southeast Kansas. *See* Treaty with the Quapaw, 7 Stat. 424 (May 13, 1833).

The Kansas portion of the reservation was known as the "Quapaw Strip" because it was only a half-mile wide from north to south. App. 6. The Tribe later ceded the Quapaw Strip to the United States, except for a small set-aside for a member of the Tribe. App. 6. In 1895, during the allotment era, the United States dissolved the remainder of the Quapaw reservation and allotted the Quapaw's Oklahoma land to individual Tribe members. *See* Act of March 2, 1895, 28 Stat. 876, 907 (1895).

At issue in this case is a 124-acre parcel (the "Kansas land") that is within the historic boundaries of the Quapaw Strip and abuts the Kansas-Oklahoma state line. App. 6. The Tribe acquired the Kansas land in 2006 and 2007 to serve as a parking lot for the Tribe's Downstream Casino Resort, which is located on adjacent trust lands on the Oklahoma side of the state line. App. 6.

2. In 2011, the Tribe applied to have the Secretary of the Interior place the Kansas land into trust, stating that the land would be used only for "additional parking for the Downstream Resort/Casino." App. 122. In early 2012, the Miami Agency of the Bureau of Indian Affairs ("BIA"), located in Oklahoma, sent the Kansas Governor a "Notice of (*Non-Gaming*) Land Acquisition Application," which described the land as a parking lot and said "there is no expected change in use of the property at this time." App. 117, 119 (emphasis added).

Concerned that the land would be used to expand the Tribe's casino into Kansas, and provide gaming on the Kansas side of the state line, the State objected to the Tribe's land-into-trust application. Cherokee

County echoed the State's objections in a letter of its own, which it later withdrew based on the Tribe's assurances that the Kansas land would not be used for gaming purposes.

In June 2012, the Miami Agency of the BIA agreed to take the land into trust. The Agency based its decision in part on the Tribe's assurance that "there will be no change in land use" because one section of the tract would be used for the existing parking lot and the other section would remain primarily agricultural. App. 108.

3. After convincing the Secretary of the Interior to take the Kansas land into trust for non-gaming purposes, the Tribe did an about-face. It asked the NIGC to issue a legal opinion that the Kansas land *is eligible for gaming* under the last recognized reservation exception to IGRA's general prohibition on gaming on Indian lands taken into trust after October 17, 1988.

The State of Kansas objected to the Tribe's request because the land was placed into trust for *non-gaming* purposes. App. 28. Citing this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the State also argued that the Kansas land did not qualify for the last recognized reservation exception. App. 28. That exception requires (among other things) that the Indian lands be "located in a State other than Oklahoma" and be "within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe *is presently located*." 25 U.S.C. § 2719(a)(2)(B) (emphasis added). In *Carcieri*, the Court held that a substantially identical phrase in the Indian Reorganization Act ("IRA")—"recognized Indian Tribe

now under Federal jurisdiction"—unambiguously means "recognized Indian Tribe under Federal jurisdiction *at the time the IRA was enacted*." 555 U.S. at 388-91 (emphasis added). Thus, the State argued, the last recognized reservation exception requires the Tribe to show that it was located in Kansas on October 17, 1988, when IGRA was enacted. App. 28.

A 15-page legal opinion issued by the NIGC's Acting General Counsel concluded that the Kansas land "is eligible for gaming under the last recognized reservation exception of IGRA." App. 69. Without addressing *Carcieri* (or even mentioning the case), the legal opinion concluded that the Kansas land satisfied the last recognized reservation exception because, in addition to satisfying the exception's other requirements, the Tribe had some tribal government and tribal member presence on the land in 2014 when the opinion was issued. *See* App. 100. The legal opinion also claimed to be judicially unreviewable. App. 101. The Department of the Interior's Solicitor's Office reviewed the legal opinion and concurred with it. App. 69.

4. Petitioners sought judicial review of the NIGC legal opinion in the U.S. District Court for the District of Kansas under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). They challenged, among other things, the NIGC's determination that a tribe is "presently located" in a State for purposes of the last recognized reservation exception as long as the tribe is found to have some minimal presence in the State at the time the tribe seeks the exception or conducts gaming operations. *See* App. 28-29, 34. The NIGC moved to dismiss the Petitioners' APA claims, arguing

that the District Court lacked subject matter jurisdiction because the NIGC legal opinion was not an appealable final agency action. App. 34. The District Court granted the NIGC's motion to dismiss, concluding that 25 U.S.C. § 2714, which provides a list of NIGC decisions considered final under the APA, silently prohibits review of any other agency decisions under IGRA, including gaming-eligibility opinions under 25 U.S.C. § 2719. *See* App. 44. In the alternative, the District Court concluded that the NIGC legal opinion was not a final agency action under the APA. App. 49.

5. Petitioners timely appealed the District Court's decision and a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. App. 20.

a. First, the panel addressed whether IGRA precludes judicial review of NIGC opinions declaring certain lands eligible (or ineligible) for gaming under 25 U.S.C. § 2719. *See* 5 U.S.C. § 701(a)(1).

Section 2714 provides that "[d]ecisions made by the Commission pursuant to sections 2710 [tribal gaming ordinances], 2711 [management contracts], 2712 [pre-IGRA ordinances and contracts], and 2713 [civil penalties] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to [the APA]." 25 U.S.C. § 2714.

The panel began with a passing reference to the presumption in favor of judicial review and acknowledged that § 2714's omission of § 2719 gaming-eligibility legal opinions does not by itself render the NIGC legal opinion unreviewable. App. 8, 10. But the panel failed to faithfully apply these well-settled

principles. The panel first turned the presumption of reviewability on its head, emphasizing that "[n]othing in . . . section [2714] provides that NIGC General Counsel letters are final agency actions." App. 9. Then it concluded that the NIGC legal opinion was not reviewable primarily because § 2714 specifically provided review of certain NIGC decisions, but not gaming-eligibility legal opinions. App. 9. The "implied corollary" of § 2714, the panel held, "is that other agency actions are not final" and therefore not reviewable. App. 9.

Turning to IGRA's broader structure, the panel observed, quite rightly, that § 2719 gaming-eligibility determinations typically are made and enforced through one of § 2714's enumerated reviewable actions (for example, through the NIGC's approval of a tribal gaming ordinance, gaming management contract, or through enforcement actions). App. 11. But the panel failed to acknowledge that the Tribe could (and had every incentive to) avoid agency action under those provisions here. The Tribe already had a non-site-specific gaming ordinance that purports to authorize Class II gaming on any of the Tribe's "Indian Lands" and Class III gaming on any "Indian Lands" where the Secretary of the Interior has approved a tribal-state compact. *See* App. 15. The Tribe was not required to use a gaming management contract to operate the new facility. Plus, the possibility of any enforcement action by the NIGC was entirely speculative.

The panel attempted to buttress its conclusion by relying on IGRA's legislative history, which even the panel recognized could be seen as sending "conflicting signals about which agency actions constitute final

decisions." App. 12. And although the Department of the Interior's own regulations recognize that the NIGC can make "final agency decisions . . . pursuant to 25 U.S.C. § 2719," 25 C.F.R. § 292.26(a), the panel instead latched on to the regulation's self-serving statements that agency legal opinions categorically are never final agency actions. App. 13.

b. Next, the panel turned to whether the NIGC legal opinion qualifies as final agency action under the APA. App. 14. *See* 5 U.S.C. § 702. The panel concluded that the legal opinion was not "final" because it did not determine any rights or obligations and no legal consequences flowed from it. *See* App. 14.

Petitioners argued that the NIGC legal opinion enabled the Tribe to expand its casino to the Kansas land, arguably triggered a statutory obligation to negotiate a class III gaming compact with the Tribe, and prompted the Tribe to sue the State in order to force Kansas to negotiate a gaming compact. App. 14. Indeed, just one month after the District Court determined the NIGC legal opinion was insulated from judicial review, the Tribe sued Kansas in federal district court to force the State to negotiate a class III gaming compact. *Quapaw Tribe of Indians v. Kansas*, Case No. 16-2037-JWL-TJJ (D. Kan.). The suit was dismissed based on the State's assertion of sovereign immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Yet the panel held that the NIGC legal opinion had no legal effect because the panel opined that the Tribe's right to game on the Kansas land derived from its sovereign authority, not the legal opinion. In the panel's view, the Tribe could have obligated the State

to negotiate without the legal opinion, the State was to blame for the Tribe's federal court suit because Kansas allegedly declined to participate in compact negotiations, and the NIGC could reconsider the eligibility of the Kansas land for gaming at any time. App. 15-18.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision that § 2714 Provides an Exclusive List of Reviewable Agency Actions under IGRA Deepens a Circuit Split.

The first reason the Court should grant review is because the Circuits are divided over whether § 2714 implicitly precludes judicial review of agency actions under IGRA that are not listed in § 2714.

In the decision below, the Tenth Circuit doubled down on a previous Tenth Circuit panel's passing observation that § 2714 "define[es] what constitutes 'final agency action' under IGRA." *Oklahoma v. Hobia*, 775 F.3d 1204, 1210 (10th Cir. 2014); App. 9-10. The panel here reasoned that because § 2714 lists certain NIGC decisions that are appealable final actions under the APA, "the implied corollary is that other agency actions are not final, and ergo, not reviewable." App. 9 (internal quotation marks omitted).

By contrast, the D.C. Circuit has held that § 2714 does *not* implicitly preclude judicial review of other final agency actions under IGRA. In *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), a county challenged a decision by the Secretary of the Interior to approve a class III tribal-state gaming compact by taking no action regarding the compact within 45 days

of its submission to the Secretary. *See* 25 U.S.C. § 2710(d)(8)(C). In response, the Secretary made the same argument the Tenth Circuit panel adopted below—that § 2714 implicitly precludes review of agency decisions not specified as reviewable. Specifically, he argued that § 2714 indicates congressional intent to preclude review of his "no-action" approval of the compact because § 2714 only provides that *NIGC* decisions under § 2710 are reviewable final agency actions, and does not expressly provide that decisions made (or not made) by the *Secretary* under § 2710 are subject to review. *See Amador County*, 640 F.3d at 381.

The D.C. Circuit first concluded that "no intent to preclude judicial review is fairly discernible in [IGRA's] statutory scheme." *Id.* at 380. The court then easily rejected the argument the Tenth Circuit adopted here, explaining that "[i]t is well established . . . that the existence of a judicial review provision covering certain actions under a statute does not preclude judicial review of other actions under the same statute." *Id.* at 381.

The Eighth Circuit, in contrast, has suggested that § 2714 indicates a congressional intent to preclude review of agency decisions not listed in that section. In *In re Sac & Fox Tribe of Mississippi in Iowa / Meskwaki Casino Litigation*, 340 F.3d 749 (8th Cir. 2003), the Eighth Circuit mentioned § 2714 on its way to determining that IGRA precludes judicial review of temporary closure orders issued by the NIGC Chair. But the Eighth Circuit primarily relied on other strong indicators of congressional intent to preclude review of temporary closure orders, including providing a right

to a hearing before the full Commission to review the temporary order and the right to judicial review of that decision. *See Sac & Fox*, 340 F.3d at 756, 761; *see also* 25 U.S.C. § 2713(b), (c). These other indicators the Eighth Circuit relied on only highlight the lack of any textual clues that Congress intended § 2714 to preclude review of gaming-eligibility legal opinions.

II. The Tenth Circuit's Decision Conflicts with this Court's Precedents.

Review also is warranted because the Tenth Circuit's decision is contrary to this Court's cases in two respects: (1) notwithstanding the well-settled presumption in favor of judicial review, the Tenth Circuit effectively applied a presumption *against* review, interpreting IGRA's silence regarding the reviewability of gaming-eligibility determinations as barring review of the NIGC's legal opinion under 5 U.S.C. § 701(a)(1); and (2) the Tenth Circuit's decision is at odds with this Court's pragmatic approach to determining the finality of agency action under 5 U.S.C. § 704.

A. The Tenth Circuit Effectively Applied a Presumption *Against* Judicial Review in Holding that IGRA Categorically Precludes Review of NIGC Gaming-Eligibility Legal Opinions *Sub Silentio*.

1. "From the beginning" this Court has applied a strong presumption that judicial review of administrative action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (internal

quotation marks omitted) (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). Just a year ago, this Court reaffirmed this settled principle: A statute that makes some agency actions "'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). The "right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141.

Rather, the starting point for deciding whether a statute precludes judicial review is "the strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. This presumption, "like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent," including "inferences of intent drawn from the statutory scheme as a whole." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). But agencies attempting to shield their actions from judicial review bear the "heavy burden" of showing the necessary congressional intent to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted).

2. The decision below begins by acknowledging the "strong presumption" in favor of judicial review. App. 8. But instead of applying a presumption in favor of judicial review, the panel effectively applied a presumption *against* judicial review. Instead of requiring the NIGC to show that Congress intended to *preclude* review, the Tenth Circuit required Kansas to

show that Congress intended IGRA to *provide* for review of NIGC legal opinions. App. 9. The court thus quite literally turned the "strong presumption" on its head.

Turning to § 2714, the court concluded that the "implied corollary" of the statute's express identification of "four categories of NIGC decisions that constitute reviewable 'final agency actions' under the APA"—decisions regarding (1) tribal gaming ordinances, (2) management contracts, (3) ordinances and contracts that predate IGRA, and (4) civil penalty and closure orders for violating IGRA or its implementing regulations—"is that other agency actions are not final, and ergo, not reviewable." App. 9 (internal quotation marks omitted). The Tenth Circuit's heavy reliance on this "implied corollary" to conclude that § 2714 exclusively "defin[es] what constitutes final agency action under IGRA" cannot be squared with this Court's rigorous application of the strong presumption in favor of judicial review. App. 9-10.

For example, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the Secretary of the Department of Health and Human Services argued that two Medicare statutes barred judicial review of regulations promulgated under Part B of the Medicare program because Congress had authorized review of "any determination . . . as to . . . the amount of benefits under part A" but failed to authorize review of such decisions under part B. *Id.* at 673 (internal quotation marks omitted). The Court roundly rejected the argument because the statute "on its face is an explicit *authorization* of judicial review, *not a bar*." *Id.* at 674 (emphasis added). The same is true of § 2714.

The argument the Tenth Circuit adopted—that § 2714's failure to specifically provide for review of gaming-eligibility legal opinions, while providing for review of other agency actions, impliedly precludes judicial review of such legal opinions—cannot be squared with this Court's decision in *Bowen*.

The Environmental Protection Agency ("EPA") made a similar argument in *Sackett v. EPA*, 566 U.S. 120 (2012). EPA argued that because Congress expressly provided for prompt judicial review when the EPA assesses administrative penalties after a hearing, but did not expressly provide for review of compliance orders, Congress must have intended to preclude judicial review of EPA compliance orders. *Id.* at 129. As in *Bowen*, the Court rejected the argument: If the express provision of judicial review in one section of a statute could alone "overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.*

3. The Tenth Circuit attempted to support its interpretation of § 2714 by relying on IGRA's structure and internally inconsistent legislative history. Neither is sufficient under this Court's cases to sustain the NIGC's heavy burden of showing that Congress intended to preclude judicial review of gaming-eligibility legal opinions.

a. The Tenth Circuit concluded that because the NIGC actions deemed final and reviewable under § 2714 correspond to the NIGC's decisionmaking authority under §§ 2710 through 2713, those must be the only reviewable agency decisions under IGRA. App. 10. As in *Bowen* and *Sackett*, the "right to review is too important to be excluded on such slender and

indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141.

The decision below is particularly troubling because IGRA's structure as a whole points in exactly the opposite direction, *i.e.*, that Congress intended for gaming-eligibility determinations to be judicially reviewable. As the Tenth Circuit correctly noted, IGRA is designed to ensure that gaming-eligibility determinations under § 2719—which are central to IGRA's structure and purpose—are generally enforced through judicially reviewable actions taken under §§ 2710 through 2713. *See* 25 U.S.C. § 2714. So where, as here, a tribe has devised a way to avoid these traditional avenues of judicial review, there is good reason to believe that Congress did not intend to insulate the resulting agency decisions from judicial review. The "inferences of intent drawn from the statutory scheme as a whole" actually undermine the Tenth Circuit's reasoning and ultimate decision. *See Bowen*, 476 U.S. at 673 n.4.

b. IGRA's legislative history offers no support either. To begin with, any reliance on legislative history should be cautious and sparing. *See Sackett*, 132 S. Ct. at 1373 (focusing analysis on statutory text and structure, not even mentioning legislative history). Here, the two pieces of relevant legislative history both come from a committee report by the Senate Select Committee on Indian Affairs that even the panel acknowledged "gives conflicting signals about which agency actions constitute final decisions." App. 12.

The Report first states: "Judicial review.—*All* decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court." S. Rep.

No. 100-446, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3078 (emphasis added). The report later states that IGRA "[p]rovides that certain Commission decisions will be final agency decisions for purposes of court review." *Id.* at 3090. Like § 2714 itself, the report says nothing about limiting judicial review to the NIGC actions listed in § 2714. Thus, IGRA's legislative history is a far cry from "specific legislative history that is a reliable indicator of congressional intent." *See Bowen*, 476 U.S. at 673.

c. Finally, the decision below conflicts with the Department of the Interior's own regulations, which assume that gaming-eligibility determinations under § 2719 can be judicially reviewable. When issuing new regulations in 2008, the Department of the Interior made clear that "[t]hese regulations do not alter final agency decisions made pursuant to 25 U.S.C. § 2719 before the date of enactment of these regulations," 25 C.F.R. § 292.26(a), which presumably include "written opinion[s] regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment," *id.* § 292.26(b).

B. The Tenth Circuit Failed to Apply this Court's Pragmatic Approach to Determining the Finality of Agency Actions.

This Court's test for determining final agency action under the APA has two prongs: (1) "the action must mark the consummation of the agency's decisionmaking process" and (2) the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)

(internal quotation marks omitted). The decision below addressed only the second prong, concluding that the NIGC legal opinion does not determine any rights or obligations and will produce no legal consequences for the parties. App. 14. The Tenth Circuit's parsimonious application of the finality requirement fundamentally contradicts the "pragmatic approach" this Court has "long taken to finality of agency actions." *Hawkes*, 136 S. Ct. at 1815 (internal quotation marks omitted).

1. For example, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Court recently looked to practical effects and consequences to hold that an approved jurisdictional determination ("JD") is final. *See id.* at 1814-15. The Court first observed that a "negative" JD—one that states a party's property does not contain jurisdictional waters (which was not at issue in the case)—creates a five-year safe-harbor under the Clean Water Act, which would be a "legal consequence" that satisfies *Bennett*'s second prong. *Id.* Therefore, the Court reasoned, affirmative JDs also have legal consequences: They not only "represent the denial of the safe harbor that negative JDs afford," they also warn that if property owners "discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." 136 S. Ct. at 1815.

Hawkes represents the Court's longstanding approach. In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), the Court considered whether an Interstate Commerce Commission order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from

regulation, and which it believed were not. *Id.* at 41-42; *see also Hawkes*, 136 S. Ct. at 1815. "Although the order 'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier,'" the Court "held that the order was nonetheless immediately reviewable." *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Labs.*, 387 U.S. at 150). That is because the "order . . . 'warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties.'" *Id.* (quoting *Frozen Food*, 351 U.S. at 44).

2. A similar dynamic is in play here. Had the NIGC issued a negative legal opinion—one determining that the Kansas land was not eligible for gaming under IGRA—such a ruling would have warned the Tribe that if it attempted to game on the land it would do so at the risk of facing civil penalties and possible forced closure of the gaming facility in an enforcement action by the Commission. *See* 25 U.S.C. § 2713. Thus, under *Hawkes* and *Frozen Food*, not only is a negative NIGC gaming-eligibility opinion a reviewable final agency action, an affirmative NIGC gaming-eligibility opinion is a reviewable final agency action too. *See Hawkes*, 136 S. Ct. at 1815; *Frozen Food*, 351 U.S. at 44.

Here, the NIGC's affirmative gaming-eligibility determination provided the Tribe the legal assurance it needed to expand its casino to Kansas. The decision below emphasizes that "tribes' right to game on Indian lands derives from their sovereign authority," not from the legal opinion. App. 14. But the decision ignores the

important fact that under IGRA's general rule, gaming is prohibited on the Kansas land because that land was taken into trust after October 17, 1988, and gaming is allowed on the land only if the last recognized reservation exception applies. IGRA does not allow gaming on Indian lands based simply on tribes' sovereignty; the statute creates a detailed framework for determining whether and to what extent gaming is allowed, including a presumption against gaming on lands taken into trust after October 17, 1988. Without the NIGC legal opinion, the uncertainty regarding whether the Kansas land is eligible for gaming would have precluded the Tribe from expanding its gaming operations to the Kansas land.

Moreover, the decision below incorrectly states that the "only condition" under IGRA that triggers a State's obligation to negotiate a tribal-state compact "is a tribe's request to enter into such negotiations." App. 16. Rather, IGRA provides that "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, *or is to be conducted*, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The NIGC legal opinion moved the Tribe to decide it could game on the Kansas land and to take steps toward opening a gaming facility, including filing a lawsuit in federal court trying to force the State to negotiate a tribal-state gaming compact.

It is no coincidence that the Tribe sued the State in federal court to force tribal-state compact negotiations just one month after the District Court found that the

NIGC legal opinion was unreviewable. *See Quapaw Tribe of Indians v. Kansas*, Case No. 16-2037-JWL-TJJ (D. Kan.) (complaint filed January 19, 2016). The suit is evidence of the important legal consequences (discussed above) that flowed from the NIGC legal opinion. And the Tribe's suit in federal court against Kansas is, itself, an important legal consequence. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment . . . serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)).

Finally, the decision below falls back on the possibility that the NIGC may, someday and on its own, adopt a different interpretation of the last recognized reservation exception. App. 19-20. But as this Court has said, the mere possibility that the NIGC could change its mind down the road—which is purely speculative—does not render its otherwise definitive legal opinion unreviewable. *See Hawkes*, 136 S. Ct. at 1814 (explaining that the possibility that the Corps of Engineers may revise an approved jurisdictional determination "does not make an otherwise definitive decision nonfinal").

III. The Tenth Circuit's Decision Significantly Disrupts the IGRA Regime and Will Lead to Serious Consequences in Kansas and Other States.

The question presented has far-reaching implications for Indian tribes and States, the delicate tribal-state balance Congress struck in IGRA, and respect for this Court's decisions.

A. Tribes and States Beyond the Quapaw and Kansas Will Feel the Detrimental Effects of Allowing the NIGC to Shield Gaming-Eligibility Determinations from Judicial Review.

When IGRA took effect on October 17, 1988, the State of Kansas had only four resident federally recognized Indian tribes within its borders: the Sac and Fox Nation of Missouri in Kansas and Nebraska, the Kickapoo Tribe in Kansas, the Prairie Band of Potawatomi Indians, and the Iowa Tribe of Kansas and Nebraska. *See Oyler v. Allenbrand*, 23 F.3d 292, 295 (10th Cir. 1994). The NIGC's interpretation of the last recognized reservation exception, which the decision below shields from judicial review, adds a fifth tribe and could allow more tribes that once had land in Kansas and are now located in Oklahoma to purchase land and build casinos in Kansas to the detriment of both the resident tribes' and the State's interests. Both the Iowa and the Sac and Fox moved to intervene in the District Court to protect their interests, but those motions were denied when the court dismissed Petitioners' case. App. 67.

The question presented in this case is bound to recur beyond Kansas. For example, in both Arkansas and Missouri, tribes have suggested they intend to build casinos on newly acquired land under the last recognized reservation exception. The Quapaw Tribe in Arkansas appears to be employing the same strategy to avoid judicial review as it did in Kansas. And there are strong incentives for the Osage Nation in Missouri to do the same. The Court should grant review to resolve the important question presented.

B. The Tenth Circuit's Failure to Apply this Court's Pragmatic Approach to Finality Upsets the Delicate Tribal-State Balance Congress Struck in IGRA.

IGRA's overarching purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). This includes providing "clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), and "ensur[ing] that each place, facility, or location where class II or III gaming will occur is located on Indian lands eligible for gaming," 25 C.F.R. § 559.1.

In pursuing this purpose Congress deliberately and carefully struck a delicate balance between state and tribal interests regarding gaming. *See, e.g.*, 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B) (allowing class II and class III gaming only on Indian lands in States that generally allow such gaming); *id.* § 2710(d)(1)(C) (requiring a tribal-state compact for class III gaming); *see also New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1226 (10th Cir. 2017); *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007).

IGRA also contemplates that the determination of whether Indian lands are eligible for gaming under § 2719 generally will be contained in the NIGC's approval of a tribal gaming ordinance (§ 2710) or management contract (§ 2711), or its review of pre-IGRA ordinances and contracts (§ 2712). Decisions in each of these contexts ultimately would be subject to judicial review. *See* 25 U.S.C. § 2714.

For example, for class II gaming, IGRA requires approval of a gaming ordinance approved by the NIGC Chair, which is appealable to the Commission. 25 U.S.C. §§ 2705(a)(3); 2710(b)(1)(B). But in many cases, as here, a tribe will have a non-site-specific gaming ordinance that permits gaming on any of the Tribe's Indian lands. *See N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 (9th Cir. 2009) ("most gaming ordinances approved by the NIGC do not identify specific sites"). IGRA also requires approval of any management contract for class II or III gaming facilities by the NIGC Chair, which also is appealable to the Commission. *See* 25 U.S.C. §§ 2705(a)(4), 2711. But nothing in IGRA requires a tribe to use a management contract, and tribes (like the Quapaw) with non-site-specific gaming ordinances have strong incentives not to enter new management contracts in order to avoid further NIGC and judicial review of whether Indian lands are eligible for gaming. Although a tribe typically must notify the NIGC Chair that it intends to issue a facility license for a new gaming facility, *see* 25 C.F.R. §§ 559.1, 559.2, NIGC regulations do "not establish any mechanism or system whereby facility licenses are submitted to the Commission for approval." Facility License Standards, 73 Fed. Reg. 6019, 6022 (Feb. 1, 2008).

Contrary to Congress's delicate balancing of tribal and state interests, the Tenth Circuit's decision deals the Tribe all the cards. The NIGC legal opinion provided the legal assurance the Tribe needed to pursue gaming on the Kansas land. With that assurance in hand, the Tribe could construct and open a class II gaming facility on the Kansas land without any administrative or judicial review of either the

NIGC legal opinion or the Tribe's decision to open a gaming facility. But if the NIGC legal opinion were negative—if it determined that the Kansas land was *not eligible* for gaming—the Tribe could obtain administrative and judicial review of the NIGC's determination by simply amending its gaming ordinance to specifically authorize gaming on the Kansas land, and then seeking approval of the amendment by the Chair and the Commission.

The Tenth Circuit's failure to apply this Court's pragmatic approach to determining the finality of agency actions upsets the delicate and careful tribal-state balance Congress struck in IGRA. By removing the availability of judicial review of NIGC gaming-eligibility legal opinions, the decision below may leave States with only less desirable options for preventing unlawful gaming on Indian lands within state boundaries, or at least receiving a judicial determination on such lawfulness, possibly leading to precisely the sort of acrimony and inter-sovereign disputes over the uses of Indian lands that IGRA was enacted to avoid. *See* 25 U.S.C. § 2701(3).

C. The Decision Below Allows the NIGC and Tribes to Shield from Judicial Review Gaming-Eligibility Determinations that Ignore this Court's Precedents.

The decision below allows the NIGC and the Tribe to shield from judicial review an administrative determination that completely ignores and blatantly conflicts with this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The NIGC legal opinion concluded that a Tribe satisfies IGRA's requirement of being "presently located" in a State for purposes of the

last recognized reservation exception as long as it has some governmental presence in the State at the time it seeks to open gaming facilities. *See* App. 100. That is, the NIGC interpreted the "presently located" requirement as not requiring a tribal presence in the State at the time IGRA was enacted. In *Carcieri*, however, this Court interpreted an effectively identical phrase in the Indian Reorganization Act ("IRA") to mean just the opposite. It held that the phrase, "recognized Indian Tribe now under Federal jurisdiction," unambiguously means "recognized Indian Tribe under Federal jurisdiction *at the time the IRA was enacted*." *Id.* at 388-91 (emphasis added). The NIGC's interpretation of the key words of IGRA's last recognized reservation exception cannot be squared with this Court's decision in *Carcieri* and should not evade review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID R. COOPER
Fisher, Patterson, Sayler
& Smith, LLP
3550 S.W. 5th Street
Topeka, KS 66606
(785) 232-7761
dcooper@fisherpatterson.com

Counsel for Petitioner Board of County Commissioners of Cherokee County, Kansas

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
STEPHEN PHILLIPS
Assistant Attorney General
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner State of Kansas

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3015

[Filed June 27, 2017]

STATE OF KANSAS, ex rel Derek Schmidt, Attorney General; CHEROKEE COUNTY, KANSAS, Board of County Commissioners,	)
Plaintiffs - Appellants,	)
v.	)
RYAN ZINKE,* Secretary of the United States Department of Interior, in his official capacity; NATIONAL INDIAN GAMING COMMISSION; JONODEV OSCELOA CHAUDHURI, National Indian Gaming Commissioner, in his official capacity; DANIEL J. LITTLE, Associate Commissioner National Indian Gaming Commission, in his official capacity; DEPARTMENT OF INTERIOR; ERIC N.	)

* Pursuant to Fed. R. App. P. 43(c)(2) as of March 1, 2017, Sally Jewell is replaced by Ryan Zinke as the Secretary of the United States Department of Interior.

SHEPARD, General Counsel National)
Indian Gaming Commission, in his official)
capacity; KEVIN K. WASHBURN,)
Assistant Secretary of Indian Affairs for)
the United States Department of Interior, in)
his official capacity; JOHN BERREY,)
Chairperson of the Quapaw Tribe of)
Oklahoma Business Committee and)
Chairperson of the Downstream)
Development; THOMAS MATHEWS,)
Vice-Chairperson of Quapaw Tribe of)
Oklahoma Business Committee; TAMARA)
SMILEY-REEVES, Secretary/Treasurer of)
Quapaw Tribe of Oklahoma Business)
Committee, Secretary of the Quapaw Tribe)
of Oklahoma Development Corporation,)
and member of the Downstream)
Development Authority; T. C. BEAR,)
Member of Quapaw Tribe of Oklahoma)
Business Committee and Quapaw Gaming)
Authority; BETTY GAEDTKE, Member)
of Quapaw Tribe of Oklahoma Business)
Committee; RANNY MCWATTERS,)
Member of Quapaw Tribe of Oklahoma)
Business Committee and Treasurer of the)
Downstream Development Authority;)
MARILYN ROGERS, Member of Quapaw)
Tribe of Oklahoma Business Committee,)
Quapaw Gaming Authority, and)
Downstream Development Authority;)
TRENTON STAND, Member of Quapaw)
Gaming Authority; LORI SHAFER,)
Member of Quapaw Gaming Authority;)
JUSTIN PLOTT; FRAN WOOD, Member)
of Quapaw Gaming Authority; LARRY)

RAMSEY, Secretary of the Downstream Development Authority; BARBARA KYSER-COLLIER, Executive Director of the Quapaw Gaming Oklahoma Tribal Gaming Agency; ERIN SHELTON, Deputy Director of the Quapaw Tribe of Oklahoma Tribal Gaming Agency, a/k/a Erin Eckart; RODNEY SPRIGGS, President of the Quapaw Development Corporation; ART COUSATTE, Vice-President of the Quapaw Development Corporation; DONNA MERCER, Treasurer of the Quapaw Development Corporation; JERRI MONTGOMERY, Member of the Quapaw Development Corporation; QUAPAW DEVELOPMENT CORPORATION; DOWNSTREAM DEVELOPMENT AUTHORITY OF THE QUAPAW TRIBE OF OKLAHOMA, (O-GAH-PAH); QUAPAW GAMING AUTHORITY,

Defendants - Appellees,

IOWA TRIBE OF KANSAS AND NEBRASKA; SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA,

Movants.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:15-CV-04857-DDC-KGS)

Bryan C. Clark, Assistant Solicitor General (Jeffrey A. Chanay, Chief Deputy Attorney General, and Stephen Phillips, Assistant Attorney General, and David R. Cooper, Fisher, Patterson, Sayler & Smith, LLP, with him on the briefs), Office of the Attorney General, Topeka, Kansas, for Plaintiffs-Appellants.

Ellen J. Durkee (Thomas E. Beall, Acting United States Attorney, District of Kansas, Jackie A. Rapstine, Assistant United States Attorney, John C. Cruden, Assistant Attorney General, Daron T. Carreiro, and Katherine J. Barton, and Jo-Ann Shyloski, Office of the General Counsel, National Indian Gaming Commission, Washington, D.C., and Jennifer Christopher, Office of the Solicitor, Department of the Interior, Washington, D.C., with him on the brief), Environment & Natural Resources Division, United States Department of Justice, Washington, D.C., for the Federal Defendants-Appellees.

Stephen R. Ward (Paul M. Croker, Armstrong Teasdale, LLP, Kansas City, Missouri, and Daniel E. Gomez, and R. Daniel Carter, with him on the brief), Conner & Winters, LLP, Tulsa, Oklahoma, for the Quapaw Tribal Defendants-Appellees.

Before **KELLY**, **LUCERO**, and **MURPHY**, Circuit Judges.

LUCERO, Circuit Judge.

The question in this case is whether a legal opinion letter issued by the Acting General Counsel of the National Indian Gaming Commission ("NIGC") regarding the eligibility of Indian lands for gaming constitutes "final agency action" subject to judicial review. In response to a request from the Quapaw Tribe, the NIGC Acting General Counsel issued a legal opinion letter stating that the Tribe's Kansas trust land was eligible for gaming under the Indian Gaming Regulatory Act ("IGRA"). The State of Kansas and the Board of County Commissioners of the County of Cherokee, Kansas, filed suit, arguing that the letter was arbitrary, capricious, and erroneous as a matter of law. The district court concluded that the letter did not constitute reviewable final agency action under IGRA or the Administrative Procedure Act ("APA").

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. IGRA's text, statutory scheme, legislative history, and attendant regulations demonstrate congressional intent to preclude judicial review of legal opinion letters. Further, the Acting General Counsel's letter does not constitute final agency action under the APA because it has not determined any rights or obligations or produced legal consequences. In short, the letter merely expresses an advisory, non-binding opinion, without any legal effect on the status quo ante.

I

The Quapaw Tribe of Indians is a federally recognized tribe. Indian Entities Recognized & Eligible to Receive Services from the U.S. Bureau of Indian

Affairs, 81 Fed. Reg. 26,826, 26,830 (May 4, 2016). Pursuant to an 1833 treaty with the United States, the Tribe was relocated from its homeland in Arkansas to a reservation near what is now the border between Oklahoma and Kansas. See Treaty with the Quapaw art. 2, May 13, 1833, 7 Stat. 424. Although most of the Quapaw Reservation was located in present-day Oklahoma, it extended about one-half mile north of the state border into Kansas, in what is known as the "Quapaw Strip." In 1867, the Tribe ceded the Quapaw Strip to the United States but retained a small set-aside for a tribal member. Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, Etc. art. IV, Feb. 23, 1867, 15 Stat. 513. The United States allotted the remainder of the Quapaw Reservation to individual tribal members in 1895. Act of March 2, 1985, ch. 188, 28 Stat. 876, 907.

At issue in this case is a 124-acre parcel in Kansas (the "Kansas land") that is directly adjacent to the Kansas-Oklahoma border and within the historic boundaries of the Quapaw Strip. The Quapaw reacquired this property in 2006 and 2007 and uses it as a parking lot and support area for its Downstream Casino Resort, which is located on Indian trust lands across the border in Oklahoma.

In 2012, the Department of the Interior ("DOI") took the Kansas land into trust for the Tribe. Approximately one year later, the Tribe requested a legal opinion from the NIGC Office of General Counsel addressing whether the property satisfies the "last recognized reservation" exception to IGRA's prohibition against gaming on trust lands acquired after October 17, 1988. This exception applies when "the Indian tribe has no

reservation on October 17, 1998," and the "[trust] lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2)(B). See also 25 C.F.R. § 292.4(b)(2). On November 21, 2014, the NIGC Acting General Counsel sent a letter to the Tribe's attorney concluding that the Kansas land is eligible for gaming under IGRA's "last recognized reservation" exception. The letter further states that "[t]his legal opinion does not constitute final agency action for purposes of review in federal court."

Plaintiffs filed this action against the NIGC in 2015. They claim that the letter's application of the last recognized reservation exception to the Kansas land was arbitrary, capricious, and erroneous as a matter of law.[1] The NIGC moved to dismiss on the ground that the letter did not constitute final agency action. The district court granted the motion, holding that neither IGRA nor the APA authorized judicial review of the letter and thus the court lacked subject matter jurisdiction. Plaintiffs timely appealed.

II

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (quotation omitted). The APA contains a limited waiver of sovereign immunity, allowing for judicial review of

[1] Plaintiffs also named various tribal parties as defendants in the suit; however, the district court's dismissal of those claims is not before us on appeal.

"[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. However, this waiver does not apply if a "statute[] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). The district court determined that IGRA precluded review of the letter and that the letter did not meet the two-part test for final agency action under the APA. See generally Bennett v. Spear, 520 U.S. 154, 177-78 (1997). We review these conclusions de novo. Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000).

A

Although there is a "strong presumption that Congress intends judicial review of administrative action," Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986), superseded on other grounds by 42 U.S.C. § 405, that presumption "may be overcome by . . . a specific congressional intent to preclude judicial review that is fairly discernible in the detail of the legislative scheme," id. at 673 (quotations omitted). In discerning congressional intent, we look to the express language of a statute and to "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administration action involved." Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984). After examining these features of IGRA, we conclude it is "fairly discernible" that Congress did not intend for the Acting General Counsel's letter to be reviewable final agency action.

IGRA expressly identifies four categories of NIGC decisions that constitute reviewable "final agency actions" under the APA. See 25 U.S.C. § 2714. Under

§ 2714, courts may review "[d]ecisions made by the Commission pursuant to sections 2710 [tribal gaming ordinances], 2711 [management contracts], 2712 [existing ordinances and contracts], and 2713 [civil penalties or closures for gaming conducted in violation of IGRA, implementing regulations, or an approved tribal gaming ordinance]."

Nothing in this section provides that NIGC General Counsel letters are final agency actions. And, as at least one court has noted, because "Congress specifically stat[ed] in § 2714 that the [enumerated] sections represent final agency actions, the implied corollary is that other agency actions are not final, and ergo, not reviewable." Cheyenne-Arapahoe Gaming Comm'n v. Nat'l Gaming Comm'n, 214 F. Supp. 2d 1155, 1171 (N.D. Okla. 2002). This reading accords with our prior decisions holding that similar agency legal opinions do not constitute reviewable final action. See Oklahoma v. Hobia, 775 F.3d 1204 (10th Cir. 2014); Miami Tribe of Okla. v. United States, 198 F. App'x 686, 690 (10th Cir. 2006) (unpublished) (citing § 2714 and holding that a DOI opinion letter did not constitute reviewable final agency action because it was "only a part of the process that [would] eventually result in [a] final NIGC action"). In Hobia, we concluded that a letter from the NIGC Chairwoman, which adopted an opinion of the General Counsel that certain lands were ineligible for gaming under IGRA, was not final agency action and thus did not moot Oklahoma's suit to prevent the construction of a gaming facility on those lands. 775 F.3d at 1210. In reaching that holding, we determined that the letter fell outside the scope of

§ 2714, which "defin[es] what constitutes final agency action under IGRA." Id.[2]

We acknowledge that § 2714's omission of opinion letters is not by itself conclusive. See Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1277 (10th Cir. 1991) ("[T]he mere fact that some acts are made reviewable by the express language of the relevant statute or statutes should not suffice to support an implication of exclusion as to others." (brackets omitted) (quoting Bowen, 476 U.S. at 674)). However, the types of actions listed in § 2714 and IGRA's broader statutory scheme indicate that Congress did not intend for NIGC General Counsel letters to be final action subject to judicial review. In contrast to the letter at issue in this case, each of the "final agency actions" in § 2714 requires a decision by the full Commission after an attendant administrative process. 25 C.F.R. pts. 522, 533, 573, 575, 580-585. The actions in § 2714 further correspond to the Commission's decisionmaking authority under

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[2] Plaintiffs contend that this determination was merely dicta and not essential to our ultimate resolution of the mootness issue. We disagree. Although the issue might have benefited from further analysis, our discussion of § 2714 provided the key rationale for our conclusion that the case was not moot. Moreover, the fact that the letter in Hobia "anticipated the possibility of future wrongful conduct on the part of the Tribe" does not alone distinguish it from the letter at issue in this case. Id. at 1211. Although the Acting General Counsel's letter does not expressly threaten the Tribe with future enforcement action (nor would it make sense to do so, given the letter's conclusion that the Kansas land is eligible for gaming), it states that the opinion "does not constitute final agency action for purposes of review in federal district court." Accordingly, the Tribe was on notice that the NIGC itself viewed the letter as non-binding, which left open the possibility of future enforcement action.

IGRA. Sections 2710 to 13 confer authority on the NIGC to take specific actions to regulate gaming on Indian lands (e.g., approval or disapproval of ordinances and management contracts, and enforcement action). By comparison, § 2719 merely identifies which lands will be eligible for gaming. It does not discuss the Commission, let alone authorize the agency to take actions to enforce the provision. Id. Instead, the NIGC enforces § 2719 through actions taken pursuant to §§ 2710-13. Likewise, although IGRA provides for the position of General Counsel, 25 U.S.C. § 2707(a), it does not grant the General Counsel any authority to bind the agency, nor does it specifically empower the General Counsel to make decisions as to the eligibility of land for gaming. Compare § 2707(a), with 25 U.S.C. § 2706 (granting specific powers to the Commission), and 25 U.S.C. § 2705(b) (granting to the Chairman "such other powers as may be delegated by the Commission"). Finally, neither IGRA nor its implementing regulations require the Office of General Counsel to issue legal opinions on any topic; rather, these opinions are "a courtesy." See Legal Opinions, Nat'l Indian Gaming Comm'n, https://www.nigc.gov/general-counsel/legal-opinions (last visited May 31, 2017).

IGRA's legislative history reinforces our conclusion that the Acting General Counsel's letter is not reviewable final agency action under IGRA. Although a report from the Senate Select Committee on Indian Affairs initially states that "[a]ll decisions of the Commission are final agency decisions," it later clarifies in the more detailed "Section By Section Analysis," that only "certain Commission decisions will be final agency decisions for purposes of court review."

S. Rep. No. 100-446, at 8, 20 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3078, 3090 (emphasis added). To the extent that the report gives conflicting signals about which agency actions constitute final decisions, it consistently suggests that only "decisions of the Commission" are subject to judicial review. See id. at 8, 20. An opinion letter from an NIGC employee such as the Acting General Counsel plainly does not qualify.

Plaintiffs argue that DOI regulations promulgated in 2008 assume that agency decisions under § 2719 are reviewable final agency actions. They point to 25 C.F.R. § 292.26(a), which states that the 2008 regulations "do not alter final agency decisions made pursuant to 25 U.S.C. § 2719 before the date of enactment of these regulations." But when considered in context, this provision does not support plaintiffs' position. As the preamble to the regulations explains, during the formulation of the rules, the DOI and the NIGC issued

> a number of legal opinions to address the ambiguities left by Congress and provide legal advice for agency decisionmakers, or in some cases, for the interested parties facing an unresolved legal issue. . . . In some cases, the [DOI] or the NIGC subsequently relied on the legal opinion to take some final agency action. In those cases, section 292.26(a) makes clear that these regulations will have no retroactive effect to alter any final agency decisions made prior to the effective date of these regulations.

Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,372 (May 20, 2008).

In other words, § 292.26(a) was intended to clarify that the 2008 regulations would not apply to final agency action taken prior to the effective date of the regulations or pursuant to an earlier legal opinion issued by the DOI or the NIGC. It does not suggest that legal opinions are final agency actions. This distinction between advisory legal opinions and final agency action is further highlighted in § 292.26(b), which provides that the "regulations shall not apply to applicable agency actions when, before the effective date of [the] regulations, the [DOI] or the [NIGC] issued a written opinion regarding the applicability of 25 U.S.C. § 2719." The preamble thus clarifies that this provision's purpose is to allow the federal government to "follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if [the 2008 DOI regulations] have created a conflict." 73 Fed. Reg. at 29,372. At the same time, the regulation retains the DOI's and the NIGC's right to "qualify, modify, or withdraw its prior legal opinions." Id. These statements all demonstrate that legal opinions are not final agency actions; rather, the NIGC may use them to make final decisions in the future. To this point, the preamble emphasizes that § 292.26 and the other 2008 regulations "do not alter the fact that the legal opinions are advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions." Id.

In sum, IGRA's text, statutory structure, legislative history, and associated regulations all establish that Congress did not intend judicial review of NIGC General Counsel opinion letters.

B

Even assuming that IGRA does not demonstrate a clear congressional intent to preclude judicial review of the Acting General Counsel's letter, the letter does not qualify as final agency action under the APA. An agency action is final if: (1) it "mark[s] the consummation of the agency's decisionmaking process"—i.e., "it [is] not . . . of a merely tentative or interlocutory nature"; and (2) it is an action "by which rights or obligations have been determined, or from which legal consequences will flow." Bennett, 520 U.S. at 177-78 (quotations omitted). Because we conclude that the letter fails the second requirement, we need not address whether the letter satisfies the first.

Plaintiffs contend that the letter determined the parties' rights and obligations and resulted in legal consequences by: (1) enabling the Tribe to expand gaming to the Kansas land; (2) obligating the State to negotiate a class III tribal-state gaming compact with the Tribe; and (3) prompting the Tribe to sue the State in order to compel it to negotiate a gaming compact. But these arguments fundamentally misapprehend IGRA. As a general matter, the Acting General Counsel's letter does not grant the Tribe a right to engage in gaming; IGRA itself does not even confer such a right. Rather, tribes' right to game on Indian lands derives from their sovereign authority to regulate themselves and their members within Indian country, without state interference. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 214-15 (1987) (recognizing that states generally may not regulate tribes on reservations absent congressional authorization), superseded by statute on other grounds

as stated in Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014). IGRA expressly recognizes tribes' sovereign right to exclusively regulate gaming activity on their lands, subject to the statute's limitations. See 25 U.S.C. § 2701(5).[3]

Further, the Tribe's ability to begin gaming on the Kansas land is not a legal consequence of the Acting General Counsel's letter. Because the Tribe already has a non-site-specific gaming ordinance, it may start class II gaming on the property irrespective of the letter. See § 2710(b). Although requesting legal guidance from the NIGC Office of General Counsel may be a prudent investment practice for tribes concerned about the possibility of civil penalties under § 2713, nothing in IGRA requires the NIGC to issue an opinion letter, let alone make an Indian lands eligibility determination before a tribe conducts class II gaming. See N. Cty. Cmty. Alliance, Inc. v. Salazar, 573 F.3d 738, 747 (9th

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[3] Plaintiffs argue that because the NIGC only has jurisdiction over gaming on Indian lands, the Acting General Counsel's determination triggers the NIGC's monitoring and enforcement responsibilities at the expense of the State's authority over gaming on non-Indian lands. They contend that this is a "legal consequence" sufficient to satisfy Bennett's second prong. But plaintiffs' argument confuses an Indian lands determination with a conclusion that the Kansas land is eligible for gaming under IGRA's last recognized reservation exception. There is no question that the Kansas land constitutes "Indian land" because the land was taken into trust for the Quapaw Tribe in 2012. See 25 U.S.C. § 2703 (defining "Indian lands" 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"). The issue relevant to this case is whether the land qualifies for an exception to IGRA's general prohibition against gaming on trust lands acquired after the Act's effective date.

Cir. 2009); Legal Opinions, Nat'l Indian Gaming Comm'n, https://www.nigc.gov/general-counsel/legal-opinions (last visited May 31, 2017). Even if the NIGC were to later bring an enforcement action against the Quapaw for gaming on ineligible lands, the Tribe could not use the non-binding letter as a defense. As noted above, the NIGC General Counsel lacks authority to bind the agency under IGRA. Nor will the letter inevitably lead to class III gaming on the Kansas land. The Tribe has yet to satisfy the two preconditions necessary for such gaming to occur: a gaming compact with the State, and approval of that compact by the Secretary of the Interior. See § 2710(d)(3)(A).

Plaintiffs' second argument—that the opinion letter required the State to negotiate a class III gaming compact with the Tribe—also fails. IGRA itself imposes an obligation on the State to negotiate a gaming compact in good faith at the Tribe's request. Id. The only condition under the statute triggering this obligation is a tribe's request to enter into such negotiations. See Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2d Cir. 1990). IGRA does not require the NIGC to also make a preliminary determination that the lands are eligible for gaming. See id. at 1028-29 (rejecting argument that the state's obligation to negotiate a compact had not arisen because the tribe had yet to adopt an ordinance authorizing gaming on the reservation).[4] Thus, because

[4] This conclusion is not altered by our statement in Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001), that a favorable Indian lands determination by the NIGC under § 2710 "impos[ed] a legal duty on the State under IGRA to negotiate a Class III gaming compact at the Tribe's request." Id. at 1224. In contrast to

the Tribe submitted a compact proposal to the State in 2013, Kansas was required to enter into compact negotiations in good faith, regardless of the Acting General Counsel's letter. The letter therefore did not determine the parties' rights and obligations with respect to class III gaming.

For similar reasons, we reject plaintiffs' argument that the Tribe's lawsuit to compel the State to negotiate a class III gaming compact represents a legal consequence of the Acting General Counsel's letter.[5] Although the letter may have influenced the Tribe's decision to bring suit, it did not legally prompt the litigation. Rather, the State's purported failure to enter

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this case, which involves application of IGRA's last recognized reservation exception, the NIGC determination at issue in Kansas affected whether the lands at issue were subject to IGRA at all. See id. at 1223 (noting that "if the tract [did] not qualify as 'Indian lands,' then IGRA does not apply"). A determination that the lands were not "Indian lands" within the meaning of the statute would have absolved the state of any obligations under IGRA, including the obligation to negotiate a tribal-state gaming compact at the tribe's request. Id. That is not the situation here: it is undisputed that the Kansas land constitutes "Indian land," and thus the State must abide by IGRA's requirements.

[5] Relatedly, plaintiffs allege that the Tribe's lawsuit is a first step in its efforts to have the Secretary of the Interior issue class III gaming procedures under 25 C.F.R. pt. 291. This claim is meritless for two reasons. First, tribes can ask the Secretary to issue these procedures without an opinion letter from Acting General Counsel. See 25 C.F.R. § 291.3 (listing requirements for a tribe to request that the Secretary issue class III gaming procedures). Second, we recently struck down pt. 291 as an invalid exercise of the Secretary's authority in New Mexico v. Department of the Interior, No. 14-2219, 2017 WL 1422365, at *17 (10th Cir. Apr. 21, 2017).

into compact negotiations in good faith gave rise to the Tribe's cause of action under IGRA. See 2710(d)(7)(A)(i) (providing for federal court jurisdiction "over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into [Tribal-State compact] negotiations . . . or to conduct such negotiations in good faith").

Plaintiffs' attempt to compare this case to U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016), is unavailing. In Hawkes, the Supreme Court concluded that an approved jurisdictional determination ("JD") by the U.S. Army Corps of Engineers, which states that a particular property contains "waters of the United States" under the Clean Water Act, is a reviewable final agency action. 136 S. Ct. at 1813-15. In determining that the approved JD satisfied the second Bennett prong, the Court reasoned that negative JDs—i.e., determinations that property does not contain "waters of the United States"—"limit[] the potential liability a landowner faces for discharging pollutants without a permit." Id. at 1814. Thus, it "follow[ed] that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford." Id. Plaintiffs contend that because a "negative" gaming eligibility opinion (one stating that certain land is ineligible for gaming) would have put the Tribe on notice of the possibility of a future enforcement action, it constitutes reviewable final agency action under Hawkes. The logical corollary, plaintiffs reason, is that an "affirmative" gaming eligibility opinion, such as the Acting General Counsel's letter, is similarly reviewable. But this argument ignores the fact that the Court's holding in Hawkes turned on the JD's ability to

bind the agency for five years. See id. at 1814-15. That critical circumstance is absent from this case because the Acting General Counsel's letter is advisory and non-binding.

Plaintiffs' reference to Frozen Food Express v. United States, 351 U.S. 40 (1956), is equally unpersuasive. There, the Court concluded that an order listing which commodities the Interstate Commerce Commission ("ICC") believed to be exempt from certain permitting requirements under the Interstate Commerce Act constituted a final agency action. Id. at 42. In so holding, the Court reasoned that the order had an immediate and practical impact on regulated parties by "warn[ing] every carrier, who d[id] not have authority from the Commission to transport those commodities, that it d[id] so at the risk of incurring criminal penalties." Id. at 44. However, the difference between this case and Frozen Food Express is that there, "the order itself was the source of the [parties'] obligation[s], modifying the applicable legal landscape by interpreting the scope of the agricultural commodities exception." Golden & Zimmerman, LLC v. Domenech, 599 F.3d 426, 433 (4th Cir. 2010). In contrast, the Acting General Counsel's opinion letter does not "modify the legal landscape" or create any obligations from which legal consequences may flow. Not only was the letter furnished by an employee of the agency rather than the full Commission, but also the letter makes clear that the NIGC is free to reach a different conclusion as to the Kansas land's eligibility

for gaming at any time.[6] These facts further distinguish this case from Frozen Food Express, where the order was issued by the ICC, and "[t]he Commission itself . . . argue[d] for finality." See Frozen Food Express, 351 U.S. at 44-45.

III

Because the Acting General Counsel's opinion letter does not constitute final agency action under either IGRA or the APA, we **AFFIRM** the district court's dismissal of this case for lack of subject matter jurisdiction. We also **GRANT** federal appellees' motion to take judicial notice of the pleadings and court order filed in Quapaw Tribe of Indians v. Kansas, No. 16-cv-2037-JWL-TJJ (D. Kan. Mar. 3, 2016).

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[6] The NIGC could make a determination about the Kansas land's eligibility for gaming if: (1) the Tribe seeks NIGC approval of a site-specific gaming ordinance for the Kansas land under § 2710; (2) the Tribe seeks approval of a management contract under § 2711; or (3) the Tribe opens a gaming facility on the Kansas land, in which case the NIGC could determine that the land is ineligible for gaming and impose fines or temporary closure orders under § 2713.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 15-CV-4857-DDC-KGS

[Filed December 18, 2015]

STATE OF KANSAS, *ex rel. Derek Schmidt, Attorney General,* State of Kansas, and BOARD OF COUNTY COMMISSIONERS OF CHEROKEE COUNTY, KANSAS,	)
Plaintiffs,	)
v.	)
NATIONAL INDIAN GAMING COMMISSION, *et al*.,	)
Defendants.	)

MEMORANDUM AND ORDER

Plaintiffs, the State of Kansas and the Board of County Commissioners of Cherokee County, Kansas, bring this action. They seek declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*.; the Declaratory Judgment Act,

28 U.S.C. §§ 2201-02; and the United States Constitution. They assert claims against two distinct groups of defendants. This Order refers to the first group, consisting of the National Indian Gaming Commission, Chair Jonodev Osceloa Chaudhuri, Associate Commissioner Daniel J. Little, General Counsel Eric N. Shepard, the U.S. Department of the Interior, Secretary of the Interior Sally Jewell, and Assistant Secretary of Indian Affairs Kevin K. Washburn, as the "federal defendants." It refers to the second group, consisting of the Downstream Development Authority of the Quapaw Tribe of Oklahoma, the Quapaw Casino Authority of the Quapaw Tribe of Oklahoma, the Quapaw Tribal Development Corporation, and 18 individual officers and members of the tribal entities, as the "tribal defendants."

This matter is before the Court on multiple motions to dismiss. The federal defendants filed a Motion to Dismiss Amended Complaint (Doc. 42). The tribal defendants filed five, nearly identical Motions to Dismiss (Docs. 50, 55, 68, 76, 86) after receiving service of plaintiffs' Amended Complaint (Doc. 13) at different times. Plaintiffs have responded to all motions and both the federal defendants and tribal defendants have filed replies. For reasons explained below, the Court grants the motions filed by both groups of defendants.

I. Factual Background

A. Acronyms and Other Abbreviations

To express its ruling on the motions, the Court must refer to a number of agencies, other entities, and various regulatory and legislative provisions. Hoping to

assist those who read this Order, the Court begins with a glossary of acronyms and other abbreviated jargon it uses.

Defined Term	Meaning
"APA"	Administrative Procedure Act
"BIA"	Bureau of Indian Affairs
"DDA"	Downstream Development Authority of the Quapaw Tribe of Oklahoma
"DJA"	Declaratory Judgment Act
"DOI"	United States Department of the Interior
"IGRA"	Indian Gaming Regulatory Act
"NIGC"	National Indian Gaming Commission
"OGC"	National Indian Gaming Commission Office of General Counsel
"TDC"	Quapaw Tribal Development Corporation
"QCA"	Quapaw Casino Authority of the Quapaw Tribe of Oklahoma
"Quapaw"	Quapaw Tribe of Oklahoma

B. Relevant History

The Quapaw is a federally recognized Indian tribe. In 1833, the Quapaw entered into a treaty with the United States. Under the terms of that treaty, the

Quapaw agreed to leave its original territory in Arkansas and relocate to a reservation located near what later became the border separating Oklahoma and Kansas. The Quapaw reservation encompassed 150 sections of land, and the majority of those sections were located on the Oklahoma side of the state boundary. The Kansas portion, known as the "Quapaw Strip," extended only one-half mile north of the state border. On February 23, 1867, the Quapaw ceded the Quapaw Strip—except for a small parcel set aside for one Quapaw member—to the United States. In 1895, the United States dissolved the remainder of the Quapaw reservation and allotted the Quapaw's Oklahoma land to individual members of the Quapaw Tribe under the Act of March 2, 1895. *See* ch. 188, 28 Stat. 876, 907 (1895).

Years later, the Quapaw purchased a tract of land in Oklahoma. The tract is adjacent to the Kansas-Oklahoma border and within the historic boundaries of the Quapaw's reservation. The Quapaw placed the land it had acquired into a trust with the Secretary of the Interior shortly after acquiring it. In 2006, the Quapaw purchased a 124-acre tract of land in Cherokee County, Kansas (the "Kansas Land"). It too is directly adjacent to the Kansas-Oklahoma border and entirely within the historic boundaries of the Quapaw's reservation—*i.e.*, the Quapaw Strip.

In 2008, the Quapaw opened the Downstream Casino Resort on its Oklahoma trust land, just south of the Kansas-Oklahoma border. The Quapaw constructed the primary parking lot, several ancillary facilities, and other infrastructure for the Downstream Casino across the Kansas-Oklahoma border on the Kansas Land.

On April 25, 2011, the Quapaw notified the State of Kansas that it had filed an application with the DOI to have the Kansas Land taken into trust. The Quapaw titled the notice a "Notice of (Gaming) Land Acquisition Application." Doc. 13-3 at 5. Part of this application called on the Quapaw to provide information about "Project Description/Proposed Land Use." In response, the Quapaw stated: "[the] property is to be used for additional parking for the Downstream Resort/Casino." *Id*. at 6 (emphasis omitted).

On February 6, 2012, Kansas Governor Sam Brownback received a similar notice from the BIA, informing him that the Quapaw had filed a "land into trust" application. The BIA titled its notice a "Notice of (Non-Gaming) Land Acquisition Application." Doc. 13-2 at 1 (emphasis omitted). The BIA described the Quapaw's proposed use of the Kansas land as follows:

> The property is commonly identified as the "Downstream Parking Lot." A portion of the property is currently an existing parking lot and the Tribe plans to continue with that use. A portion of the property is primarily agricultural and there are no plans for development of this property at this time. Therefore, there is no expected change in use of the property at this time.

Id. at 2. To inform the BIA's decision whether to take the Kansas Land into trust, the BIA's notice invited the State to submit written comments about the Quapaw's application.

The State submitted objections about the Quapaw's application to the BIA on March 5, 2012. The State

based its primary objection "on a concern that [the Kansas Land] would be used for expanded gaming operation[s]." Doc. 13-3 at 1. The State attached a copy of the Quapaw's April 25, 2011 notice—titled a "Notice of (Gaming) Land Acquisition Application"—to its objections and also opined hat "[i]t would seem, based on this letter's express reference to 'gaming,' that expanded gaming on this parcel is indeed possible. Although, the BIA's letter of February 3, [2012], is a notice of 'non-gaming' acquisition, that is not legally determinative of the tribe's proposed use of the land." *Id*. The State also objected to the BIA's consideration of the application as an "on-reservation" request. *Id*.

Plaintiff Cherokee County sent the BIA a letter echoing the State's objections. *See* Doc. 15-3 at 2. But the County later withdrew its objections, explaining: "After consultation with local elected officials, business and community leaders[,] and residents from . . . Cherokee County, the Commission believes it is in the County's best interests to withdraw[] their prior letter of opposition." Doc. 15-3 at 3.

The BIA took the Kansas Land into trust on June 8, 2012. In doing so, the BIA concluded that the Quapaw's "request adequately describe[d] the purpose for which the land will be used." Doc. 13-4 at 3. In response to the State's objection about the application being an "on-reservation" request, the BIA concluded that 25 C.F.R. § 151.3(a)(1) permitted the BIA to take the land into trust because it was "contiguous and adjacent to the historic reservation boundaries of the [Quapaw] Tribe." Doc. 13-4 at 4. The State did not appeal the BIA's decision.

In early 2013, the Quapaw asked the Office of General Counsel for the National Indian Gaming Commission to issue an advisory opinion addressing whether the Kansas Land satisfied the "last recognized reservation" exception to the IGRA's prohibition against gaming on trust lands acquired after October 17, 1988. *See* 25 U.S.C. § 2719(a)(2)(B). This exception provides:

> (a) Prohibition on lands acquired in trust by Secretary
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless–
>
> . . .
>
> (2) the Indian tribe has no reservation on October 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.

Id.

As part of its analysis of the Quapaw's request, the OGC sent a letter to Kansas Attorney General Derek Schmidt (the "Kansas AG" or "General Schmidt") notifying him of the Quapaw's request and soliciting his comments. *See* Doc. 13-6. General Schmidt's office

responded on June 21, 2013. *See* Doc. 13-7. This response advanced two arguments against the capacity of the Kansas Land to qualify under the IGRA's last recognized reservation exception. First, because the Quapaw had placed the Kansas Land in trust for non-gaming purposes, the Kansas AG asserted that the Quapaw should be "equitably estopped from putting forth this parcel as one appropriate for gaming." Doc. 13-7 at 2. Second, the Kansas AG contended that the Quapaw's presence in Kansas did not satisfy the exception's requirement that it be "presently located" within the state. The Kansas AG noted that only one case had interpreted the term "presently located," as used in § 2719 of the IGRA. *See Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193 (D. Kan. 2006) (cited by General Schmidt in Doc. 13-7 at 2). According to the Kansas AG, the *Wyandotte Nation* decision held that a tribe is "presently located" in a state where it has a population center and a "major governmental presence." Doc. 13-7 at 2 (citing *Wyandotte Nation*, 437 F. Supp. 2d at 1206). The Kansas AG argued that the Quapaw lacked such a presence in Kansas and thus did not meet this requirement in § 2719(a)(2)(b). In addition, the Kansas AG asserted that the Quapaw's present location must be determined as of October 17, 1988, the effective date of the IGRA. The Kansas AG cited the Supreme Court's interpretation of the term "now under federal jurisdiction"—as used in the Indian Reorganization Act—to support this contention. *See id.* (citing *Carcieri v. Salazar*, 555 U.S. 379 (2009)).

The OGC issued an advisory opinion on November 21, 2014. In it, the OGC opined that the Quapaw's Kansas Land was eligible for gaming under the IGRA. The OGC also opined that the Quapaw was "presently

located" in Kansas under the terms of 25 C.F.R. § 292.4(b)(2), a DOI regulation implementing the IGRA. This regulation—enacted two years after *Wyandotte Nation*—provides that an Indian tribe without a reservation on October 17, 1988, satisfies the last recognized reservation exception if its land is "located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, *as evidenced by the tribe's governmental presence and tribal population*." 25 C.F.R. § 292.4(b)(2) (emphasis added). The OGC's opinion did not explicitly address the arguments advanced by the Kansas AG's written comments. But the OGC did note the conflicting interpretations of the term "presently located" in *Wyandotte Nation* and 25 C.F.R. § 292.4(b)(2). The OGC explained its decision to follow the regulatory meaning of that term over the one favored in *Wyandotte Nation*, asserting that the DOI's regulatory definition deserved deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). And after analyzing the Quapaw's population and governmental presence in Kansas, the OGC opined that the Quapaw met the requirements of 25 U.S.C. § 2719 and thus could engage in gaming on the Kansas Land.

Plaintiffs filed this lawsuit on March 9, 2015. Their Amended Complaint asserts four causes of action, advancing two claims against the federal defendants. Specifically, plaintiffs ask the Court to review the OGC's advisory opinion and declare the OGC's application of the last recognized reservation exception arbitrary and capricious under the APA and IGRA. The Amended Complaint also challenges the federal

defendants' promulgation and application of 25 C.F.R. § 292.4(b)(2) because, plaintiffs claim, the federal defendants failed to consider and incorporate the tribal location standards adopted in *Wyandotte Nation* and *Carcieri*. Plaintiffs' two other claims ask the Court to apply the doctrine of equitable estoppel against the tribal defendants and thus enjoin them from constructing a casino on the Kansas Land.

The tribal defendants, the NIGC, and the individual NIGC officials all have moved for dismissal of plaintiffs' claims under Fed. R. Civ. P. 12(b)(1). They contend that sovereign immunity precludes the Court from exercising jurisdiction. Also, all defendants ask the Court to dismiss plaintiffs' claims under Rule 12(b)(6) because they fail to assert viable claims under the APA, IGRA, DJA, and federal common law.

II. Legal Standards

"Different standards apply to a motion to dismiss based on lack of subject matter jurisdiction under Rule 12(b)(1) and a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). When faced with motions for dismissal relying on both aspects of Rule 12, a court must first determine whether it has subject matter jurisdiction over the controversy before addressing the merits of the case under a Rule 12(b)(6) analysis. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."). Thus, the Court, first, must decide whether it has subject matter jurisdiction over the

claims brought against each defendant group before it can address the merits of those claims.

A. Rule 12(b)(1)

"Motions to dismiss for lack of subject matter jurisdiction 'generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based.'" *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 906 (10th Cir. 2004) (quoting *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)). If the motion challenges the sufficiency of the complaint's jurisdictional allegations, the district court must accept all such allegations as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). But the analysis differs if the movant goes beyond the complaint's allegations and challenges the facts on which subject matter jurisdiction depends. In that circumstance, a court "may not presume the truthfulness of the complaint's factual allegations" and "has wide discretion to allow affidavits [and] other documents . . . to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id*. at 1003.

In this setting, referencing material outside the pleadings does not convert the motion to dismiss into one seeking summary judgment under Rule 56. *Id*. (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)). But the Court must "convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Id*. Such a situation exists where resolving "the jurisdictional

question requires resolution of an aspect of the substantive claim." *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000). Because federal courts are courts of limited jurisdiction, a presumption exists against jurisdiction, and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)).

B. Rule 12(b)(6)

Defendants also seek to dismiss plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6), claiming it fails to state a claim upon which the Court can grant relief. Fed. R. Civ. P. 8(a)(2) requires a federal court complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed actual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court has explained, simply "will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Under this standard, 'the complaint must give the court reason to believe that *this* plaintiff

has a reasonable likelihood of mustering factual support for *these* claims.'" *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original)).

Although the Court must assume that the factual allegations in the complaint are true, it is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 1263 (quoting *Iqbal*, 556 U.S. at 678). And "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'" to state a claim for relief. *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider the complaint itself along with any attached exhibits and documents incorporated into it by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1180 (10th Cir. 2007); *Indus. Constructors Corp. v. U. S. Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir. 1994)). Also, a court "'may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" *Id.* (quoting *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation omitted)).

III. Federal Defendants' Motion to Dismiss

Plaintiffs' Amended Complaint asserts two claims against the federal defendants. First, it asks the Court

to declare the OGC's advisory opinion is arbitrary and capricious. Plaintiffs contend that the OGC has misapplied the IGRA's "last recognized reservation" exception and erred by refusing to invoke equitable estoppel to bar the Quapaw from gaming on the Kansas Land. Second, the Amended Complaint asks the Court to declare the federal defendants' enactment and application of 25 C.F.R. § 292.4(b)(2) arbitrary and capricious because its definition of where a tribe is "presently located," as that term is used in the IGRA, is inconsistent with *Wyandotte Nation* and *Carcieri*.

The federal defendants attack these theories for relief under both Rule 12(b)(1) and Rule 12(b)(6), contending, first, that the Court lacks subject matter jurisdiction over the claims levied against defendant NIGC and its officers. According to the federal defendants, the OGC's advisory opinion is not "final agency action" within the NIGC's limited waiver of its sovereign immunity, and thus is not subject to judicial review. Alternatively, and if the Court concludes that the OGC's opinion is subject to judicial review, the federal defendants contend the Court should dismiss under Rule 12(b)(6). This argument contends that plaintiffs' attack on 25 C.F.R. § 292.4(b)(2) fails to state a claim on which relief can be granted. These alternative attacks implicate two distinct sets of legal principles. The Court thus addresses them separately, beginning with the jurisdictional issue, below.

A. Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Consistent with *Bell v. Hood*, the Court first considers the federal defendants' jurisdictional attack under Rule 12(b)(1). *See* 327 U.S. at 682. Because this

aspect of the federal defendants' motion challenges the sufficiency of plaintiffs' jurisdictional allegations, the Court accepts as true all factual allegations made by the Amended Complaint. *See Holt*, 46 F.3d at 1003.

1. Sovereign immunity principles under the APA

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Any waiver of "sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)). Waivers of immunity by the United States or one of its agencies "will not be implied" and any waiver is "strictly construed, in terms of its scope, in favor of the sovereign." *Id*. (citing *United States v. Williams,* 514 U.S. 527, 531 (1995)).

The APA contains a limited waiver of sovereign immunity. It permits a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review. 5 U.S.C. § 702. Establishing standing to challenge agency action under § 702 of the APA is a two-step process. First, "a plaintiff must . . . identify 'final agency action.'" *Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001) (citing 5 U.S.C. § 704); *see also Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093-94 (10th Cir. 2004) ("Ordinarily, whether the issues are fit for review depends on whether the plaintiffs challenge a final agency action."). Next, the plaintiff must demonstrate that the agency action "subjects plaintiff to a 'legal wrong,' or 'adversely affects or aggrieves'

plaintiff 'within the meaning of the relevant statute.'" *Kansas*, 249 F.3d at 1222 (quoting 5 U.S.C. § 702). This step injects a prudential standing requirement into § 702, requiring plaintiffs to demonstrate that the interest they seek to protect is "'*arguably* within the zone of interests to be protected or regulated by the statute in question.'" *Id*. (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998)) (emphasis in original).

2. Final agency action under the IGRA

Plaintiffs, as the parties seeking judicial review, bear the burden to establish that the OGC's advisory opinion amounts to final agency action by the NIGC and thus lies within the APA's limited wavier of sovereign immunity. *See Catron Cty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)).

Section 2714 of the IGRA explicitly identifies which NIGC actions are final for purposes of judicial review under the APA. It provides:

> Decisions by the Commission pursuant to Sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal district court pursuant to [the APA].

25 U.S.C. § 2714. This statute's reference to four sections of the IGRA identifies the following as final agency actions by the NIGC: (1) actions affecting or denying tribal gaming ordinances (under § 2710); (2) actions approving or denying gaming management contracts (under § 2711); (3) actions reviewing existing

tribal gaming ordinances or contracts (under § 2712); and (4) actions imposing civil penalties (under § 2713). In contrast, nothing in § 2714 or any other part of the IGRA identifies OGC advisory opinions as final agency action.

Consistent with this omission, Tenth Circuit precedent suggests that opinions issued by the OGC do not amount to final agency action under the IGRA. *See Oklahoma v. Hobia*, 775 F.3d 1204, 1210 (10th Cir. 2014) (holding that NIGC chairwoman's letter adopting OGC's opinion was not final agency action because § 2714 defines "that constitutes 'final agency action's under the IGRA."); *Miami Tribe of Okla. v. United States,* 198 F. App'x 686, 690 (10th Cir. 2006) (concluding that DOI advisory opinion interpreting the IGRA was not a final agency action because it was "only part of the process that will eventually result in the final NIGC action."). The Circuit's ruling in *Hobia* is particularly instructive.

There, an Indian tribe had informed the NIGC that it intended to license a casino on land it did not own. *See Hobia*, 775 F.3d at 1209. After reviewing the tribe's submission, the OGC issued a memorandum to the NIGC Chairwoman, opining that the casino property did not qualify as "Indian lands," as the IGRA requires, and, therefore, was ineligible for gaming. *Id*. The Chairwoman sent a letter to the tribe adopting the OGC's memorandum and threatening to order the temporary closure of the casino under 25 U.S.C. § 2713(b) if gaming occurred. *Id*. The Tenth Circuit held that the Chairwoman's letter did not amount to final agency action because it "anticipated the possibility of future wrongful conduct on the part of the

Tribe, i.e., conducting gaming on the Property, and in turn future agency action, i.e., a hearing before the Commission and a final decision as to whether to permanently close the Tribe's gaming facility," as required by § 2713(b)(2) of the IGRA. *Id*. at 1211.

The OGC's advisory opinion here is similar to the Chairwoman's letter in *Hobia*. Here, the OGC has opined that the Quapaw's Kansas Land is eligible for gaming under the IGRA. His conclusion is neither legally definitive nor binding on the NIGC or its Chairman. *See* Doc. 13-8 at 15 (stating that the advisory opinion "does not constitute final agency action for purposes of review in federal district court"). Instead, the Chairman may disagree with the OGC's opinion. In that case, § 2713 permits the Chairman temporarily to close any gaming facility operating on the Kansas Land in violation of the IGRA. *See* 25 U.S.C. § 2713(b)(1). And, as in *Hobia*, such an order would not become final agency action until the NIGC conducts a hearing and decides whether to close the facility permanently or dissolve the Chairman's temporary order. *See Hobia*, 775 F.3d at 1211 (quoting 25 U.S.C. § 2713(b)(2)). *Hobia* also explained how the Chairman's enforcement of the IGRA progresses to final agency action:

> Section 2713(b) of the IGRA addresses '[t]emporary closure' orders and provides that, '[n]ot later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe . . . involved shall have the right to a hearing before the Commission to determine whether such order should be made permanent or dissolved.' 25 U.S.C. § 2713(b)(2). Section

> 2713(c) in turn provides that '[a] decision of the Commission . . . to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court.' 25 U.S.C. § 2713(c).

Id. at 1210.

Hoping to overcome this statutory language and Circuit precedent, plaintiffs make two arguments. First, they contend that the IGRA's legislative history indicates that § 2714 does not provide an exhaustive list of final NIGC actions subject to judicial review. Second, plaintiffs argue that the OGC's advisory opinion satisfies the Supreme Court's test for determining whether agency action is final under the APA. Neither argument is persuasive, however, and the next two subsections explain why.

a. Plaintiffs' legislative history argument

Plaintiffs' legislative history argument begins in the wrong place. It presupposes that it is appropriate for the Court to examine the IGRA's legislative history. The Court rejects this premise. A federal court can consider legislative history only when it finds that a statute's terms are unclear or ambiguous. *See United States v. Brian N.*, 900 F.2d 218, 221 (10th Cir. 1990) ("Normally when we find a statute's terms to be unambiguous, our inquiry is complete.") (citing *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987)); *see also In re Roberts*, 906 F.2d 1440, 1442 (10th Cir. 1990) ("Such an expression of contrary legislative intent must appear on the face of the statute, read in its entirety; beyond the statute itself,

legislative history should be used to resolve ambiguity, not create it.") (internal quotation omitted).

Here, the Court concludes that § 2714 provides clear and unambiguous direction about which NIGC actions are final and thus subject to judicial review under the APA. A "frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand coverage of the statute to subsume other remedies." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) (holding that statutory provisions creating right to judicial review for one party do not create a corresponding right for another party that the statute did not mention). When it passed the IGRA, Congress defined which actions by the NIGC amounted to final agency actions subject to judicial review. *See* 25 U.S.C. § 2714. No words in this provision suggest that Congress' definition reaches other forms of agency action such as the OGC advisory opinion at issue here.

But, even if it were proper to consider § 2714's legislative history, this history does not support plaintiffs' argument. In fact, it refutes plaintiffs' argument. Plaintiffs' argument relies on the "Highlights" section of Senate Report 100-446. In relevant part, these Highlights state: "All decisions of the Commission are final agency decisions for purposes of appeal to Federal district court." S. Rep. No. 100-446, at 8 (1988). But later, this same Report explains that only "certain Commission decisions will be final agency decisions for purposes of court review." *Id*. at 20. Indeed, other federal courts have concluded that

§ 2714's legislative history will not support the proposition that an OGC advisory opinion is final agency action subject to judicial review. Specifically, the District Court for the Northern District of Oklahoma has held:

> A proper analysis of the IGRA illustrates Congress' intent to provide only limited review under the Act. In considering the IGRA, the Senate stated that Section 15 of the Act[1] provides "that certain Commission decisions will be final agency provisions for purposes of court review." Senate Report 100-446 at 20, 1998 U.S.C.C.A.N. 3071, 3090. *Thus, it is clear that Congress intended that a final order be a prerequisite for judicial review since the only reference to judicial review mandate[s] that there must be a decision by the Commission pursuant to only certain sections of the IGRA for it to be considered a final action*. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208, 114 S. Ct. 771, 127 L.Ed.2d 29 (1994) (holding that Congress shows its intent to preclude judicial review where it creates a scheme permitting judicial review only for certain actions).
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> The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction. Additionally, further evidence of preclusion can be found in § 2714. That section explicitly states that the decisions capable of judicial review are

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[1] 25 U.S.C. § 2714 codifies § 15 of the Act.

> "[d]ecisions made by the Commission." *See* 28 U.S.C. § 2714. Because Chairman issued orders must be reviewed by the full Commission upon appeal before it is considered a final agency action, the IGRA then does not consider these orders "decisions" that warrant a forum in federal district courts. *Thus, an advisory opinion letter from the NIGC's General Counsel office does not rise to the level of a decision from the Commission*.

Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n, 214 F. Supp. 2d 1155, 1171-72 (N.D. Okla. 2002) (emphasis added). Similarly, the United States District Court for the District of Columbia has determined that "the legislative history of the [IGRA] reflects an intent to limit judicial review only to certain agency decisions, thereby overcoming the APA's presumption of judicial review." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (citing S. Rep. No. 100-446, at 20).

Plaintiffs' legislative history argument also invokes *United Keetoowah Band of Cherokee Indians v. State ex rel. Kuykendall*, No. CIV-04-340-WH, 2006 U.S. Dist. LEXIS 97268, at *1 (E.D. Okla. Jan. 26, 2006). *See* Doc. 60 at 4. But plaintiffs' reliance on this case reflects a truncated view of it.

In *United Keetoowah Band*, a tribe sought judicial review of a letter issued by the OGC. The letter reported "that the NIGC had reached the 'conclusion' that the Land [at issue] is not 'Indian land' as that term is defined by the IGRA, and that accordingly, the IGRA does not apply to Plaintiff's gaming" operations.

United Keetoowah Band, 2006 U.S. Dist. LEXIS 97268, at *4-5. This "conclusion" "never went to the [NIGC's] Chairman or the full Commission for formal written approval." *Id*. at 5. But after the letter was issued, the NIGC acted upon it. It refused to accept the tribe's gaming operation reports, tried to refund all fees that the tribe previously had paid to the NIGC, and "ceased all regulation of plaintiff's gaming operation[s]." *Id*. This led the State of Oklahoma to announce its intention to pursue criminal sanctions against the tribe because their gaming operations violated state law. *Id*. On these facts, the Oklahoma federal court concluded that "the NIGC certainly appears to have treated [the OGC letter] as the consummation of the agency's decision-making process, and [thus] Plaintiff has suffered legal consequences" permitting judicial review. *Id*. at 17. The jurisdictional facts in the present case are materially different.

Here, the acting OGC has provided his "legal opinion" in a letter to counsel for the Quapaw. The letter is extensive—15 pages—and recites that the Solicitors Office of the DOI has reviewed the letter and concurs with its opinion. But the letter never asserts that it conveys a decision reached by the Commission, or even that it portrays the view of the Commission's Chair. Instead, it professes a legal opinion about something it calls "a threshold question [that must be considered] prior to considering whether the [Quapaw] Tribe exercises government power over" the trust lands. Doc. 13-8 at 5. Indeed, the letter closes with an explicit statement of what it is not: "This legal opinion does not constitute final agency action for purposes of review in federal district court." *Id*. at 15.

Other material differences exist between the present case and *United Keetoowah Band*. For example, plaintiffs never allege that the NIGC has acted to implement the OGC's legal opinion. In contrast, the Oklahoma court concluded that the NIGC had implemented the OGC's legal conclusions in *United Keetoowah Band*. *See* 2006 U.S. Dist. LEXIS 97268, at *5 (reciting that the NIGC had refused the tribe's operational reports, attempted to return all fees paid to the NIGC, and stopped regulating the tribe's gaming operations).

In sum, § 2714 of the IGRA unequivocally defines the actions that are final agency decisions subject to judicial review under the APA. The Court is not free to examine the Act's legislative history looking for ways to expand the universe of decisions that Congress saw fit to define as final agency action. And even if the Court could consider the IGRA's legislative history, it would not benefit plaintiffs.

b. The Supreme Court's test for determining whether agency action is final

Plaintiffs next argue that the OGC's advisory opinion is a reviewable, final action because it satisfies the two-part test articulated by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In *Bennett*, the Court held that an agency action is final under the APA if it: (1) marks "the 'consummation' of the agency's decisionmaking process;" and (2) is "one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Id*. (internal citations omitted). Here, plaintiffs note that the text of the IGRA does not require the NIGC to determine

whether the Kansas Land satisfies the last recognized reservation exception before the Quapaw can build or license a class II or III gaming facility. Thus, plaintiffs contend, the OGC's advisory opinion is the consummation of the NIGC's decision-making process because it is "the only definitive assessment by the NIGC of whether the Kansas land is eligible for gaming . . . ." Doc. 60 at 6. Plaintiffs also argue that the advisory opinion has imposed legal consequences because now, the State must negotiate a Tribal-State gaming compact with the Quapaw and the County must repair roads damaged by traffic from a future casino.

The federal defendants respond that plaintiffs' reliance on *Bennett* is misplaced given the Tenth Circuit's conclusion that the IGRA limits review of NIGC actions to those listed in § 2714. *See Hobia*, 775 F.3d at 1210; *Miami Tribe of Okla.*, 198 F. App'x at 690. The federal defendants also contend that, even if that precedent did not exist, the OGC's advisory opinion does not satisfy either prong of the *Bennett* test. The federal defendants argue that the OGC's advisory opinion cannot meet the first prong of the *Bennett* test—*i.e.*, it does not consummate the NIGC's decision-making process—for two reasons. First, the federal defendants assert that the letter is not a "decision" by the NIGC itself. Instead, they contend that it is only "a staff member's letter opinion issued to the Tribe, who is not a party to this case." Doc. 88 at 8. Second, the federal defendants argue that the advisory opinion does not conclude the NIGC's decision-making process, "as numerous other (and truly final) agency actions may occur with respect to this tract of land." *Id*. at 9.

The Court agrees that the OGC's advisory opinion does not constitute a final decision by the NIGC. *See, e.g., St. Croix Chippewa Indians of Wis. v. Kempthorne*, No. 07-2210 (RJL), 2008 WL 4449620, at *5 (D.D.C. Sept. 30, 2008) ("Simply stated, a letter that merely advises the recipient of the agency's position does not amount to a 'consummation' of the agency's decision-making process."), *aff'd*, 384 F. App'x 7 (D.C. Cir. 2010); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1065 (N.D. Cal. 2005) ("[T]he advisory opinion that the lease provisions violate IGRA has no legal effect because it is not a final decision of the agency."); *Lac Vieux Desert Band of Lake Superior Chippewa Indians*, 360 F. Supp. 2d at 68 (holding that the "IGRA specifically limits APA review to 'decisions of the Commission'" and "for the agency to take any official action, the Chairman or Commission must make a decision"). Indeed, the District Court for the Northern District of Oklahoma has held that a similar OGC advisory opinion was not final NIGC action, stating, in relevant part:

> The Court finds more probative the fact that the letter was not signed by the NIGC's chairman as all decisions are, but instead was issued under the name of the General Counsel. *For the NIGC to take any official action, the Chairman or the Commission itself, on appeal, must make a decision. See 25 U.S.C. § 2711, et. seq. The General Counsel is simply a staff member of the NIGC advising the decision-makers and tribal entities when required*. In this case, the Court finds that the advisory letter is simply courtesy correspondence offering the kind of guidance

> that is intended to prevent the need for official NIGC action.

Cheyenne-Arapaho Gaming Comm'n, 214 F. Supp. 2d at 1168 (emphasis added).

The court's reasoning in *Cheyenne-Arapaho Gaming Comm'n* applies equally here. As plaintiffs concede, "[n]othing in the text of the IGRA . . . requires the NIGC to determine whether the land meets the last recognized reservation exception" before the Quapaw licenses or constructs a class II or class III gaming facility. Doc. 60 at 6. Thus, the Quapaw's request for a legal opinion applying the exception was no more than a voluntary request for guidance from the NIGC staff. Similarly, the OGC issued the advisory opinion voluntarily, and stated explicitly that his opinion "did not constitute final agency action for purposes of review in federal district court." Doc. 13-8 at 15. Notably, the OGC website explains the procedure for tribes, members of the gaming industry, and other interested parties to request a legal opinion, stating, in relevant part:

> As a general matter, legal opinions are issued by the OGC as a courtesy, and neither IGRA nor NIGC regulations require the OGC to issue a legal opinion on any matter. Further, the legal opinion of the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process, both for the party making the request and the OGC.

Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of General Counsel, 1 (Dec. 2013), http://www.nigc.gov/images/uploads/game-

opinions/SubmittingRequestforLegalOpinionDec112013.pdf.

Because the IGRA did not require it and the Chairman or the Commission did not issue it, the Court concludes that the OGC's advisory opinion is not a decision by the NIGC itself. Thus, it cannot consummate an NIGC decision-making process. Plaintiffs therefore have failed to show that the advisory opinion satisfies the first prong of the *Bennett* test.

The OGC's advisory opinion also fails the second prong of the *Bennett* test. This part of the standard asks whether the agency's action imposes legal obligations or consequences on plaintiffs. As explained above, the IGRA does not require the OGC to issue an advisory opinion before the Quapaw may game on the Kansas Land. Thus, the OGC's opinion had no effect on the status quo. While plaintiffs contend that the opinion requires the State to negotiate a Tribal-State gaming compact, this argument misapprehends the State's responsibility under the IGRA. The State must negotiate a compact only if the Quapaw builds a gaming facility in Kansas, decides to conduct class III gaming there, and requests the State enter into negotiations on a Tribal-State compact "governing the conduct of [class III] gaming activities."[2] 25 U.S.C.

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[2] Section 2710(d)(3)(A) of the IGRA requires the State to negotiate "with the Indian tribe in good faith to enter into such a compact." If the State refuses to negotiate a compact with the Tribe or does not negotiate in good faith, the Tribe may bring suit in federal district court to resolve the issue under the procedure set out in 25 U.S.C. § 2710(d)(7).

§ 2710(d)(3)(A) (requiring tribe who wishes to conduct class III gaming on Indian lands to request the state to negotiate a Tribal-State compact).

Because plaintiffs have failed to demonstrate that the OGC's advisory opinion was final NIGC action, the Court concludes that it does not have subject matter jurisdiction to review it. The NIGC and its officials have not waived sovereign immunity under the IGRA or APA. The Court thus dismisses plaintiffs' claims against the federal defendants in Counts I and II of the Amended Complaint.[3]

B. Motion to Dismiss Under Rule 12(b)(6) for Failure to State a Claim

1. The parties' positions

Plaintiffs attack the DOI's promulgation and the NIGC's application of 24 C.F.R. § 292.4 in Count III of their Amended Complaint. Specifically, they challenge

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[3] Plaintiffs' response in opposition (Doc. 60) alternatively asks the Court, if it determines that the OGC advisory opinion is not a final agency action, to issue an order "prohibiting the Quapaw defendants from gaming on the land unless and until a final agency decision regarding the eligibility of the land for gaming is made." Doc. 60 at 13. But, as plaintiffs concede, "[n]othing in the text of the IGRA . . . requires the NIGC to determine whether the land meets the last recognized reservation exception when a tribe licenses or begins construction of a class II or class III gaming facility already authorized by a non-site-specific ordinance." Doc. 60 at 6; *see also Bd. of Comm's of Cherokee Cty., Kan. v. Jewel*, 956 F. Supp. 2d 116, 124-25 (D.C.C. 2013) (finding no statutory or regulatory basis for requiring the NIGC or Secretary of the Interior to determine the gaming eligibility of land on which a tribe plans to game). The Court therefore declines to grant the relief that this request seeks.

the regulatory interpretation of the term "presently located" in 25 C.F.R. § 292.4(b)(2).

The DOI's Bureau of Indian Affairs promulgated § 292.4 in 2008 to define and implement the IGRA's last recognized reservation exception (25 U.S.C. § 2719(a)). Section 292.4(b)(2) provides that a tribe that acquires land after October 17, 1988, satisfies the exception if its land is: "Located in a State other than Oklahoma and [is] within the tribe's last recognized reservation with the State or States within which the tribe is presently located, *as evidenced by the tribe's governmental presence and tribal population*." (emphasis added).

Plaintiffs note that Congress did not define "presently located" in 25 U.S.C. § 2719(a). They also assert that the DOI's definition of "presently located" in 25 C.F.R. § 292.4(b)(2) conflicts with this Court's interpretation of the term in *Wyandotte Nation*, a case decided two years before the DOI adopted § 292.4. *See* 437 F. Supp. 2d at 1206. In *Wyandotte Nation*, the Court held that a tribe is "presently located" where it "has its population center and 'major governmental presence.'" *Id*. (emphasis omitted). Plaintiffs assert that "[b]y failing to recognize *Wyandotte Nation*['s] . . . major governmental presence standard, the DOI acted arbitrarily and in excess of its authority, and 25 C.F.R. § 292.4 should be declared null and void." Doc. 13 at 16. Plaintiffs also assert that the DOI acted arbitrarily and exceeded its authority by "failing to include in 25 C.F.R. § 292.4 a requirement that the tribe's location be determined as of the date of IGRA's effectiveness, October 17, 1988[.]" *Id*.

The federal defendants advance four independent reasons why the Court should dismiss plaintiffs' challenge to 25 C.F.R. § 292.4. First, they contend that plaintiffs' challenge is barred by the six-year statute of limitations established in 28 U.S.C. § 2401. Second, the federal defendants assert that plaintiffs waived their ability to challenge 25 C.F.R. § 292.4(b)(2) by failing to assert their challenge during the DOI's notice-and-comment rulemaking. Third, the federal defendants argue that the DOI was not bound by *Wyandotte Nation*'s definition of "presently located" during its 2008 promulgation of 25 C.F.R. § 292.4. And last, the federal defendants assert that plaintiffs' contention that the term "presently located" must be interpreted as a "date-of-enactment" restriction is wrong as a matter of law. As the next section explains, the Court concludes that plaintiffs are time-barred from challenging this regulation.

2. Plaintiffs' challenge to 25 C.F.R. § 292.4 is barred by the six-year statute of limitations.

The federal defendants move to dismiss plaintiffs' challenge against 25 C.F.R. § 292.4 because, they contend, it is a facial challenge to a regulation and 28 U.S.C. § 2401(a)'s six-year statute of limitation time-bars such a challenge now. Plaintiffs respond that their action is not a facial challenge. Instead, plaintiffs assert that they challenge the regulation "as-applied" because their "suit is primarily a challenge to the NIGC's land opinion that gaming is permitted on the [Kansas Land]" and they have attacked "the regulation on which the NIGC relied." Doc. 60 at 15.

Our Circuit has provided standards district courts must use to distinguish between a facial challenge and an as-applied challenge. The former "'considers [the regulation's] application to all conceivable parties.'" *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014) (quoting *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007)). In contrast, an as-applied challenge "'rests the application of that [disputed regulation] to the facts of a plaintiff's concrete case.'" *Id*.

This distinction matters because a plaintiff hoping to prosecute a facial challenge must assert it within six years of the regulation's publication in the Federal Register. *See, e.g., Wind River Mining Corp. v. United States*, 946 F.2d 710, 714-15 (9th Cir. 1991) (applying 28 U.S.C. § 2401(a)'s six-year statute of limitation to request for judicial review under the APA). *Wind River* explains the rationale for this outcome: "The grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision" and the "government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of procedure." *Id*. at 715.

An as-applied challenge is not subject to the same limitation. Instead, a plaintiff who challenges an agency's application of a regulation to the plaintiff's specific circumstances must file its action within six years of an adverse agency decision. *See id.* at 716 ("We hold that a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger."); *see also Functional*

Music, Inc. v. F.C.C., 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). Also, the APA requires that an "as applied challenge must rest on final agency action." C*rosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 3:06-cv-00657-LRH-RAM, 2008 WL 5111036, at *6 (D. Nev. Dec. 3, 2008) ("'Agency action made reviewable by statute and final agency action for which there is no remedy in a court are subject to judicial review.'" (quoting 5 U.S.C. § 704.)).

Count III of plaintiffs' Amended Complaint asserts several objections to the DOI's promulgation of 25 C.F.R. § 292.4(b)(2). It tries to advance an as-applied challenge against the NIGC, alleging: "The NIGC's actions in applying 25 C.F.R. § 292.4(b)(2) to the current location of the tribe, and in a manner inconsistent with *Carcieri*, are arbitrary and in excess of its authority." Doc. 13 at 17. But this allegation cannot serve as the basis for an as-applied challenge. Plaintiffs' challenge arises from the OGC's advisory opinion. Because the opinion, and its application of § 292.4, was not final NIGC action ripe for judicial review, plaintiffs cannot assert an as-applied challenge based on it. *See* 5 U.S.C. § 704; *see also Crosby Lodge, Inc.*, 2008 WL 5111036, at *6. Thus, plaintiffs have failed to assert a viable as-applied challenge to 25 C.F.R. § 292.4.

This leaves plaintiffs' claims against the DOI's promulgation of § 292.4. Specifically, plaintiffs contend that the DOI acted "arbitrarily and in excess of its authority" by: (1) "failing to recognize *Wyandotte Nation v. NIGC*'s major governmental standard;" and (2) "failing to include in 25 C.F.R. § 292.4 a requirement that the tribe's location be determined as

of the date of IGRA's effectiveness" in a "manner [consistent] with *Carcieri*." Doc. 13 at 16. Plaintiffs also ask the Court to "[d]eclare that the DOI acted arbitrarily and in excess of its authority by implementing 25 C.F.R. § 292.4(b)(2) without a temporal restriction, and in a manner that does not rely on tribes' major governmental presence." *Id*. at 18.

The Court concludes that these attacks on the DOI's implementation of 25 C.F.R. § 292.4 amount to facial challenges to the validity of the regulation itself. Plaintiffs contend, in essence, that the DOI acted arbitrarily and exceeded its authority when it promulgated § 292.4. Plaintiffs therefore contend that the regulation is invalid as written—an alleged defect that would affect all conceivable parties. *See Njord*, 774 F.3d at 1264. The grounds for plaintiffs' challenge—*i.e.*, the IGRA, *Wyandotte Nation*, and *Carcieri*—existed in 2008 when the DOI published the regulation in the Federal Register and were "apparent to any interested citizen" within six years of publication. *Wind River Mining Corp.*, 946 F.2d at 715. Because plaintiffs failed to assert their facial challenge to § 292.4 within the six-year period of limitation set out in 28 U.S.C. § 2401(a), it is time-barred as a matter of law. The Court thus dismisses Count III of plaintiffs' Amended Complaint.[4]

IV. Tribal Defendants' Motions to Dismiss

The Court turns now to the five motions to dismiss filed by the tribal defendants. The tribal defendants seek to dismiss plaintiffs' claims against them for lack

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[4] Given this conclusion, the Court need not address the federal defendants' other attacks on plaintiffs' challenge to § 292.4.

of subject matter jurisdiction under Rule 12(b)(1). The tribal defendants contend that the Court lacks jurisdiction for two reasons.

First, as entities and members of a federally recognized Indian tribe, they assert that tribal immunity shields them from suit in federal court. Plaintiffs respond that the Downstream Development Authority's tribal charter contains provisions that amount to a blanket waiver of the DDA's tribal immunity. To support their argument, plaintiffs attach a Quapaw tribal resolution chartering the DDA and reference the DDA's complete charter in their response in opposition (Doc. 56). Resolution of this issue requires the Court to examine the DDA charter, which plaintiffs did not attach to or reference in their Amended Complaint. Thus, the Court must consider documents outside of the complaint and will not presume that all of plaintiffs' jurisdictional allegations are true. *See Holt*, 46 F.3d at 1003.

Second, the tribal defendants assert that plaintiffs cannot sidestep tribal immunity by bringing an officer suit against tribal officials under *Ex parte Young*, 209 U.S. 123 (1908). The tribal defendants attack both the "legal [and] factual merit [of] the State's claims against the Tribal officers" through their motions to dismiss. Doc. 51 at 11. Thus, the tribal defendants ask the Court to address both the propriety of jurisdiction (a Rule 12(b)(1) motion) and the plausibility of plaintiffs' claims (a Rule 12(b)(6) motion). Before reaching the merits of plaintiffs' substantive claims, the Court first must determine whether it has subject matter jurisdiction over the 18 individual tribal officers under *Ex parte Young*. *See Muscogee (Creek) Nation*, 669 F.3d

at 1167-68. If it finds that jurisdiction exists, the Court may then take up the tribal defendants' substantive arguments under Rule 12(b)(6). *See Holt*, 46 F.3d at 1003; *Pringle*, 208 F.3d at 1223. The Court addresses each one of the tribal defendants' arguments below.

A. Plaintiffs have failed to establish that the tribal defendants have waived tribal immunity.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Likewise, an Indian tribe's waiver of its tribal immunity must be unequivocal. *Id.*; *see E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001).

Tribal immunity "may extend to subdivisions of a tribe, including those engaged in economic activities . . . ." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) (citing *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008)). Granting immunity to tribal businesses furthers

"'Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.'" *Id.* (quoting *Okla Tax Comm'n*, 498 U.S. at 510). Generally, tribal immunity also extends to tribal officials acting in their official capacities and within the scope of their authority. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (citing *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997)).

Plaintiffs contend that the Quapaw has waived the DDA's tribal immunity expressly by its charter. Plaintiffs assert that the charter exposes the DDA to suit because it permits the DDA to "[s]ue Persons in its own name" and to "[c]onsent to the exercise of jurisdiction over any suit or over the Authority by the federal courts." Doc. 56-1 at 8. Plaintiffs characterize these provisions as a "sue and be sued clause." And, according to plaintiffs, at least three federal circuits, including our own, have held that such clauses waive a tribal corporation's immunity. *See, e.g., Native Am. Distrib.*, 546 F.3d at 1288 (affirming district court opinion); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006), *vacated*, 540 F.3d 916, 921 (9th Cir. 2008); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989).

In response, the tribal defendants contend that the provisions of the DDA's charter are not a "sue and be sued clause" and thus did not waive immunity. Instead, they contend that the DDA's provisions authorized the DDA to waive its tribal immunity on a transaction-by-transaction basis. Tribal defendants note that the DDA charter also provides that it "shall be entitled to all of

the privileges and immunities of the Tribe, including without limitation, sovereign immunity from suit." Doc. 73 at 3.

As discussed above, a tribe or tribal entity must express any intent to waive tribal immunity in unequivocal words. *See C&L Enters., Inc.,* 532 U.S. at 418; *Breakthrough Mgmt. Grp.*, 629 F.3d at 1183-84. Here, the DDA's tribal charter grants it the power to "[*c*]*onsent* to the exercise of jurisdiction over the Authority by the federal courts . . . ." Doc. 56-1 at 7 (emphasis added). This language does not manifest an intent to waive tribal immunity. Instead, it vests the DDA with the power to waive its immunity at its election. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000) (finding no waiver of immunity where the "ordinance . . . authorizes the Authority to shed its immunity from suit 'by contract,' and these words would be utter surplusage if the enactment of the ordinance itself served to perfect the waiver").

For this reason, the provisions of the DDA charter differ from the traditional "sue and be sued clauses" cited by plaintiffs. Indeed, the clauses on which plaintiffs rely demonstrate that the tribes in those cases intended to shed the immunity of their corporate entities. *See Marceau*, 455 F.3d at 979-81 (clause giving "irrevocable consent to [allow] the [tribal] Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation" amounts to an express waiver of tribal immunity); *Rosebud Sioux Tribe*, 874 F.2d at 552 (tribal charter permitting entity "[t]o sue and to be sued in courts of competent jurisdiction" waived immunity); *Native Am. Distrib. v. Seneca-*

Cayuga Tobacco, Co., 491 F. Supp. 2d 1056, 1065 (N.D. Okla. 2007) (charter allowing entity "[t]o sue and be sued; to defend in any court" constituted a waiver of tribal immunity). In contrast, the DDA's charter does not expose the DDA to suit in any context.

Here, the charter evinces the Quapaw's intent to preserve the DDA's tribal immunity. The Quapaw granted the DDA the ability to decide when, and under what circumstances to waive its immunity. The charter itself shows as much. Section 6 authorizes the DDA to "[g]rant limited waivers of the sovereign immunity of the Authority to enter into contracts or agreements or other business relations . . . ." Doc. 56-1 at 8. And Section 8 provides that the DDA is an "instrumentality of the Tribe," "enjoys an autonomous existence[,]" and "*shall be entitled to . . . sovereign immunity from suit*" *Id*. (emphasis added). Thus, the charter contains no unequivocal waiver of tribal immunity.

In sum, plaintiffs have adduced no facts plausibly supporting the conclusion that the DDA, the QCA, or the TDC have waived tribal immunity. Because plaintiffs have failed to establish that the Court has subject matter jurisdiction over these three entities, the Court dismisses plaintiffs' claims against them under Rule 12(b)(1).

B. Plaintiffs cannot establish subject matter jurisdiction over individual tribal officers under *Ex Parte Young*.

Next, the tribal defendants ask the Court to dismiss plaintiffs' claims against the 18 individual tribal officers. This aspect of the Amended Complaint tries to overcome tribal immunity by asserting claims against

the officers under the exception established in *Ex parte Young*, 209 U.S. 123 (1908). "[U]nder *Ex parte Young*, a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation*, 669 F.3d at 1166 (citing *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). The *Ex parte Young* exception applies "not just to state sovereign immunity but also to tribal sovereign immunity." *Crowe & Dunlevy, P.C.*, 640 F.3d at 1154.

To determine whether plaintiffs may bring claims against the tribal officers, the Court "'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Muscogee (Creek) Nation*, 669 F.3d at 1167 (quoting *Verizon Md. Inc.*, 535 U.S. at 645). Plaintiffs allege an ongoing violation of federal law if they state a "'non-frivolous, substantial claim for relief against the [tribal] officers that does not merely allege a violation of federal law solely for the purpose of obtaining jurisdiction.'" *Id*. (quoting *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 866 (10th Cir. 2003)). "But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md. Inc.*, 535 U.S. at 636-37 (citing *Idaho v. Coeur d'Alene*, 521 U.S. 261, 281 (1997)).

Here, plaintiffs have asserted claims against individual tribal officers and have asked the Court to enjoin them from constructing or operating "an illegal, unauthorized gaming facility" on the Kansas Land. Doc. 13 at 17. Plaintiffs emphasize the request that the

Quapaw made in its 2012 application to the BIA. It asked the BIA to take the Kansas Land into a trust that the Quapaw intended to use for non-gaming purposes. Because plaintiffs say that they relied on this representation when they decided not to appeal the BIA's decision, plaintiffs argue that the Court must declare the tribal defendants equitably estopped from gaming. Plaintiffs assert that "[i]f the [t]ribal [d]efendants game on the Kansas [L]and, they will be in violation of IGRA[,] as the land does not meet the exception set forth in 25 U.S.C. § 2719 and is not eligible for gaming." Doc. 56 at 11.

The tribal defendants respond, contending that plaintiffs may not circumvent tribal immunity merely by asserting a claim characterized as equitable estoppel. The tribal defendants contend that the Eleventh Amendment bars plaintiffs' claim because it is frivolous and asserted only to obtain jurisdiction. The tribal defendants also assert: plaintiffs have failed to allege an ongoing violation of federal law; *Ex parte Young* cannot apply because the tribal officers named by plaintiffs have no authority to act individually; and application of *Ex parte Young* requires a violation of the "supreme law" of the United States and equitable estoppel is only a civil remedy.

Beginning with the tribal defendants' first argument—that plaintiffs assert an equitable estoppel claim merely to circumvent the IGRA's jurisdictional limitations—the Court returns to the fundamental purpose of the IGRA. Congress enacted the IGRA "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996) (citing 25

U.S.C. § 2702). The IGRA grants Indian tribes exclusive jurisdiction to regulate gaming on Indian lands if: (1) "the gaming activity is not specifically prohibited by Federal law;" and (2) it "is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The IGRA also defines when a state may sue an Indian tribe for gaming violations on Indian lands. *See* 25 U.S.C. § 2710(d)(7)(A). Section 2710(d)(7)(A)(ii), in relevant part, provides:

> The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

But the Supreme Court has determined that § 2710(d)(7)(A)(ii) "does not even cover all suits [seeking] to enjoin gaming on Indian lands . . . ." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2034 n.6. Instead, the Court has determined:

> Section 2710(d)(7)(A)(ii) recall, allows a State to sue a tribe not for all class III gaming activity located on Indian lands . . . , but only for such gaming as is conducted in violation of any Tribal-State compact . . . that is in effect. Accordingly, *if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue*; only the Federal Government can enforce the law. *See* 18 U.S.C. § 1166(d).

Id. (emphasis added) (internal quotations omitted).

The Supreme Court also has held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a [tribe] of a statutorily created right"—such as that set out in § 2710(d)(7)—"a court should hesitate before casting aside those limitations and permitting an action against a [tribal] officer based upon *Ex parte Young*" *Seminole Tribe of Fla.*, 517 U.S. at 74. Thus, if plaintiffs' equitable estoppel claim here seeks to prevent a threatened violation of the IGRA, jurisdiction against the tribal officers does not exist under *Ex parte Young*.

Plaintiffs argue that their claims against the tribal officers "arise not under the IGRA specifically, but from the common law principles of equitable estoppel." Doc. 56 at 12. Plaintiffs contend that the tribal defendants misrepresented their intended use of the Kansas Land and, therefore, deprived plaintiffs of the opportunity to contest the Quapaw's BIA trust application. Thus, according to plaintiffs, no statutory rights under the IGRA are at issue. But plaintiffs' response in opposition contains numerous statements indicating otherwise.

For example, plaintiffs' introduction, in relevant part, provides:

> Because the Kansas [L]and does not meet the [25 U.S.C. § 2719] exception, constructing and operating a casino on the land would violate the Indian Regulatory Gaming Act, 25 U.S.C. §§ 2701-2721 ("IGRA") and the [t]ribal [d]efendants should be estopped from doing so based on their representations to the BIA.

Doc. 56 at 2. Later, plaintiffs contend that they have alleged an ongoing violation of federal law under *Ex*

parte Young because they are "prospectively ensuring that the [t]ribal [d]efendants do not act upon [the NIGC opinion] letter because the NIGC's application of the 'last reservation exception' is wrong, and to conduct gaming on such land would be a violation of IGRA and federal law." Doc. 56 at 9. Plaintiffs' response continues, stating:

> IGRA prohibits [t]ribes from conducting gaming, including Class II gaming, on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain requirements are met. 25 U.S.C. §§ 2710(a)(2), 2719. *The Amended Complaint alleges that to conduct gaming on the [t]ribe's trust land in Kansas would not meet those requirements and thus, constitute a violation of federal law*. [Doc. 13 at 9, 14-17.] Thus, the Amended Complaint seeks prospective relief to prevent the tribal members from acting in violation of federal law.

Id. at 9 (emphasis added). Finally, plaintiffs argue: "If the Tribal Defendants game on the Kansas land, they will be in violation of the IGRA as the land does not meet the exception set forth in 25 U.S.C. § 2719 and is not eligible for gaming." Doc. 56 at 11.

To determine whether relief sought by a party is permitted under *Ex parte Young*, the Court must "look to the substance rather than to the form of the relief sought . . . ." *Papasan v. Allain*, 478 U.S. 265, 279 (1986). Plaintiffs here assert a claim they call "equitable estoppel." But it is evident that they seek to prevent the tribal defendants from committing an alleged violation of the IGRA—*i.e.*, gaming in violation

of 25 U.S.C. § 2719. Plaintiffs cannot use *Ex parte Young* to bring such a claim. *See Seminole Tribe of Fla.*, 517 U.S. at 74 (affirming dismissal of *Ex parte Young* suit seeking to remedy alleged IGRA violation because Congress enacted the IGRA as a detailed remedial scheme designed to address such violations); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2034 n.6 ("[I]f a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law.").

Even if plaintiffs' Amended Complaint did not seek to deter a potential violation of the IGRA, their equitable estoppel claim still would not satisfy *Ex parte Young*. As discussed above, application of *Ex parte Young* requires a party to allege an ongoing violation of federal law and seek prospective relief. *See Muscogee (Creek) Nation*, 669 F.3d at 1166. Plaintiffs, however, assert that the Quapaw misrepresented its intended use for the Kansas Land during its 2012 BIA land-into-trust proceeding and "deprived plaintiffs the opportunity to be fully heard during the trust application process." Doc. 56 at 12. This alleged misrepresentation happened in the past. Thus, plaintiffs do not assert an ongoing or threatened violation of federal law. Instead, they seek to remedy something even they perceive as a past wrong, and this cannot abide a suit under *Ex parte Young*. *See Papasan*, 478 U.S. at 277-78 ("*Young* has been focused on cases in which a violation of federal law . . . is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . ."); *Fuller v. Davis*, 594 F. App'x 935, 940 (10th Cir. 2014) (finding *Ex parte Young* inapplicable where plaintiffs claimed "they were tricked long ago" because

the relief requested would "address alleged past harms rather than prevent prospective violations of federal law") (internal quotations omitted); *Sanders v. Kan. Dep't of Soc. & Rehab. Servs.*, 317 F. Supp. 2d 1233, 1243-44 (D. Kan. 2004) (denying *Ex parte Young* jurisdiction where suit would not "remedy any future wrongs, and it does not appear that the circumstances . . . will reoccur with any level of frequency, if at all.").

The Court concludes that the *Ex parte Young* exception to tribal immunity does not apply to plaintiffs' claims against the individual tribal defendants. The Eleventh Amendment therefore shields the tribal defendants from this suit in federal court. The Court thus dismisses plaintiffs' claims against the tribal defendants under Rule 12(b)(1).

V. Conclusion

Plaintiffs have failed to establish that this Court has subject matter jurisdiction over their claims against the tribal defendants, the NIGC, or the named NIGC officials. In addition, plaintiffs' claims against the DOI and its officials are barred by 25 U.S.C. § 2401(a). For reasons explained by this Order, the Court grants the federal defendants and tribal defendants' motions to dismiss.

IT IS THEREFORE ORDERED BY THE COURT THAT the federal defendants' Motion to Dismiss (Doc. 42) is granted.

IT IS FURTHER ORDERED THAT the tribal defendants' Motions to Dismiss for Lack of Jurisdiction (Docs. 50, 55, 68, 76, 86) are granted.

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Preliminary Injunction (Doc. 14) and the tribal defendants' Motion to Continue or Stay Proceedings on Pending Request for Preliminary Injunction (Doc. 87) are denied as moot.

IT IS FURTHER ORDERED THAT the Iowa Tribe of Kansas and Nebraska and Sac and Fox Nation of Missouri's Motion to Intervene (Doc. 58) and the tribal defendants' Unopposed Motion to Continue Response to Motion to Intervene (Doc. 79) are denied as moot.

IT IS SO ORDERED.

Dated this 17th day of December, 2015, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX C

NEW MAILING ADDRESS:
NIGC/DEPARTMENT OF THE INTERIOR
1849 C Street NW, Mail Stop #1621
Washington, DC 20240
Tel: 202.632.7003 Fax: 202.632.7066
REGIONAL OFFICES
Portland, OR; Sacramento, CA; Phoenix, AZ;
St. Paul, MN; Tulsa OK; Oklahoma City, OK
WWW.NIGC.GOV

November 21, 2014

Via First Class Mail & Facsimile

Stephen R. Ward
Conner & Winters, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
Fax: 918-586-8982

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.[1]

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.[2] 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

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[1] 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).

[2] U.S. Department of Interior, Bureau of Land Management Plat of Dependent Resurvey and Survey (Nov. 19, 2010).

parking lot and support area for its adjacent Downstream Casino property, which is located in Oklahoma.[3] The tract, which consists of approximately 124 acres, was taken into trust by the Department of the Interior in August 2012.[4] 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.[5]

In 2011, the Department of the Interior Bureau of Land Management confirmed that Section 13 of the Quapaw Strip, containing approximately 100.42 acres,

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

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

[5] *Id.*

is within the boundaries of the Tribe's former reservation in Kansas.[6]

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.[7] In accordance with the treaty, the reservation consisted of 150 sections of land.[8] The portion of the reservation in Kansas consisted of approximately 12 full sections of land and

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[6] 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).

[7] 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...").

[8] Treaty with the Quapaw, 7 Stat. 424, Art. 2, *supra.*

6 fractional sections of land and included Section 13 at issue here.[9] 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.[10] The Tribe ceded 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.[11] In the same treaty, the Tribe ceded approximately 18,500 acres in the

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[9] Letter from Robert A. Casias, *supra* at 1.

[10] 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 Breuf, 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. 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.").

[11] *Id.*

western part of the reservation in Oklahoma to the United States.[12]

Applicable Law

IGRA permits an Indian tribe to "engage in, or license and regulate, gaming on Indian lands within such Tribe's jurisdiction."[13] 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.[14]

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

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

[13] 25 U.S.C. §§ 2710(b)(1), 2710(d)(1)(A)(i), 2710(d)(3)(A).

[14] 25 U.S.C. § 2703(4).

> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.[15]

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.[16]

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

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[15] 25 C.F.R. § 502.12.

[16] 25 U.S.C. § 2719(a)(2)(B).

is presently located, as evidenced by the tribe's governmental presence and tribal population.[17]

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,"[18] 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."[19] NIGC regulations further define "Indian lands" as: "[l]and within the limits of an Indian reservation; or [l]and

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[17] 25 C.F.R. § 292.4(b)(2).

[18] 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2.

[19] 25 U.S.C. § 2703(4).

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."[20]

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.[21] If the land were within a present day reservation, that would be the end of the Indian lands analysis.[22] However, here, Section 13 is trust land.

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.[23] Importantly, the Tenth Circuit requires that "before a

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[20] 25 C.F.R. § 502.12.

[21] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).

[22] 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).").

[23] 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."[24] 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] 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.[26] 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.

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[24] *Kansas v. United States,* 249 F.3d 1213, 1229 (10th Cir. 2001).

[25] 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1).

[26] *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").

The question of the Tribe's jurisdiction "focuses principally on congressional intent and purpose,"[27] as "an Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute."[28] Evidence of congressional intent and purpose can be found in the language of the legislation and treaties.[29] "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.[30] 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.[31]

Moreover, generally, an Indian tribe possesses jurisdiction over "over both their members and their

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[27] *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...").

[28] *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).

[29] *See, e.g., id.* at 1229-30.

[30] *Kansas, supra,* at 1229-30.

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

territory."[32] It is well settled that a tribe retains primary jurisdiction over land that the tribe inhabits if the land qualifies as Indian country.[33] 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 ....[34]

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[32] *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'").

[33] *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").

[34] 18 U.S.C. § 1151.

"This definition applies to questions of both criminal and civil jurisdiction."[35]

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."[36] 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."[37]

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

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[35] *Cabazon,* 480 U.S. at 253 n.5.

[36] *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 (10th 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.").

[37] *United States v. Roberts,* 185 F.3d at 1130.

requirements for "Indian lands."[38] IGRA is silent regarding how the NIGC should determine whether a tribe exercises 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.[39]

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."[40] 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.[41] 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

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[38] *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).

[39] *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act,* 57 Fed. Reg. 12382, 12388 (1992).

[40] *Rhode Island* v. *Narragansett Indian Tribe,* 19 F.3d at703.

[41] *Id*.

whether off-reservation trust lands constitute Indian lands.[42] 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.[43]

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;[44]

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[42] 830 F. Supp. 523 (D.S.D. 1993), *aff'd,* 3 F.3d 273 (8th Cir. 1993).

[43] *Id.* at 528.

[44] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014); Declaration of Christopher A. Roper,

(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;[45]

(3) The Tribe's Fire and Emergency Medical Services provide services on the tract;[46]

(4) The Tribe developed and maintains the parking lot and surrounding area of its casino resort on the tract;[47]

(5) The Tribe constructed and maintains a water distribution and storage system on the tract, including support areas and access roads;[48]

Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 5 & 6.

[45] 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); Depulization Agreement between Cherokee County, Kansas Sheriff and the Quapaw Tribal Marshals Service (Dec. 27, 2011).

[46] 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.

[47] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 7.

[48] 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.

(6) The Tribe constructed and maintains a wetlands sanctuary and habitat for the broadhead skink on the tract;[49]

(7) The Tribe tests and monitors the water system and maintains compliance with environmental permits on the tract;[50]

(8) The Tribe undertakes program obligations associated with a Superfund Memorandum of Agreement with the U.S. Environmental Protection Agency on the tract;[51] 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.[52]

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

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[49] 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.

[50] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 3 & 6.

[51] *Id.* ¶ 10.

[52] Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶ 5.

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.[53] All of the infrastructure is located in Section 13, with the exception of the constructed wetlands that is located in Section 12.[54] In light of the above, the 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.[55] 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

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[53] 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.

[54] 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.

[55] 25 U.S.C. § 2719; 25 C.F.R. part 292.

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."[56]

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.[57] In the same treaty, the Tribe ceded approximately 18,500 acres in the western part of the reservation in Oklahoma to the United States.[58] The

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[56] 25 U.S.C. § 2719 (a)(2)(B).

[57] 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 Breuf, 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.").

[58] *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

second part of the exception is also satisfied, because Section 13 of the Quapaw Strip trust tract is in Kansas,[59] 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

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

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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").

[59] U.S. Department of Interior, Bureau of Indian Affairs, Kansas Warranty Deed (May 16, 2012).

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."[60] 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."[61] Although in the preamble to the Part 292 regulations Interior did not discuss *Wyandotte Nation v. National Indian Gaming Commission*[62] 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.

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[60] U.S. Department of Interior, *Gaming on Trust Lands Acquired After October 17, 1988,* 73 FR 29354-01.

[61] *Wyandotte Nation v. Nat'l Indian Gaming Comm'n,* 437 F. Supp. 2d 1193, 1206 (Kansas 2006).

[62] *Id.*

Nonetheless, Interior's interpretation as articulated in this regulation is owed *Chevron* deference.[63] Review by a court of an agency interpretation is a two-step analysis.[64] In *Chevron's* first step, the court must answer "whether Congress has directly spoken to the precise question at issue."[65] If the language of the statute is clear, the court and the agency must give effect to "the unambiguously expressed intent of Congress."[66] 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."[67] "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."[68] "[C]onsiderable weight should be accorded to an executive department's

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[63] *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.").

[64] *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.").

[65] *Id.*

[66] *Id.*

[67] *Id.* at 842-843.

[68] *Id.* at 844.

construction of a statutory scheme it is entrusted to administer....”[69] 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 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.*[70]

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.”[71] 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

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[69] *Id.*

[70] 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).

[71] 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).

tribal government and population center."[72] 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."[73]

Thus, a tribe may be "presently located" in "states."[74]

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.[75] As noted previously, the Kansas portion and significant acreage in the Oklahoma portion of the reservation were ceded to the United States in 1867.[76] And,

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

[73] *Id.* at 1206.

[74] 25 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).

[75] Treaty with the Quapaw, 7 Stat. 424, Art. 2 (May 13, 1833).

[76] Treaty between the United States and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas of Blanchard's Fork

according to the 10th Circuit, in the early 1900s, Congress intended to disestablish all Oklahoma reservations.[77] Today, the Tribe's trust land spans both these states.[78]

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, and are provided to tribal members and non-members in both states.[79] 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

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and Roche de Breuf, 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.

[77] *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010).

[78] 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.

[79] 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.

Department, the Enrollment Department, the Realty and Trust Services Department, the Environmental Department, and the Tribal courts.[80] 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.[81] Elsewhere in Oklahoma, the Tribe has fire, emergency medical services, and marshals' stations.[82]

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.[83] 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.[84]

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[80] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 5.

[81] *Id.*

[82] 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.

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

[84] Declaration of John L. Berrey, Chairman, Tribal Business Committee, Quapaw Tribe (May 8, 2014) ¶ 3.

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.[85] Although the main tribal marshals' station is in Oklahoma, two tribal marshals are assigned to the Kansas substation as their regular duty station.[86] 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.[87] 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 Sheriffs office for purposes of providing the county law enforcement assistance.[88] Further, the tribal marshals are deputized

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[85] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014).

[86] *Id.* ¶ 5.

[87] 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.

[88] Declaration of Josh Lewis, Tribal Marshal, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 5-7.

in Kansas and may handle cases throughout Cherokee County.[89]

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.[90] 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.[91]

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.[92]

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[89] 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).

[90] 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.

[91] *Id.* ¶ 4.

[92] 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,

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.[93] 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.[94]

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.[95] In Kansas, QSA served as construction manager and general contractor for the construction of

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2011) at I(A); Declaration of Tim L. Kent, Director, Environmental Department, Quapaw Tribe of Oklahoma (Jan. 21, 2014) ¶¶ 2 &10.

[93] 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.

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

[95] Declaration of Christopher A. Roper, Director Quapaw Services Authority (Jan. 21, 2014) ¶¶ 2-6.

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.[96]

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

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

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[96] *Id.* ¶¶ 3 & 4.

[97] 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.

[98] *Id.*

[99] Letter from John Berrey to Tracie Stevens, *supra* at 2.

protection and preservation of the Tribe's historical and cultural sites within the Quapaw Strip trust tract.[100]

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.[101] 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

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[100] 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.

[101] 25 C.F.R. § 292.4(b)(2).

members) where Section 13 is located.[102] 1,857 tribal members live in Oklahoma.[103]

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.[104] 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

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[102] Declaration of Cathy Daugherty, Director, Enrollment Deparment, 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.

[103] 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.

[104] 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.

members) live within Cherokee County, Kansas next to the portion of the historic reservation in Kansas.[105]

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.[106] The reservation was ultimately ceded by treaty to the United States in 1867.[107] The Department of the Interior Bureau of Land

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[105] Declaration of Juanita A. Huntzinger, Paralegal, Conner & Winters LLP (Jan. 20, 2014) ¶ 4.

[106] 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...").

[107] See *supra* note 63.

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."[108] 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.

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[108] 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).

Sincerely,

/s/Eric N. Shepard
Eric N. Shepard
Acting General Counsel

APPENDIX D

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Miami Agency
Post Office Box 391
Miami, Oklahoma 74355

IN REPLY REFER TO: JUN 08 2012

Real Estate Services

CERTIFIED MAIL -RETURN RECEIPT REQUESTED

Honorable John Berrey
Chairman, Quapaw Tribe of Indians, Oklahoma
P.O. Box 765
Quapaw, Oklahoma 74363

Dear Chairman Berrey:

This is the decision of the Bureau of Indian Affairs (Bureau), Eastern Oklahoma Region, Miami Agency (Agency), on the fee-to-trust acquisition request for the Quapaw Tribe of Indians, Oklahoma, also known as Quapaw Tribe of Oklahoma (O-Gah-Pah), (Tribe) for 123.79 acres, more or less, located in Cherokee County, Kansas, Oklahoma, known as the "Downstream Parking Lot", described as follows:

> 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. (Formerly known as the South Twenty-Seven (27) Acres of U.S. Government Lot Seven (7), Section 12, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 1869 U.S. Government 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. (Formerly known as part of the U.S. Government Lots 1 and 3, and all of U.S. Government Lot 2, Section 13, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 1869 U.S. Government 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.

Based on the following analysis, it is the Bureau's decision to approve the trust acquisition request, provided all updated documents are submitted for closing and nothing has been filed of record or construction performed which would prevent closing.

The determination to acquire property in trust is made in the exercise of discretionary authority that is vested in the Secretary of the Interior (Secretary) and delegated to this office. The request was evaluated in accordance with the regulations contained in Title 25, Code of Federal Regulations, part 151 (25 CFR 151),

Land Acquisitions. The Bureau's evaluation of the request is as follows:

I. §151.3-Land acquisition policy.

Land may be acquired in trust by the United States Government for Indians and Tribes only where there is statutory authority to do so. Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S. C. 465), as amended, authorizes the Secretary to acquire land in trust for Indians. Section 2202 of the Indian Land Consolidation Act (ILCA) (96 Stat. 2517; P.L. 97-459) makes Section 5 of the Act of June 18, 1934 applicable to all Tribes.

25 CFR 151.3(a) states that land may be acquired in trust for a Tribe when (1) the land is located within the exterior boundaries of the Tribe's reservation or adjacent thereto, or within a Tribal consolidation area; or (2) when the Tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate Tribal self determination, economic development, or Indian housing.

By Tribal Resolution No. 013112, the Quapaw Tribe of Indians, Oklahoma requested the fee-to-trust acquisition of 123.79 acres located in Section 12, Township 35 South, Range 25 East, Cherokee County, Kansas. The above described property is adjacent and contiguous to the former, historic reservation boundaries of the Tribe. The Bureau finds that the request falls within § 151.3 (a)(1), (2) and (3), and there is statutory and regulatory authority to acquire land in trust for the Tribe.

2. § 151.4 – Acquisitions in Trust of Lands Owned in Fee by an Indian is not applicable to this request.

3. §151.5 – Trust acquisitions in Oklahoma under Section 5 of the I.R.A.

The proposed property to be acquired in trust is located in the state of Kansas, contiguous and adjacent to land owned by the United States of America in Trust for the Tribe, and contiguous to the former, historic reservation of the Tribe. Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 465), as amended, authorizes the Secretary to acquire land in trust for Indians. Section 2202 of ILCA (96 Stat. 2517; *P.L. 97-459)* makes Section 5 of the Act of June 18, 1934 applicable to all Tribes. The Bureau finds that this authority is applicable to the proposed acquisition.

4. §151.6 – Exchanges is not applicable to this request.

5. § 151.7 – Acquisitions of fractional interests is not applicable to this request.

6. § 151.8 Tribal consent for non-member acquisitions is not applicable to this request.

7. § 151.9 – Request for approval of acquisitions

By Tribal Resolution No. 013112, the Tribe submitted a written request and accompanying documentation for an acquisition of land to be held in trust by the United States Government for its benefit. The property consists of 123.79 acres located in Cherokee County, Kansas. It is currently owned in fee by the Tribe and the request states that the acquisition will be utilized for parking for the Downstream Casino Resort.

8. § 151.10 – On-reservation acquisitions

The proposed acquisition is located in Cherokee County, Kansas, immediately North and contiguous to the former, historic reservation boundaries of the Tribe as defined by the Secretary, and contiguous and adjacent to land owned by the United States of America in Trust for the Tribe. The acquisition is not mandated by legislation. The Bureau finds that this request adequately meets the definition of an on-reservation acquisition.

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority.

Land may be acquired in trust by the United States Government for Tribes when there is statutory authority to do so. Authority for the proposed acquisition is contained in Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 465) which authorizes the Secretary, in his discretion, to acquire through "purchase, any interest in lands, within or without existing reservations," for the purpose of providing land for Indians. Section 2202 of ILCA (96 Stat. 2517; *P.L. 97-459)* makes Section 5 of the Act of June 18, 1934 applicable to all Tribes. The Bureau finds that there is statutory authority to acquire land in trust for the Quapaw Tribe of Indians, Oklahoma and the proposed acquisition request is included within the scope of 25 U.S.C. 465.

(b) The need of the Tribe for additional land.

The Quapaw Tribe of Indians, Oklahoma owns a total of approximately 1,300 acres of land in Ottawa County, Oklahoma that is held in restricted status or by the United States of America in Trust for the Tribe. The

Tribe stated the need for additional trust land is required to expand the Tribe's land base to accommodate future growth and economic development, and social and economic advancement of the Tribe's citizenry and the achievement of self-sufficiency.

(c) The purposes for which the land will be used.

Per the Tribe's application, there will be no change in land use. Currently a parking lot exists on Section 13 and the Tribe will continue to use the land for that purposes. Section 12 is primarily agricultural and there are no plans for development of the property at this time. The purposes stated would not conflict with existing zoning and use patterns for the area or with state or Federal law. The Bureau finds that this request adequately describes the purpose for which the land will be used.

(d) The Bureau finds this section is not applicable.

(e) If the land to be acquired is in unrestricted fee status, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls.

The Tribe currently owns this land in fee simple. Comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments were solicited from the state and local political subdivisions. By correspondence dated February 3, 2012, the Cherokee County and state officials were contacted for their comments.

On March 6, 2012, the Agency received correspondence, dated March 5, 2012, from Mr. Stephen Phillips, Assistant Attorney General, State of Kansas, Office of the Attorney General (State), providing the amount of property taxes for the county and state and objecting to the acquisition based on the concern that this property would be used for expanded gaming operation. The Resolution submitted by the Tribe, certified on January 31, 2012, states that the property is already developed and is being used as parking for the Downstream Casino Resort. The Tribe also submitted an Executive Summary of its Application wherein it states there will be no change in land use. Currently a parking lot exists on Section 13 and the tribe will continue use of the land for this purpose and Section 12 is primarily agricultural and there are no plans for development of this property at this time.

The State also objected regarding the reference in the notice to 25 CFR 151.10 for "on-reservation" acquisitions and the subject tract is adjacent to trust land. Title 25 CFR, Part 151.10 provides that the Secretary will consider certain criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and Part 151.3 (a) (1) provides for property located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area. The proposed acquisition is for property contiguous and adjacent to the historic reservation boundaries of the Tribe as defined by the Secretary, and contiguous and adjacent to land owned by the United States of America in Trust for the Tribe.

Further, the State objected that it had not received a copy of the Tribe's application and in connection therewith, submitted a Freedom of Information Act (FOIA) request. In compliance with such FOIA request, the Bureau provided a copy of the Tribe's application package to the State on March 26, 2012.

On March 7, 2012, the Agency received correspondence, via facsimile, dated March 7, 2012, from Mr. Kevin Cure, Attorney at Law, for the Board of County Commissioners of Cherokee County, Kansas, (Commissioners) wherein the Commissioners concurred with the State's statements and further states there were no known Cherokee County, Kansas special assessments or applicable zoning to the subject property. Thereafter, on April 16, 2012, the Agency received undated correspondence from Mr. Cure stating it was in the County's best interests to withdraw their prior letter of opposition, and rescinded the Commissioners' opposition.

On March 19, 2012, the Agency received correspondence, dated March 16, 2012, from Mr. Todd Berry, Superintendent, Riverton USD 404 Schools, Unified School District No. 404 (School.) Mr. Berry stated the School did not oppose the Tribe's request.

On March 23, 2012, the Agency received correspondence, dated March 21, 2012, in support of the Tribe's application, from Mr. Steve Richards, identified as a property owner, resident and a businessman in the area.

On March 28, 2012, the Agency received correspondence, dated March 8, 2012, in support of the Tribe's application, from Mr. Samuel E. Snow, Mr.

Wayne Smith, Mr. and Mrs. John and Rita Patrick, Mr. Roger A. Patrick, Mr. Ron Upton, Mr. Rocky Brock, Ms. Alicia Tinsley, Mr. Jonathan Tinsley, Ms. Kimberly Brown, Mr. Sean Mathews and Mr. James Coveilius, identified as adjacent land owners.

On March 29, 2012, the Agency received correspondence, dated March 27, 2012, from Mr. Dale Oglesby, Mayor, City of Galena, Kansas (Mayor.) The Mayor expressed his support for the application submitted by the Tribe.

Real property in Kansas is subject to state ad valorem taxes, which is collected by the respective counties to fund a variety of countywide services. The largest share goes to the local school districts. The subject property is currently carried on the Cherokee County Assessor's rolls as taxable. There are no special assessments or outstanding tax assessments. Property taxes are not the sole source of county support. The 2011 ad valorem taxes paid for the property identified in the proposed acquisition were $46,051.11. Fire and ambulance services for the property are currently provided by the Quapaw Tribe and the Quapaw Tribal Police will provide law enforcement. No negative impacts from the loss of the property tax revenue were identified by the aforementioned officials.

(f) Jurisdictional problems and potential conflicts of land use which may arise.

The subject property is located within Cherokee County, Kansas. By correspondence dated February 3, 2012, the Cherokee County Treasurer, Cherokee County Assessor, Oklahoma Tax Commission, Cherokee County Sheriff, Board of County

Commissioners, and the Governor of Oklahoma were contacted for comments on the proposed acquisition. Responses were received from the State and Commissioners, as well as correspondence from the School, Mayor, and individuals: Mr. Samuel E. Snow, Mr. Wayne Smith, Mr. and Mrs. John and Rita Patrick, Mr. Roger A. Patrick, Mr. Ron Upton, Mr. Rocky Brock, Ms. Alicia Tinsley, Mr. Jonathan Tinsley, Ms. Kimberly Brown, Mr. Sean Mathews, Mr. James Coveilius and Mr. Steve Richards, all as set forth in paragraph (e) above. The information provided did not identify any jurisdictional problems and potential conflicts of land use as a result of the United States approving the acquisition of the property. The Bureau did not identify any jurisdictional problems or potential conflicts.

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The land proposed for trust acquisition is located contiguous to the jurisdictional boundaries of the Eastern Oklahoma Region. The Quapaw Tribe of Indians, Oklahoma is responsible for the administration of the realty program functions associated with the management of trust lands formerly provided by the Bureau's Miami Agency through a self governance compact pursuant to 25 U.S.C. 458aa, et seq. Technical assistance and realty services are provided by the Miami Agency. Law enforcement services within the proposed acquisition area are provided by Cherokee County and the Quapaw Police. The Bureau finds that adequate resources are available to assume the additional responsibilities

resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act (NEPA) Revised Implementing Procedures, and 602 DM2, Land Acquisitions: Hazardous Substances Determinations.

The proposed fee-to-trust acquisition qualifies for a categorical exclusion. The Environmental Site Assessment (ESA) submitted by the Tribe states there would not be future development of the 123.79 acre tract, and the current land use will remain unchanged. The Region finds that the ESA was prepared in accordance with the American Society for Testing and Materials Standard Practice for Environmental Site Assessments and no recognized environmental conditions were identified. The Bureau finds that the Tribe has met this requirement.

The Bureau's evaluation of the request and supporting documents illustrated that there is regulatory and statutory authority for the acquisition of the property in trust. The property is located contiguous to the former, historic Tribe reservation for a purpose that is not illegal or in conflict with existing land use. The loss of property taxes will be minimal and will not result in a loss of or diminished level of services currently being provided by the County. The Bureau did not identify any potential conflicts of land use or jurisdictional issues. The Tribe submitted the environmental documents required for the Secretary to comply with NEPA and Hazardous Substances Determinations for land acquisitions. Based upon the above findings, the

Bureau has determined that the acquisition will be approved.

This decision may be appealed to the Regional Director, Eastern Oklahoma Region, Bureau of Indian Affairs, in accordance with the regulations in 25 CFR Part 2 (copy enclosed.) Your notice of appeal must be filed with the Agency within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. Your notice of appeal should clearly identify the decision being appealed. If possible, attach a copy of the decision. The notice and the envelope in which it is mailed should be clearly labeled "Notice of Appeal." Your notice of appeal must list the names and addresses of the interested parties known to you and must certify that you have sent copies of the notice to these parties. You must also send a copy of the notice of appeal to the Regional Director, P.O. Box 8002, Muskogee, Oklahoma 74402-8002. If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal. If the notice of appeal is not timely filed, this decision will become final for the Department of the Interior at the expiration of the 30-day appeal period. No extension of time can be granted for the filing of the notice of appeal.

If you have any questions, please contact Ms. Mary King, Deputy Superintendent-Trust Services, at (918) 542-3396, or the above address.

Respectfully,

/s/Paul Yates

Superintendent

Enclosure

cc: Honorable Sam Brownback
Governor, State of Kansas

Mr. Richard Hildebrand
Chairman, Board of County Commissioners
Cherokee County, Kansas

Mr. Nick Jordan
Secretary of Revenue, State of Kansas

Ms. Nancy Herrenbruck
Assessor, Cherokee County, Kansas

Ms. Juanita Hodgson
Treasurer, Cherokee County, Kansas

Mr. David Groves
Sheriff, Cherokee County, Kansas

(All above Certified Mail, Return Receipt Requested)

Mr. Dale Oglesby
Mayor, City of Galena, Kansas

Mr. Todd Berry
Superintendent, Unified School District No. 404

Mr. Kevin Cure
Attorney at Law, Cure Law Office

Mr. Samuel E. Snow

Mr. Wayne Smith

Mr. and Mrs. John and Rita Patrick

Mr. Robert Patrick

Mr. Ron Upton

Mr. Rocky Brock

Ms. Alicia Tinsley

Mr. Jonathan Tinsley

Ms. Kimberly Brown

Mr. Sean Mathews

Mr. James Coveilius

Mr. Steve Richards

Mr. Trenton Stand
Director of Realty/Trust Services
Quapaw Tribe of Indians, Oklahoma

APPENDIX E

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Miami Agency
Post Office Box 391
Miami, Oklahoma 74355

IN REPLY REFER TO: FEB 3 2012

Real Estate Services

CERTIFIED MAIL -RETURN RECEIPT REQUESTED

Honorable Sam Brownback
Governor, State of Kansas
Capitol, 300 SW 10th Ave., Ste 241S
Topeka, Kansas 6612-1590

Re: NOTICE OF (NON-GAMING) LAND ACQUISITION APPLICATION

Dear Governor Brownback:

Pursuant to the Code of Federal Regulations, Title 25, Indians, Part 151.10, notice is given of the application filed by the Quapaw Tribe of Indians, Oklahoma (Tribe), with the Bureau of Indian Affairs, Eastern Oklahoma Region, Miami Agency (Agency), to have real property accepted "in trust" for the Tribe by the United States of America. The determination whether to acquire this property "in trust" will be made in the

exercise of discretionary authority which is vested in the Secretary of the Interior, or his authorized representative, U.S. Department of the Interior. To assist the Secretary in the exercise of that discretion, comments are invited on the proposed acquisition. In order for the Secretary to assess the impact of the removal of the subject property from the tax rolls, and, where applicable, request that the following information be provided:

(1) If known, the annual amount of property taxes currently levied on the subject property allocated to your organization;

(2) Any special assessments, and amounts thereof, that are currently assessed against the property in support of your organization;

(3) Any governmental services that are currently provided to the property by your organization; and

(4) If subject to zoning, how the intended use is consistent, or inconsistent, with the zoning.

The following information is provided regarding this application.

Applicant:

Quapaw Tribe of Indians, Oklahoma

Legal Land Description/Site Location:

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. (Formerly

known as the South Twenty-Seven (27) Acres of Government Lot Seven (7), Section 12, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 1869 U.S. Government 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. (Formerly known as Government Lots 1 and 3, and all of U.S. Government Lot 2, Section 13, Township 35 South, Range 25 East of the Sixth Principal Meridian, Cherokee County, Kansas, according to the 1869 U.S. Government 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.

Project Description/Proposed Land Use:

The property is commonly identified as the "Downstream Parking Lot". A portion of the property is currently an existing parking lot and the Tribe plans to continue with that use. A portion of the property is primarily agricultural and there are no plans for development of this property at this time. Therefore, there is no expected change in use of the property at this time.

As indicated above, the purpose for seeking your comments regarding the proposed trust land acquisition is to obtain sufficient data that would enable an analysis of the potential impact on local/state government, which may result from the removal of the subject property from the tax roll and local jurisdiction.

This notice does not constitute, or replace, a notice that might be issued for the purpose of compliance with the National Environmental Policy Act (NEPA) of 1969.

Your written comments should be addressed to the Agency at P.O. Box 391, Miami, Oklahoma 74346. Any comments received within thirty days of your receipt of this notice will be considered and made a part of the record. You may be granted one thirty day extension of time to furnish comments, provided you submit a written justification requesting such an extension within thirty days of receipt of this letter. Additionally, copies of all comments will be provided to the applicant for a response. You will be notified o the decision to approve or deny the application.

If any party receiving this notice is aware of additional governmental entities that may be affected by the subject acquisition, please forward a copy to said party.

A copy of the application, excluding any documentation exempted under the Freedom of Information Act, is available for review at the Agency. A request to make an appointment to review the application, or questions regarding the application, may be directed to Ms. Mary King, Agency Deputy Superintendent-Trust Services at (918) 542-3396.

Respectfully,

/s/Paul Yates

Superintendent

APPENDIX F

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

April 25, 2011

Honorable Sam Brownback
Governor of Kansas
300 SW 10th AVE Ste 241
S Topeka, Kansas 66612-1590

Dear Governor Parkinson:

NOTICE OF (GAMING) LAND ACQUISITION APPLICATION

Pursuant to the Code of Federal Regulations, Title 25, INDIANS, Part 151.10, notice is given of the application filed by the Quapaw Tribe of Oklahoma to have real property accepted "in trust" for said applicant by the United States of America. The determination whether to acquire this property "in trust" will be made in the exercise of discretionary authority which is vested in the Secretary of the Interior, or his authorized representative, U.S. Department of the Interior (DOI). To assist the DOI in the exercise of that discretion, we invite your comments on the proposed acquisition. In order for the Secretary to assess the impact of the removal of the subject property from the tax rolls; and, if applicable to your organization, The

Quapaw Tribe of Oklahoma also requests that you provide the following information:

1. If known, the annual amount of property taxes currently levied on the subject property allocated to your organization;

2. Any special assessments, and amounts thereof, that are currently assessed against the property in support of your organization;

3. Any governmental services that are currently provided to the property by your organization; and if subject to zoning, how the intended use is consistent, or inconsistent, with the zoning.

Each party notified of this application for trust status will have thirty (30) days to provide a written response

The following information is provided regarding this application:

Applicant: Quapaw Tribe of Oklahoma. The subject property is located on lands formerly reserved for the Quapaw Indians from 1834 until the tribe moved to Oklahoma in 1867. The land is contiguous to property that is owned USA in Trust for the Quapaw Tribe of Oklahoma.

Project Description/Proposed Land Use: The property is to be used for additional parking for the Downstream Resort/Casino.

Legal Description: Total area contains 123.831 acres, more or less. Except any part taken or deeded for roads. Subject to any easements or restrictions of record.

[See Attached Survey and Legal Description]

This notice does not constitute, or replace, a notice that might be issued for the purpose of compliance with the National Environmental Policy Act of 1969.

Should there be additional questions, please contact this office.

Respectfully,

(SGD) Darla J. Yocham

Darla J. Yocham
Director or Realty/Trust Services

Cc: Mr. Ron Estes, Kansas State Treasurer, 900 SW Jackson, Suite 201, Topeka, Kansas, 66612-1235; Ms. Juanita Hodgson, Cherokee County Treasurer, PO Box 149, Columbus, Kansas 66725; Mr. Steve Norman, Cherokee County Sheriff, PO Box 479, Columbus, Kansas 66725; Assessor/Appraiser, Cherokee County Appraiser's Office, 110 West Maple St., 37, Columbus, KS 66725, Phone (620)429-3984