July 30, 2008

David L. Bernhardt, Solicitor
United States Department of the Interior
Office of the Solicitor
Mail Stop 6352
Washington, DC 20240

Dear Mr. Bernhardt:

We received your June 13, 2008 letter that seeks to review the National Indian Gaming Commission (NIGC or Commission) Chairman's decision to continue regulating the Poarch Band of Creek Indians' (Tribe) gaming facility in Tallapoosa, Alabama. You also request a copy of the administrative record on which the Chairman relied. We will provide the record to you as a matter of courtesy under separate cover. I respectfully and categorically reject, however, your assertions that the Secretary of the Interior (Secretary) has the authority to review and approve or disapprove the Chairman's decision. I also strongly disagree with your characterization of the respective authorities of the NIGC and the Secretary under the Indian Gaming Regulatory Act (IGRA).

Background

This matter began when the State of Alabama wrote to the NIGC expressing concern over the eligibility of the Tallapoosa site for gaming. *See* Letter from Jack Park, Assistant Attorney General for the State of Alabama to Penny Coleman, Acting General Counsel (Nov. 20, 2003). The Tribe operates a Class II gaming facility regulated by the NIGC. That regulation includes, among other things, conducting site visits to determine compliance with IGRA, processing fingerprints and reviewing background investigation reports for key employees and primary management officials, accepting fees for regulating, accepting and reviewing audit and agreed upon procedures reports, and providing such technical assistance as may be required.

Upon receipt of the State's inquiry, the Chairman reviewed the Tallapoosa site's status to determine its eligibility for gaming and whether an enforcement action might be necessary. To accomplish this review, NIGC sought records and documentation from the Department of the Interior (Department), particularly focusing on information the Department had relied on to recognize the Tribe and to acquire the Tallapoosa site into trust. Unfortunately, the Department was not able to timely comply with NIGC's record request. Therefore, the Commission's review was delayed. The factual record, which was ultimately compiled by NIGC, was extensive and included the Department's acknowledgement and land-into-trust records; Bureau of Indian Affairs' (BIA) land records; historical records, maps, archaeological reports; and other documentation from the Tribe.

That record reflects a long and difficult history. It establishes that the Poarch Band was a part of a large confederacy that was the historic Creek Nation, most of which was moved out of what is now the State of Alabama in the first half of the nineteenth century. Before the forced resettlement to the Indian Territory, ancestors of the Poarch Band allied with the United States to fight against the other Creeks. Thereafter, they were rewarded with land grants and were allowed to remain in Alabama. As a result of the forced resettlement,what was once the Creek Nation of Alabama now exists as the Poarch Band, the Muskogee (Creek) Nation in Oklahoma and certain recognized tribal towns.

The Tribe's government-to-government relationship with the United States ended under the terms of an 1832 treaty, which terminated United States' protection over the Tribes's lands in 1837. Subsequently, the United States specifically and repeatedly disclaimed any relationship with the Poarch Band. It was not until the Tribe was recognized under the Department of Interior's recognition regulations in 1984 did the Tribe once again enjoy a government-to-government relationship with the United States.

Because of the complexity of the issues presented by the Band's history, the Commission's review was careful, comprehensive, and included many discussions with the Office of the Solicitor, Division of Indian Affairs (Division). As the review progressed and issues were raised, both the Office of General Counsel (OGC) and the Division asked the Tribe to provide additional documentation and views to address these issues. Given the different views presented and the extensive factual record compiled, the OGC exercised great care in its restored lands analysis.

In the end, the OGC's last draft legal opinion sent to the Division supported a conclusion that the Tribe could conduct gaming on the Tallapoosa site. That opinion was based specifically on a theory recommended by the Department's attorneys. OGC was dismayed, therefore, when the same attorneys then refused to concur with the draft opinion. OGC requested the non-concurrence in writing.

In reviewing the non-concurrence, we determined that the Division's analysis failed for several reasons. The analysis (1) failed to remain consistent with previous interpretations of the Indian Gaming Regulatory Act; (2) failed to take into account the Indian canon of construction, which requires that an ambiguous statute must be interpreted in favor of tribes; (3) was inconsistent with case law that the NIGC cited in previous determinations; and (4) was contrary to case law because it recognized only Congressional termination and not administrative termination of the government-to-government relationship. We also realized that there were weaknesses in the General Counsel's draft and addressed those issues during the first few months of 2008. Regrettably, as we struggled with those weaknesses, we did not continue to collaborate as we developed our views.

During that time, we were advised by tribal representatives that the Commission's hesitation was adversely affecting the Tribe's business dealings. The Department of the Interior also indicated its intent to issue regulations governing the applicability of 25 U.S.C. § 2719 when the Secretary acquires lands into trust. Those regulations were not immediately effective, and the Chairman recognized that if he relied upon them, he might have to start the review process over again.

Therefore, because the Tribe had waited for over four years for the Commission's views and because the Chairman believed that he had a thoroughly researched and well-reasoned basis for a decision, the Chairman chose to issue his decision. Consequently, on May 19, 2008, the Chairman concluded that he would not take an enforcement action against the Tribe, and the Commission would continue to regulate the Tallapoosa Entertainment Center.

Additionally, I note that throughout your June 13, 2008 letter, you refer to the decision as an "opinion," suggesting that it was merely advisory and issued by the OGC. On the contrary, the May 19, 2008 letter was a decision by the Chairman pursuant to the enforcement authority granted to him under IGRA. 25 U.S.C. § 2713. As such, his decision is an agency action with legal effect. It is reviewable only by the Commission and the federal courts. Further, even if his May 19 decision had been an opinion of the OGC, the opinion would be reviewable only by the Chairman.

ANALYSIS

I. The Secretary's authority under IGRA is strictly limited.

Your statements that the "Secretary has authority for Indian matters and matters related to Indian gaming that are not expressly assigned to any entity under IGRA" and that the Secretary has the power to "fill any gaps in IGRA" ignore the plain and unambiguous language of IGRA. It is well settled that the proper interpretation of an unambiguous statute requires nothing else. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms".) (*quoting United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (*in turn quoting Caminetti v. United States,* 242 U.S. 470, 485 (1917)). Contrary to your claims, section 2709 of IGRA specifically and unambiguously transfers all of the Secretary's powers over gaming to the NIGC. 25 U.S.C. § 2709. Accordingly, the Secretary retains only those powers that he has been specifically delegated under IGRA.

Section 2709 states that the Secretary's general authority over gaming was expressly taken from him and given to the Commission:

> Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. . . .

This section is clear and unambiguous. The Secretary was able to exercise his authority over gaming until the Commission prescribed the bulk of its regulations in 1993. *See* 57 Fed. Reg. 12382 (April 9, 1992) and 58 Fed. Reg. 5802 (January 2, 1993). Consequently, any authority the Secretary may have had over gaming vested with the Commission by 1993.

To the same effect is section 2711(h), which removed from the Secretary the power to approve management contracts under 25 U.S.C. § 81 and vested it in the Commission:

> The authority of the Secretary under section 81 of this title [25 U.S.C. § 81], relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

25 U.S.C. § 2711(h).

Therefore, when Congress granted the Department authority under 25 U.S.C. § 2719(b)(1), it was not a general grant of authority. Rather, under § 2719, Congress granted the Secretary authority to act only in specifically delimited circumstances: to determine whether gaming on certain parcels may be in the best interest of an Indian tribe and not detrimental to the surrounding community, 25 U.S.C. § 2719(b)(1)(A); to identify the former reserves in Oklahoma 25 U.S.C. § 2719(a)(2)(A)(i); and to determine reservation status, 2002 Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). In the balance of IGRA, the Secretary's authority is limited to approving tribal revenue allocation plans so as to allow per capita payments from net gaming revenue, 25 U.S.C. § 2710(b)(3)(B); approval of tribal-state compacts, 25 U.S.C. § 2710(d)(8); and issuance of procedures in lieu of a tribal-state compact under specified conditions. 25 U.S.C. § 2710(d)(7)(B)(vii).

Contrary to your claim, it is the NIGC and not the Department that administers IGRA, and it is the NIGC and not the Department that fills any "gaps" that exist in IGRA. This, the courts have made abundantly clear, is why Congress delegated to the Commission and not to the Department the authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of IGRA. 25 U.S.C. § 2706(b)(10). "NIGC is the agency expressly charged by Congress with administering the IGRA" by virtue of 25 U.S.C. 2706(b)(10). *Citizens Against Casino Gambling in Erie County (CACGEC) v. Kempthorne*, 471 F. Supp. 2d 295, 321 (W.D.N.Y 2007). *See also*, *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003) ("NIGC's broad powers include inspecting tribes' books and records… levying and collecting civil fines, monitoring and shutting down unauthorized tribal games, and promulgating regulations and guidelines to implement IGRA."); *Shakopee Mdewakanton Sioux Community v. Hope*, 16 F.3d 261, 263 (8th Cir. 1994) ("IGRA established the Commission to regulate Indian gaming, and specifically authorized the Commission to promulgate regulations and guidelines necessary to implement the provisions of the Act."); *CACGEC*, 471 F. Supp. 2d at 322 (grant of rulemaking authority carries with it "the primary authority to interpret any ambiguous phrases or terms contained in the IGRA.").

What is more, NIGC's role as the administrator of IGRA carries with it the ability to make Indian lands determinations. *See, e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.*, 46 F. Supp. 2d 689, 707 (W.D. Mich. 1999) (the question of restored land is within the NIGC's "special competence."); *County of Amador, California v. United States DOI*, 2007 U.S. Dist. LEXIS 95715 at *17, n. 7 (E.D. Cal. Dec. 12, 2007) ("[O]utside the context of the trust application, NIGC retains the authority for determining whether the restored lands exception applies."); *CAGEC*, 471 F. Supp. 2d at 303 ("the Indian lands determination is one that

Congress placed in the NIGC's hands..."). As shown more fully below, the language of IGRA makes this so.[1]

II. Congress specifically delegated to the NIGC the authority to determine the status of Indian lands as part of its oversight of Indian gaming.

That NIGC is responsible for administering IGRA means, under IGRA's plain terms, that NIGC has oversight authority over Indian gaming. *Kansas v. United States*, 249 F.3d 1213, 1218 n. 1 (10th Cir. 2001) ("Although the NIGC is nominally part of ... Interior, Congress has given the NIGC exclusive authority to regulate Indian gaming conducted pursuant to IGRA"); For example, IGRA provides NIGC with the authority to monitor and inspect the premises on which gaming takes place. 25 U.S.C. § 2706(b)(1)-(2). Moreover, IGRA specifically requires the Chairman to review and approve tribal gaming ordinances that authorize gaming on Indian lands. 25 U.S.C. § 2710(b)(2) and (d)(1)(A). It also requires the Chairman to review and approve management contracts for tribal gaming operations. 25 U.S.C. § 2711. Further, IGRA permits the Chairman to take enforcement action against the operators of tribal gaming facilities that violate any section of IGRA, NIGC regulations, or approved tribal gaming ordinances. 25 U.S.C. § 2713; 25 C.F.R. parts 573 and 575. Appeals from the Chairman's actions are heard by the full Commission, which is authorized to hold hearings on appeal and to request all witnesses and documents needed to make its decision. 25 U.S.C. §§ 2715 and 2716; 25 C.F.R. parts 539 and 577; 25 U.S.C. §§ 2706(b)(4), (8), 2713(a)(2-3), and 2715(a) and (d). Finally, the Chairman's enforcement actions are reviewable only by the Commission or the courts. 25 U.S.C. §§ 2713(c), 2714.

That said, Indian gaming is only permissible on *Indian lands*, which IGRA defines as:

> All lands within the limits of an 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 subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703 (4). In other words, IGRA expressly provides for Indian gaming only where land qualifies as *Indian lands* under the Act. *See, e.g., State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) (finding that the Act's key provisions are limited to any Indian tribe having jurisdiction over Indian lands and to Indian lands within such tribe's jurisdiction). IGRA's "on Indian lands" requirement is integrally woven throughout the regulatory tapestry of the Act. 25 U.S.C. § 2710(a)(1-2), (b)(1), (d)(1), (d)(3)(A-B)(permitting Class II and Class III gaming *only* on Indian lands). As Congress established NIGC to oversee

---

[1] We do not mean to suggest, however, that the Secretary cannot decide the status of Indian lands under his own separate authority to acquire land into trust. *County of Amador*, 2007 US Lexis 95715 at *7-*8 ("While NIGC regulates gaming, DOI analyzed whether gaming would be permissible on the land, because, under regulations implementing Section 5 of the IRA, DOI must take into account the purpose for which the land will be used. 25 C.F.R. §151.11. This is not to suggest, however, that DOI's analysis is subsequently binding upon the NIGC.")

Indian gaming, the regulatory authority of the Chairman and the Commission may only be exercised on Indian lands.

As the agency head specifically tasked under the statute with the duty to monitor gaming, approve management contracts, approve ordinances, and take enforcement action, the Chairman must have the power to first determine the extent of his agency's jurisdiction. As that jurisdiction is necessarily coextensive with Indian lands, IGRA necessarily grants the Chairman the authority to make Indian lands determinations in the process of exercising these powers. It is beyond question that administrative agencies have the authority to determine their own jurisdiction prior to taking action. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 641-643 (1950) ("When investigative duties are delegated by statute to an administrative body, it . . . may . . . inform itself as to whether there is a probable violation of the law."); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 476 (7th Cir. 1999) (agency's determination of its own jurisdiction not entitled to *Chevron* deference upon judicial review).

Put slightly differently, where a statute vests an administrative agency with authority to oversee a particular industry or subject matter, it necessarily confers on that agency the authority to determine whether particular activities, actions or entities fall within its jurisdiction. *See, e.g., Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-509 (1943) (Secretary of Labor empowered to determine which employees and government contracts fall within Walsh-Healey Public Contracts Act, mandating minimum wages in government contracts and allowing sanctions for violations and non-compliance.); *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003) (whether sprinkler heads are "consumer products" within statutory jurisdiction of Consumer Products Safety Commission).

A. The NIGC Chairman has exclusive authority to make, and is required to make, an Indian lands determination when presented with a tribal gaming management contract.

Congress gave the NIGC Chairman the authority to review and approve gaming management contracts, 25 U.S.C. § 2711, which he is required to do before such a contract is valid. Again, in giving the Chairman this power, Congress stripped it from the Secretary. 25 U.S.C. § 2711(h).

Management contracts have certain submission and content requirements set forth in IGRA and NIGC regulations. 25 U.S.C. § 2711(a)-(c), (g); 25 C.F.R. §§ 531.1, 533.1, and 533.3. Among these requirements is that a management contract must relate to a specific gaming site that qualifies as Indian lands. To determine whether to approve a management contract, therefore, the Chairman must determine whether the desired gaming will occur on Indian lands that meet IGRA's requirements. 25 U.S.C. §§ 2703(4), 2719. To make this determination, the Chairman must conduct an Indian lands analysis prior to contract approval. In light of this, your suggestion that the Chairman must request land opinions from your office when reviewing a management contract is inconsistent with federal law.

In fact, the District Court of Kansas emphasized this point:

> The IGRA created the NIGC to, among other things, review management contracts for class II gaming.... Part of that responsibility included determining whether or not a tribe exercises governmental authority over the land on which it seeks to conduct gaming....

Miami Tribe of Oklahoma v United States, 927 F. Supp. 1414, 1423 (D. Kan. 1996).

The Ninth Circuit Court of Appeals echoed this sentiment in *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 902 (9th Cir. 2002), when it addressed the Chairman's approval of a management contract for a tribal telephone lottery:

> The NIGC is statutorily obliged to reject any lottery proposal that does not conform to IGRA . . . In fact, the NIGC has previously refused to approve management agreements when it believed the proposed gaming activity will not be conducted "on Indian lands" for IGRA purposes.

295 F.3d at 909 (*citing Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1218 (D. Kan. 1998)). Thus, the NIGC Chairman has the exclusive authority to determine Indian lands for the purpose of gaming when he reviews and approves management contracts.

B. The NIGC Chairman has exclusive authority to make, and is required to make, an Indian lands determination when presented with a site-specific tribal gaming ordinance.

Next, as with management contracts, Congress gave the Chairman the authority to review tribal gaming ordinances to determine whether they meet IGRA's requirements. The Chairman must approve an ordinance before it is valid. 25 U.S.C. §§ 2710(b)(2) and (d)(1)(A). While IGRA requires ordinances to include certain provisions, 25 U.S.C. § 2710(b)(2)-(4); 25 C.F.R. § 522.4, and parts 556 and 558, tribes often exercise their sovereign legislative powers and include additional provisions that are not mandated by IGRA. A common additional provision is a clause authorizing gaming on a specific parcel of land creating a so-called *site-specific ordinance*. To date, the Chairman has reviewed over 23 site-specific ordinances and continues to receive such requests for approval. The plain and unambiguous language of IGRA requires the Chairman to make an Indian lands determination when faced with a site-specific ordinance authorizing Class II gaming:

> The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that . . . .

25 U.S.C. § 2710(b)(2). By incorporating this language by reference for Class III gaming, IGRA requires this same determination for a site-specific Class III ordinances. 25 U.S.C. § 2710(d)(1)(A)(ii).

That is, IGRA only authorizes the Chairman to approve a site-specific ordinance if it authorizes gaming on *Indian lands*, as IGRA defines the term. Without confirmation that the site-specific ordinance authorizes gaming on Indian lands eligible for gaming, the Chairman would have to disapprove the ordinance. To approve an ordinance that specifically permitted gaming on ineligible lands would authorize a tribe to offer gaming that IGRA prohibits. *AT&T Corp.*, 295 F.3d at 908 ("the statutory framework suffices to demonstrate that the NIGC must consider the legality of Class III gaming before approving compacts, resolutions, ordinances, and management contracts . . . ").

Federal courts recognize the NIGC's authority to issue land opinions in connection with ordinance reviews:

> The NIGC is charged with interpreting and applying the IGRA to Indian lands for gaming. *See Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1422 (D. Kan. 1996) (holding that NIGC had the authority to determine whether particular lands were within the tribe's jurisdiction for purposes of determining whether they constituted "Indian lands" within the meaning of the statute).

Grand Traverse, 46 F. Supp. 2d at 707. Further, the District Court for the Western District of New York insisted that the Chairman must complete such a determination as part of his duties:

> Having fully considered the purpose and structure of the IGRA, and the authority delegated to the NIGC by Congress, this Court rejects Defendants' contention that the NIGC Chairman is not required to make "Indian lands" determinations when he acts on a tribal gaming ordinance. To the contrary, whether Indian gaming will occur on Indian lands is a threshold jurisdictional question that the NIGC must address on ordinance review to establish that: 1) gaming is permitted on the land in question under the IGRA, and 2) the NIGC will have regulatory and enforcement power over the gaming activities occurring on that land.

CACGEC, 471 F. Supp. 2d at 303. In fact, the court in *CACGEC* vacated the Chairman's ordinance approval because the Chairman did not make an Indian lands determination on a site-specific compact: "Because the Indian lands determination *is one that Congress placed in NIGC's hands*, the NIGC's 2002 ordinance approval is vacated . . . ." *Id.* at 303 (emphasis added).

The statutory obligation to review and approve site-specific ordinances grants the NIGC Chairman the exclusive authority in those instances to determine Indian lands for the purpose of gaming.

C. The NIGC Chairman has the exclusive authority to make, and is required to make, an Indian lands determination prior to the initiation of an enforcement action.

Lastly, Congress gave the Chairman authority to bring enforcement actions against any tribal gaming operator or manager that violates IGRA's provisions, NIGC regulations, or tribal gaming ordinances. 25 U.S.C. § 2713. To assist the Chairman in an enforcement investigation, the Commission may use its power to request witnesses and documents and issue subpoenas. 25 U.S.C. § 2715(a). Additionally, the Commission may order depositions with proper notice to the parties. 25 U.S.C. § 2715(d). For violations of IGRA, the Chairman may assess civil fines of up to $25,000 per day or closure of all or part of a gaming operation. 25 U.S.C. § 2713(a)-(b).

IGRA's specific language is:

> The Chairman shall have the authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordnances, or resolutions approved under section 2710 and 2712 of this title.

25 U.S.C. § 2713(a).

The Chairman may only bring enforcement actions against those operations that come within the Commission's jurisdiction, and as explained above, the Commission's jurisdiction extends only to Indian lands. Accordingly, the Chairman must have the ability to determine whether the operations are on Indian lands in order to be able to bring an enforcement action in the first place.

Once again, courts recognize this. The District Court for the Western District of Washington recently held that "tribal gaming under IGRA must occur on 'Indian lands' and the NIGC is the agency charged with ensuring this happens." *North County Community Alliance v. Kempthorne*, No. C07-1098-JCC, slip op. at 14 (W.D. Wash. Nov. 16, 2007).

Again, then, the Chairman's statutory authority to bring enforcement actions for IGRA violations necessarily gives him the exclusive authority in those instances to determine Indian lands for the purpose of assessing his jurisdiction. For the same reasons, the Chairman also has exclusive authority to make an Indian lands determination as part of investigating whether a tribe is gaming on Indian lands where gaming is prohibited under IGRA. This was the essence of the Chairman's Poarch Band determination. He acted under the authority expressly granted to him under IGRA, 25 U.S.C. §§ 2705(a)(1)-(2), 2713(a), and responded to the State of Alabama's concern that the Tribe was gaming on lands in violation of IGRA. The Chairman issued a decision concluding that no enforcement action was warranted because the Tribe was gaming in compliance with IGRA. The Chairman's decision was squarely within this statutory enforcement authority.

III. Due to its status as an independent regulatory agency, the Secretary does not have the authority to order the NIGC to take actions on whether to regulate gaming

All of that said, the Secretary lacks the authority to oversee the Chairman's Poarch decision for other, equally sufficient reasons. NIGC's nominal placement "within" the Department of the Interior is insufficient to give the Secretary any authority over NIGC decisions. Congress, courts, and other federal agencies have all acknowledged NIGC as an independent agency. Your analysis ignores this. It also ignores IGRA's language and legislative history, case law that specifically addresses the NIGC's independence, the course of dealing between the Department and NIGC that treated the NIGC as independent, and the history of the treatment of the NIGC as independent by other offices of the Executive branch and the Congress.

A. The NIGC Meets All of the Characteristics of Independent Agencies

Justice Sutherland described the independent agency:

> [It is] a body of experts who shall gain experience by length of service — a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Humphrey's Ex'r v. United States, 295 U.S. 602, 624, 625-626 (1935) (internal citations omitted), cited in Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1112, 1113. (Fall 2000).

Numerous other law review articles and treatises have been written on the subject of independent agencies and their identifying characteristics. *See, e.g., Symposium: The Independence of Independent Agencies*, 1988 DUKE L.J. 215; *A Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. Rev. 277 (1987); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); and Bernard Schwartz, *Administrative Law* § 1.10 at 20 (3d ed. 1991). The Breger & Edles article is noteworthy here, however, not only because it explains those identifying characteristics but also because it analyzes the NIGC as part of its survey of 32 independent agencies. Breger & Edles at 1139, 1272-1273.

The following are the fundamental characteristics of agencies that are independent of executive authority:

- A multi-member commission whose members serve fixed terms.
- Protection against removal except "for cause."

> The defining characteristic of the 32 agencies discussed in Breger and Edles's article is that at least one member of the agency is appointed by the President to a full-time, fixed term position with the advice and consent of the Senate

and has protection against summary removal by some form of "for cause" restriction on the President's authority. *Id.* at 1113.

This "for cause" removal feature continues to be a critical criterion by which scholars typically distinguish between "independent" and executive branch agencies. *See, e.g.,* Davis & Pierce, *Administrative Law* § 2.5 at 46 (3d ed. 1994) ("The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President's power to remove the head (or members) of an agency." Schwartz, §1.10 at 20 ("The key to independence is security of tenure."); and Peter L. Strauss, *An Introduction to Administrative Justice in the United States* 15 (1989) ("Because [independent commission] members are appointed for fixed terms from which they cannot be dismissed without formal cause, they are more remote from presidential influence and control than the more usual 'executive' agency.").

- Possess a combination of rulemaking, enforcement, and adjudication powers and functions.

- Members generally appointed by the President with the advice and consent of the Senate.

  This is not always the case as Breger and Edles noted with the NIGC: "For example, the chairman of the National Indian Gaming Commission is appointed by the President with the advice and consent of the Senate, but the other two members are appointed by the Secretary of the Interior. All members serve three-year terms and can only be removed from office for good cause." Breger and Edles at 1139.

- Typically, agency statutes require political balance, *i.e.* no more than a bare majority of members may come from the same political party.

- Agency has specialized mandate directing it to focus either on particular industry or on specific cross-cutting problems.

- Agency makes its own submissions to Congress.

- Agency chairperson is the chief executive and appoints and supervises staff and prepares the agency's budget and expenditure of funds.

Id. at 1112, 1138-1142, 1115 and 1165.

The NIGC possesses all of these hallmarks of an independent agency:

- The Commission is a multi-member body whose members serve fixed terms. 25 U.S.C. § 2704 (b)(4)(A).

- Commission members enjoy secure tenure. Commissioners are removable only for cause. 25 U.S.C. § 2704(b)(6).

- The Commission possesses a combination of rulemaking, enforcement and adjudication powers and functions. *See, e.g.*, 25 U.S.C. § 2706(b)(10) (the Commission "shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act"); 25 U.S.C. § 2706(b)(1)-(4) (Commission to monitor gaming, inspect gaming facilities, conduct background investigations and audits); 25 U.S.C. § 2715(a) (subpoena and deposition authority for any matter under investigation); 25 U.S.C. §§ 2705(a)(2), 2713(a) (Chairman has authority to assess civil fines of $25,000 per day); 25 U.S.C. § 2705(a)(1), 2713(b) (Chairman has authority to order temporary closure of casino); 25 U.S.C. § 2706(b)(8) (Commission may hold hearings and take testimony as necessary); 25 U.S.C. § 2713(a)(2) (appeal of Chairman's civil fine assessment to full Commission); and 25 U.S.C. § 2713(b)(2) (appeal of Chairman's closure order to full Commission).

- The Chairman is appointed by the President with the advice and consent of the Senate. 25 U.S.C. § 2704(b)(1)(A).

- Appointments to the Commission are limited by political party and tribal membership. Specifically, no more than two commissioners may be from the same political party and at least two commissioners must be enrolled members of an Indian tribe. 25 U.S.C. § 2704 (b)(3).

- Congress delegated powers to the Commission in furtherance of a specific mandate, namely the oversight and protection of Indian gaming and the promotion of tribal economic development, tribal self sufficiency, and strong tribal government. 25 U.S.C. §§ 2701, 2702.

- The Commission is required to submit its own report to Congress with information on its funding, recommendations for amendments to IGRA, and any other matters considered appropriate by the Commission. 25 U.S.C. § 2706(c).

- The Chairman is the chief executive of the NIGC. He appoints the General Counsel, 25 U.S.C. § 2707(a), and appoints and supervises other staff of the Commission. 25 U.S.C. § 2707(b). At the request of the Chairman, "the head of any federal agency is authorized to detail of the personnel of such agency to the Commission . . . ." 25 U.S.C. § 2707(d). The Chairman and the Commission prepare and adopt the agency's budget. 25 U.S.C. § 2706(a)(1).

Moreover, other executive departments have independent agencies "within" or "in" them. For example, the Federal Energy Regulatory Commission's (FERC) enabling legislation describes it as an "independent regulatory commission" within the Department of Energy. Notwithstanding its location, courts treat FERC as an entity independent of the Department of Energy. *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 472 (D.C. Cir. 1982) (identifying FERC as

functionally independent of the Executive Branch due to tenure of commissioners and finding that the Supreme Court has upheld "the constitutionality of such agency independence"). Additionally, the legislation creating the Surface Transportation Board states that "[t]here is hereby established within the Department of Transportation the Surface Transportation Board." 49 U.S.C. § 701(a). *See also Commonwealth of Pennsylvania v. Surface Transportation Board,* 290 F. 3d 522, 524 (3rd Cir. 2002) ("The Surface Transportation Board is the independent federal agency established by Congress within the Department of Transportation and has the responsibility for the economic regulation of the country's railroads."). Likewise, the legislation creating the United States Parole Commission provides that "[t]here is hereby established an independent agency in the Department of Justice. . . ." 18 U.S.C. § 4202. *See also U.S. v. Coyer*, 732 F.2d 196, 200 (1984) (describing the Parole Commission as "an independent agency of the Executive subject to the supervisory oversight of the Congress . . .").

B. IGRA's Statutory Provisions and Legislative History Show that NIGC is an Independent Agency

Congress explicitly made the NIGC an independent agency. IGRA states, "the purpose of this chapter is . . . to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands . . . and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3)). While this language could be construed to create authority independent of tribes and states rather than to create a regulatory body independent of the Executive, a review of the legislative history dispels this notion.

Again, where "the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Toibb v. Radloff,* 501 U.S. 157, 162 (1991), *citing Blum v. Stevenson*, 465 U.S. 886, 896 (1984). Here, the Senate report accompanying the passage of IGRA provides Congress's intention clearly and unambiguously: the bill "established a National Indian Gaming Commission as an independent agency within the Department of Interior." S. Rep. No. 100-446, at 1 (1988). This language clarifies, beyond any doubt, Congress's intention to create the NIGC as an independent agency. Lest there be any doubt, however, Congress reiterated its intention when it amended IGRA in 2005:

> Additionally, it is to be noted that the NIGC is an independent regulatory agency. This status has ramifications, including, that the agency is not governed by Executive Order 13175, which compels agencies other than independent regulatory agencies to consult tribal officials in the development of regulatory policies that have tribal implications. The Executive Order encourages independent agencies to observe its precepts, however, and the Committee notes with approval that the Commission, through its current consultation policy, has endeavored to do so.

S. Rep. No. 109-122 at 3 (2005).

C. Courts Recognize the NIGC as an Independent Agency

Several courts have held that NIGC is an independent agency. In 1991, shortly after IGRA was passed and before the NIGC was fully functional, the Tenth Circuit Court of Appeals recognized that under IGRA, gaming "is subject to the supervision of a newly created, independent regulatory authority – the National Indian Gaming Commission – established to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991), *quoting* 25 U.S.C. §§ 2702(3), 2704. IGRA was described by this court as "a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming." *Id., quoting Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 648 (D.Wis. 1990). Likewise, in two separate cases, the Seventh Circuit noted NIGC's independence. *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208 (7th Cir. 1995) (the NIGC is a "three-member independent agency within the Department of Interior."); *United States ex rel. Mosay v. Buffalo Bros. Management*, 20 F.3d 739 (7th Cir. 1994) ("Congress enacted the Indian Gaming Regulatory Act, which establishes a three-member independent agency within the Department of Interior, the National Indian Gaming Commission, to supervise Indian gambling.").

D. The Course of Dealing Between the Department and NIGC Supports NIGC's Independent Authority.

I note that the your current claim stands in stark contrast not only to the court opinions discussed above, but to the Department's own position as stated in *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1265 n. 12 (10th Cir. 2001) ("Although the Commission is nominally part of the Department of the Interior, the Secretary conceded at oral argument that the Commission functions as an independent entity.").

You cite to the Departmental Manual for support of your new claim that the Department must supervise the work of the NIGC. *See* Letter from Bernhardt to Hogen of 6/13/08. This fails to acknowledge the true nature of the relationship: the Department is obligated through contractual relationship to provide NIGC with administrative services. By statute, the NIGC is free to contract elsewhere for such services, though the Department is obligated to provide them upon request. 25 U.S.C.
§ 2707(e).

In particular, NIGC contracts with the Department for support services such as personnel services and hearing officials for administrative appeals before the Commission. The NIGC pays for all services it receives, and the Department provides these services at NIGC's request because it is required to do so under IGRA. 25 U.S.C. § 2707(e). If the NIGC were simply part of the Department, a Congressional mandate of services would be unnecessary. Thus, despite this relationship of contractual service, IGRA indicates that the NIGC is independent from the Secretary, and it stretches the imagination to think this relationship could give the Secretary any authority over the NIGC.

Further, contrary to your assertion that the Commission must seek its legal advice from the Department, IGRA specifically directs the Chairman to appoint a General Counsel. 25 U.S.C. § 2707(a). If Congress had intended the Chairman to rely on the Department for advice, it would not have provided for a separate General Counsel who is answerable only to the Chairman. In fact, Congress underscored the importance of independent legal advice by making the General Counsel the only staff position specifically designated within IGRA. What is more, given that IGRA gives to the Chairman the authority to appoint a general counsel, the legal advice given by the general counsel's office is for the use and approval of the Chairman and the Commission alone. They, and only they, are OGC's clients. As such, even if the Chairman's May 19 Poarch Band decision was an opinion of the OGC, neither the Secretary nor your office has the ability to review, approve, or reject it.

Looked at slightly differently, Congress has tasked the NIGC with providing technical assistance to the tribes. 25 U.S.C. § 2706(d)(2). Technical assistance encompasses a broad range of activities, and one particular way that the Commission meets this obligation is to provide legal opinions through the OGC on matters over which the Commission exercises jurisdiction. These opinions may clarify various matters under IGRA from game classifications to Indian lands status. The Secretary's interpretation of IGRA, however, would deny the Commission's ability to opine on Indian lands generally. This runs afoul of the requirement to provide technical assistance and would improperly prevent NIGC from fulfilling its statutory mandates.

On occasion, the NIGC does require legal advice in matters of general law. Pursuant to a memorandum of understanding with the Office of the Solicitor, the NIGC formally requests advice and pays for the service. *See* Memorandum of Understanding, from Tadd Johnson, Chairman of NIGC, to Robert More, Director of Administration, Department of the Interior (undated). As with the administrative services, the Department provides occasional legal advice only through a contractual relationship and the NIGC is free to adopt such advice or obtain it elsewhere. As such, when the NIGC seeks to do business with the Department of Interior, it frequently does so through a memorandum of understanding or other cooperative agreement, not through any perceived chain of command.

E. Congress Treats the NIGC as an Independent Agency

After all these years of functioning as an independent agency, one would think Congress would let the NIGC know if it did not intend for it to be one. To the contrary, however, Congress interacts with the NIGC as an independent agency and recently reiterated its independence. Again, in 2005, when Congress raised the cap on the amount of fees the NIGC can collect from tribal gaming revenue, the Senate report accompanying the legislation noted the NIGC's status as an independent regulatory agency. S.Rep. No. 109-122 at 3 (2006).

Further, NIGC makes its own submissions to Congress. Pursuant to IGRA, the NIGC issues its own biannual reports to Congress. 25 U.S.C. § 2706(c). The Commission has submitted reports for fiscal years 1998, 1999, 2000, 2003 and 2004. Since passage of NIGC fees legislation in 2005, the NIGC is required to comply with the Government Performance and Results Act of 1993 (GPRA). 31 U.S.C. § 1115 *et. seq.* Furthermore, the NIGC Chairman testifies directly

before the Senate Indian Affairs Committee and the House Natural Resources Committee when it holds NIGC oversight hearings.

F. The Department of Justice and the National Archives and Records Administration Treat the NIGC as an Independent Agency

The Department of Justice (DOJ) also recognizes the NIGC as an independent agency. The NIGC is involved in litigation in its own name. *See, e.g., Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 2007 U.S. App. LEXIS 1651 (D.C. Cir. Jan. 23, 2007); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1021 (10th Cir. 2003); *JPW Consultants, Inc. v. Nat'l Indian Gaming Comm'n*, 1999 U.S. App. LEXIS 11022 (D.C. Cir. Apr. 29, 1999); *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 304 U.S. App. D.C. 335 (D.C. Cir. 1994); *Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 45 (D.D.C. 2006).

Furthermore, in the Unified Agenda listing published twice a year by the National Archives and Records Administration, which summarizes the rules and proposed rules that each federal agency expects to issue during the next six months, the NIGC is listed separately from the Department and with all of the other independent agencies. *See* http://www.gpoaccess.gov/ua/browse1204.html. Congress, the courts, the Department, and other federal agencies have all acknowledged NIGC's independence from the Department. Therefore, the Secretary's claims of authority over NIGC are unfounded.

V. The Secretary cannot grant himself more power through regulation than Congress has granted through statute.

Finally, you claim that the Secretary has power to review Commission decisions under the Department's regulation 43 C.F.R. § 4.5(a). Yet IGRA specifically states that decisions of the Chairman are reviewable only by the Commission and federal courts. 25 U.S.C. §§ 2713, 2714. You may not interpret 43 C.F.R. § 4.5 in a way that allows you to usurp the authority that Congress expressly granted to the Commission. "An agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself." *La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Section 4.5 gives the Secretary the authority "to review any decision of any employee . . . of the Department . . . or to direct any such employee . . . to reconsider a decision . . . ." In carrying out this authority, the Secretary will issue a written notice, request the administrative record, and subsequently issue a new written decision on the matter. 43 C.F.R. § 4.5(c). While this rule clarifies the Secretary's authority to review decisions made by his subordinate divisions, it does not grant him power to review the decisions of those outside his chain of command. *MCI Telecom. v. AT&T*, 512 U.S. 218, 231 (1994); *see also Massachusetts v. EPA*, 127 S.Ct. 1438, 1462 (2007). Thus, the Department's regulation in section 4.5 (or any other regulation) does not give the Secretary the authority to review or overturn decisions of the NIGC Chairman.

The Secretary may only review those decisions under section 4.5 that he has the authority to review. The Chairman is expressly granted enforcement authority over IGRA violations. 25

U.S.C. §§ 2705, 2713. The Chairman's decision in the Poarch matter was not an opinion but a determination of NIGC jurisdiction and a conclusion that the Tribe was not violating IGRA. To decide whether the Tribe was violating IGRA, the Chairman had to determine whether the lands constituted Indian lands on which the Tribe could conduct gaming. The Chairman's decision was a precursor to an enforcement action over which the Secretary can claim no authority.

Allowing the Secretary to review the Chairman's exercise of his statutory powers would directly contravene the express will of Congress. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *La. Public Serv. Comm'n v. FCC*, 476 U.S. at 374-375.

CONCLUSION

After thorough review of your letter, statutes, and case law, I conclude that the Secretary does not have the broad authorities you claim. Congress created the NIGC as an independent agency to administer IGRA and thereby vested regulatory authority for Indian gaming with the Chairman. The Department's authority under IGRA is limited to that expressly authorized by statute. Where IGRA is silent in delegation, that authority must necessarily rest with the administrator of the statute, the NIGC. Further, IGRA grants NIGC the power to determine its jurisdiction to monitor Indian gaming and to take action on site-specific ordinances, management contracts, and enforcement. This necessarily grants the agency the power to issue Indian lands decisions in those contexts. The Chairman acted within his statutory enforcement authority when he investigated the complaint of the State of Alabama and ultimately determined that the Poarch Band was properly gaming on lands within the definition of IGRA. The Chairman's decisions are reviewable only by the Commission and the federal courts. Any review by the Secretary would fail to account for NIGC's status as an independent agency and directly contravene express statutory language transferring the Secretary's authority over gaming to the Commission.

For all these reasons, you do not have the authority to review the Chairman's Poarch Band decision or to order the Commission not to act in compliance with that decision. Consequently, the Commission will continue to regulate the Tallapoosa site as mandated under IGRA.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Buford L. Rolin, Poarch Band Tribal Chairman
William Perry, Sonosky, Chambers, Sachse, Endreson & Perry
Troy King, Attorney General, State of Alabama