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To: Phil Hogen

Date: 6-16-08

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 # Pages (Including cover sheet) 6

Subject: letter as requested and DOB indicated on fax.

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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPL REPER TO:

JUN 13 2008

Honorable Phillip N. Hogen
Chairman, National Indian Gaming Commission
1441 L St., NW
Suite 9100
Washington, DC 20005

Dear Chairman Hogen:

I am writing in regard to your May 19, 2008 letter to former Assistant Secretary – Indian Affairs Carl Artman and Deputy Associate Solicitor, Division of Indian Affairs, Edith Blackwell enclosing your May 19, 2008 Indian lands opinion for the Poarch Band of Creek Indians, which purports to recognize the Band's right to game on the Tallapoosa Site in Alabama. In the letter, you informed Mr. Artman and Ms. Blackwell that you were issuing the Indian lands opinion despite the fact that your Office of General Counsel (OGC) and the Solicitor's Office Division of Indian Affairs (DIA) had not reached agreement on whether the Tallapoosa Site is restored lands and thus covered by an exception to the general prohibition on gaming on lands acquired after October 17, 1988.

On January 14, 2008, the Deputy Associate Solicitor provided your Acting General Counsel with a letter of non-concurrence in the National Indian Gaming Commission's (NIGC's) draft Indian lands opinion. The January 14, 2008 letter provided specific details as to why DIA disagreed with the draft opinion. The non-concurrence focused on the restored tribe analysis. Generally, DIA does not believe that the Poarch Creek Band ever had a government-to-government relationship with the United States until it was acknowledged through the Part 83 process in 1983. The Deputy Associate Solicitor concluded that the record simply does not support the Band's existence as a separate tribal entity with a governmental relationship with the United States, nor does it support that the United States terminated this governmental relationship. The Deputy Associate Solicitor also questioned the Band's relationship with the Creek burial grounds located at the Tallapoosa Site. Your May 19, 2008 opinion does not address any of the concerns raised in our January 14, 2008 letter.

Given that the legal conclusions reached by OGC are inconsistent with the legal views of the Office of the Solicitor, and that, as discussed below, NIGC has no statutory mandate to issue Indian lands opinions independently, the Secretary has directed me to inform you that he is invoking his authority referenced in 43 C.F.R. § 4.5 to review your decision and has asked me to assist him in that review. Accordingly, in accordance with 43 C.F.R. § 4.5(c), please provide me with the administrative record supporting your May 19, 2008

decision. Pending this review, you may not take any further action to implement your May 19, 2008 decision.

I understand that the matter concerning the Poarch Creek Band first arose in November 2003, when the Assistant Attorney General for the State of Alabama questioned the Band's gaming activities on three parcels. From what I understand, NIGC reviewed two of those parcels and determined that they met the initial reservation exception in 25 U.S.C. § 2719(b)(1)(B)(ii). The third gaming location, the Tallapoosa Site, remained at issue, however, because the land was taken into trust in 1995 and is not within the Band's initial reservation. The Band has continued its gaming operation on the Tallapoosa Site during the pendency of NIGC's review.

While the request from the Assistant Attorney General came to NIGC in November 2003, it was not until January 2006 that the DIA received OGC's first draft of its Poarch Creek Indian lands opinion. Attorneys in DIA expressed their concern with the Poarch draft as early as February 2006. OGC attorneys and DIA attorneys met in May, October, and December 2006 to discuss DIA's concerns with the draft opinion. After the December 12, 2006 meeting, OGC agreed to revise the January 2006 draft opinion. DIA attorneys and OGC attorneys met together with the Tribe on March 13, 2007 to discuss the unresolved issues. On March 26, 2007, the Band's attorneys provided OGC and DIA with their response to the restored lands issues raised at the March 13 meeting. It was not until September 24, 2007 that OGC provided DIA with a revised draft dated July 18, 2007.

After receipt of the July 18, 2007 draft, attorneys in OGC and DIA tried to reach consensus on the legal position. On December 27, 2007, OGC notified DIA that it wanted DIA's response prior to December 31, 2007. On January 3, 2008, the Deputy Associate Solicitor sent OGC a short letter expressing DIA's non-concurrence with the July 18, 2007 draft. On January 7, 2008, you, the Deputy Solicitor, and attorneys from OGC and DIA met via a conference call to discuss the unresolved issues. At that time, OGC requested a detailed written non-concurrence.

On January 14, 2008, the Deputy Associate Solicitor provided a six-page letter that detailed most of the rationale for the non-concurrence to OGC's July 18, 2007 opinion. Since its receipt of the January 14, 2008 letter, OGC has made no efforts to resolve the issues raised by DIA. As previously noted, the May 19, 2008 opinion you signed made no reference to the concerns raised in the January 14, 2008 letter.

Generally, the Office of the Solicitor and the OGC have worked cooperatively on Indian lands opinions since the inception of your Office of General Counsel. In March 2000, the cooperative process was memorialized in a Memorandum of Understanding signed by the Associate Solicitor, DIA and General Counsel, NIGC. In 2006, it became apparent that a new Memorandum of Understanding needed to be negotiated. I signed a Memorandum of Agreement (MOA) on May 31, 2006, for a six-month period. That agreement was renewed in February 2007 for another six-month term. While it expired in August 2007 and has not been renewed, OGC and DIA have both expressed a willingness to continue

to abide by its terms. Inexplicably, the NIGC took no steps after receiving the January 14, 2008 non-concurrence to attempt to follow the MOA's process fot resolution of non-concurrence issues. For example, no effort was made to have further discussions with DIA or senior Solicitor's Office officials, including discussions whether to refer the matter to the Office of Legal Counsel, as was expressly provided in the MOA.

Generally, when OGC attempts to draft an Indian lands opinion, it typically writes a broad and wide-ranging opinion that touches on issues not unique to gaming. NIGC Indian lands opinions discuss a tribe's jurisdiction over lands, a tribe's governmental authority, the boundaries of a tribe's reservation, and the history of a tribe. In NIGC's Indian lands opinion regarding the restored land for a restored tribe exception, OGC extensively delves into the history of the tribe's relationship with the United States, especially with the Secretary of the Interior. OGC also looks at the history of the tribe's occupation of certain lands and communications between the Department of the Interior and the tribe. DIA has in the past questioned the need for delving into such issues that are not specific to gaming. While the Solicitor's Office and OGC have reached consensus on all Indian lands opinions prior to the Poarch Creek decision, it has not been without controversy. DIA has on several occasions agreed with NIGC's conclusions but not with its analysis. For the Poarch Creek decision, as the January 14, 2008 letter sets out, my Office did not agree that the Poarch Creek Band is a restored tribe for Indian Gaming Regulatory Act (IGRA) purposes.

As the chief legal officer for the Department of the Interior, it is incumbent on me to ensure that all legal opinions are consistent and sound. Nothing in IGRA changes my role as the principal legal adviser to the Secretary and the chief legal officer of the Department. Congress expressly placed the NIGC "within the Department of the Interior."[1] It is my responsibility to supervise the legal work of the Department.[2]

What is at issue is only the Poarch Creek Band's Indian lands opinion and the prospective drafting, review, and approval of Indian lands opinions.[3] The Department is not seeking to review previously issued NIGC Indian lands opinions through this process. In addition, DIA and OGC worked together to draft language in the 25 C.F.R. Part 292 regulations that provided that the regulations do not apply to final agency actions based on legal opinions issued prior to the effective date of the regulations. Nor is the Department calling into question the overall good work of the NIGC. NIGC's role in the regulation of Indian gaming has been and will continue to be positive and important. The Secretary has no desire to intrude in NIGC's statutory role for the regulation of Indian gaming.

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[1] 25 U.S.C. § 2704(a).

[2] *See* 109 DM 3.1; 110 DM 2.2; 209 DM 3.

[3] My Office defines Indian lands opinions as legal opinions that analyze whether gaming is authorized on particular lands. These include opinions on whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292.

However, IGRA does not vest all authority for Indian gaming in one entity. IGRA is not an example of a statute that transferred all responsibility out of the Department. The scope and parameters of the NIGC's power are established and limited by the language of IGRA, the NIGC's sole source of statutory authority. In the purpose section of IGRA,[4] Congress clearly stated its intent to establish the NIGC as a commission to regulate Indian gaming. However, the scope of the power granted to the NIGC is not determined by the ultimate purpose of regulating Indian gaming. Rather, the scope of the NIGC's power is based upon the specific means prescribed by Congress to achieve that ultimate purpose.[5] IGRA sets out in detail the specific means to be employed by the NIGC to carry out its discrete powers to issue orders of temporary closure of gaming activities; levy and collect civil fines; approve tribal ordinances or resolutions; approve management contracts for Class II and Class III gaming;[6] and monitor, inspect, and examine Class II gaming activities.[7]

IGRA grants authority over other aspects of Indian gaming to the Secretary, Indian tribes, and the States. Therefore, it is evident from the plain language of IGRA that, although Congress established the NIGC as a commission for the purpose of regulating Indian gaming, it did not grant the NIGC the power to regulate, interpret, or decide all aspects of Indian gaming or matters related to Indian gaming.

As with the NIGC, it is clear that Congress did not grant the Secretary the power to regulate, interpret, or decide all aspects of Indian gaming. The Secretary has limited authority over those aspects of gaming that are assigned by IGRA to the NIGC, Indian tribes, or the States. Unlike the NIGC, the Secretary has authority for Indian gaming matters and matters related to Indian gaming that are not expressly assigned to any entity under IGRA. This authority is based upon statutes other than IGRA that give the Secretary broad authority to manage matters of Indian affairs and implement the laws governing Indians, and specific authority over Indian lands and tribal governments. Thus, the scope of the Secretary's authority is much broader than that of the NIGC and includes many general matters.

The authority of the NIGC is strictly limited to the discrete powers that are expressly assigned to it by Congress in IGRA. While it may interpret the statute and fill gaps with respect to its specific powers, the NIGC has no general authority over the regulation of Indian gaming based on the ultimate purpose of its authorizing statute. By contrast, the scope of the Secretary's authority extends broadly to most matters of Indian affairs and includes implementing many of the laws governing relations with tribes and individual Indians. Moreover, based on longstanding and specific authority under the Indian Reorganization Act and other generally applicable Indian law, the Secretary has the specific authority and subject matter expertise to decide issues concerning Indian lands and tribal jurisdiction. Thus, it is the Secretary, not the NIGC, who has the implicit authority to interpret any ambiguities and fill any gaps in IGRA, particularly with respect

[4] 25 U.S.C. § 2702(4).
[5] *See MCI v. AT&T Co.*, 512 U.S. 218, 231 (1994).
[6] 25 U.S.C. § 2705(a).
[7] 25 U.S.C. § 2706(b).

to ambiguities or gaps that concern what constitutes Indian lands and the scope of tribal jurisdiction.

Indian lands opinions are by definition legal opinions that analyze whether lands are eligible for gaming. Indian lands opinions include issues such as whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292. Resolution of these questions has not been delegated to the NIGC. Moreover, resolution of these issues relies on the particular expertise of the Solicitor's Office regarding overall Indian issues and not just Indian gaming concerns.

I am sending a copy of this letter to all parties copied on your May 19, 2008 opinion.

Sincerely,

David L. Bernhardt
Solicitor

cc: Buford L. Rolin, Tribal Chairman
William Perry, Sonosky, Chambers, Sachse, Endreson, & Perry
Cindy Altimus, Region Director
Troy King, Attorney General, State of Alabama