July 21, 2011

By First Class Mail & Facsimile

George Wickliffe, Chief
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Principal Chief
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E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Keetoowah Cherokee Casino – Status of land

Dear Gentlemen:

This letter resolves a dispute over whether a parcel of land on which the Keetoowah Cherokee Casino sits is Indian land eligible for gaming under the Indian Gaming Regulatory Act ("IGRA"). The land is owned in fee by the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") and located at 2450 South Muskogee Avenue in Tahlequah, Oklahoma ("Gaming Site"). Based on the administrative record and the General Counsel's opinion that is adopted and incorporated into this decision, I conclude that the Gaming Site is not currently Indian land eligible for gaming under IGRA.

On September 29, 2000, the NIGC's General Counsel, Kevin Washburn, sent a letter to UKB opining that the gaming site is not "Indian land" as defined in IGRA. Letter from Kevin K. Washburn, NIGC General Counsel, to Jim Henson, UKB Chief (Sept. 29, 2000) ("the September 2000 Letter"). Mr. Washburn opined that the UKB's gaming activity is not subject to IGRA because the UKB lacks the requisite legal jurisdiction over the Gaming Site for it to qualify as Indian lands. *Id.* at 4-6.

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The UKB challenged the September 2000 Letter in federal district court. The district court found that the General Counsel's letter was agency action and set it aside as arbitrary and capricious under the Administrative Procedure Act. *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Kuykendall*, No. 04-340, 2006 U.S. Dist. LEXIS 97268 (E.D. Okla. Jan. 26, 2006) at 10-14. In setting aside the September 2000 Letter and remanding the matter to the NIGC, the court ordered the NIGC to "investigate, compile a complete record and consider all relevant factors before making its final determination of whether the [Gaming Site] Land is 'Indian land' as that term is defined by 'IGRA.'" *Id.* at 14.

In response to the court's remand order, and after substantial briefing by the United Keetoowah Band of Cherokee Indians in Oklahoma, the Cherokee Nation of Oklahoma, and the State of Oklahoma, the NIGC General Counsel provided me with a legal opinion concluding that at present the Gaming Site does not constitute Indian lands eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. Specifically, the legal opinion concludes that the Gaming Site is not within a current reservation and has not yet been set aside by the United States for the UKB. The record supports the General Counsel's opinion, and I hereby adopt the analysis and conclusions provided therein.

On June 20, 2011, UKB wrote a letter to the NIGC, informing the agency that the Assistant Secretary—Indian Affairs had for the first time taken a separate parcel of land into trust for UKB pursuant to the tribe's corporate charter and further noting that the decision was appealed by the Cherokee Nation of Oklahoma to the Interior Board of Indian Appeals ("IBIA"). The UKB also informed the NIGC of its intent to amend its trust application for the Gaming Site to conform with the Assistant Secretary's recent decision. UKB then made the following requests: 1) that the NIGC join UKB's filings asking the IBIA for an expedited appeal regarding the non-gaming parcel; 2) that the NIGC allow briefing on the impact of the land into trust decision for the non-gaming parcel on the matter before the NIGC; and 3) that the NIGC exercise its discretion not to take final agency action until after conducting briefing on the impact of the amended application and resolution of the IBIA appeal regarding the non-gaming parcel. The Cherokee Nation of Oklahoma shortly thereafter wrote its own letter objecting to each of the UKB's three requests. The Cherokee Nation of Oklahoma argued that further delay would be unfair, that UKB's ability at some future date to obtain land in trust bears no relationship to whether the UKB's current operations on fee land are Indian lands as defined in IGRA, and that UKB is not eligible for land into trust under DOI regulations.

I decline to delay taking action here until future resolution of the IBIA appeal for the non-gaming parcel and future resolution of an amended trust application for the Gaming Site by the Department of the Interior, Assistant Secretary of Indian Affairs. The Gaming Site may or may not be taken into trust by the Assistant Secretary at some point in the future, but that action, if and when it happens, does not change the current status of the Gaming Site and its eligibility today for gaming under IGRA. The only fact relevant to my analysis to be derived from the trust applications for both the gaming and non-gaming parcels and the IBIA appeal is that the Gaming Site is not yet in trust. If and

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when the Gaming Site is taken into trust, this decision can be revisited. This matter has been pending before the Commission for more than five years and further consideration of the matters identified by the UKB does not change the current status of the Gaming Site.

I am instructing my staff to abide by this decision. In the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman any regulatory authority over the Gaming Site. This decision serves as agency action in response to the remand issued in *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Kuykendall*, No. 04-340, 2006 U.S. Dist. LEXIS 97268 (E.D. Okla. Jan. 26, 2006). There are no appeal procedures for such an action in IGRA or NIGC regulations. Therefore, I have directed that this decision and the General Counsel opinion that is adopted and incorporated into this decision be filed with the U.S. District Court for the Eastern District of Oklahoma, from which the matter was remanded to the NIGC for reconsideration several years ago.

Sincerely,

Tracie L. Stevens
NIGC Chairwoman

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